CHAPTER 4

GLOBALIZATION, NATION-STATES AND THE LEGAL FIELD: FROM LEGAL DIASPORA TO LEGAL ECUMENISM?

INTRODUCTION

In Chapter Three, the analytical focus was on legal particularism and legal locality in modern society. The analysis of Pasargada law illustrated how the modern state, far from having the monopoly of the production of law, shared the national legal field with other law-generating social forces operating at an infrastate level and entertaining with the state and the official legal system complex and multidirectional relations. Rather than as a monolithic entity, the national legal field was conceived as a quilt of legalities woven by a national-local dialectics which interlaced the hegemonic state legal thread with multiple local legal threads.

In the present chapter the analytical focus is, in a loose sense, the inverse of the previous chapter, the transnational, suprastate time-space rather than the local, infrastate time-space. The dialectical movement analyzed here takes place mainly on a transnational-national axis, though at times also on a transnational-national-local axis. The national legal field is analyzed here in the interaction of multiple transnational legal fields. The focus is not on the interactions among different state legal systems—the traditional field of public international law—nor on the national legal regulation of private social relations touching upon the legal systems of different states—the traditional field of private international law. It is rather on (a) legal forms (regulations, institutions, cultures) which are transnational in origin or which, though national or even local in origin, reproduce themselves transnationally by mechanisms other than those typical of interstate relations; and (b) national legal fields (state legal orders and local, infrastate legal orders) as they are transformed by transnational legal movements. In this chapter, therefore, the state monopoly of production of law is also questioned, not, however, as in Chapter Three, because the national legal field comprises other non-state or infrastate forms of law, but rather because the national legal field is increasingly interpenetrated by transnational legal forms which unfold in complex relations with both the state legal order and the local legal orders.

In Chapter Three I felt the need to emphasize the fact that Pasargada law, far from being a residue of some precapitalist or premodern past, was an innovative, adaptive solution to the specific conditions of capitalist development or modernization in Brazil, and to that extent was constantly being reproduced and recreated; in this chapter, if an emphasis were in order, it would probably go in the opposite direction. Indeed, in light of the dramatic intensification of transnational interactions in the last two or three decades and its impact on the legal field, one might be tempted to conceive of the "globalization of the legal field" as a radically new phenomenon without any roots in the past. Though, in my view, such legal globalization or, at least, some aspects of it represent a qualitatively new development, it should be borne in mind that the modern world system, within which the globalization of social interactions occurs, has been in place since the sixteenth century, and that the roots of the most recent legal, as well as cultural, social, political and economic transformations are to be located in this historical development. Moreover, the existence of a transnational legal culture antedates the modern world system, as is dramatically illustrated by the reception of Roman law in the twelfth century and onwards. Even at the end of the nineteenth century, at a time when liberal political theory had imposed the equation among nation, state and law, the idea of a global or world law continued to flourish as a legal sub-culture. Though cultivated at the time mainly by legal comparatists who were quite marginal to mainstream legal science, this legal subculture was part and parcel of a widely hegemonic cultural constellation, the idea of the seamless and irreversible uniformization of the conditions of social life throughout the world, brought about by progress, capitalism and scientific and technological development.

The breakdown of national differences and of local confines as part of the unfolding of modernity itself, predicted in the *Communist Manifesto* of 1848, grounds both the idea of unified science propounded by the Vienna Circle and the proposal of a *droit commun de l'humanité* presented by Edouard Lambert in the course of the first International Congress for Comparative Law held in Paris in 1900, during the World Exhibition.[1] The epochal affinities between the manifesto and Lambert's proposal are actually quite striking. According to Marx and Engels, "[n]ational differences and antagonisms between peoples are daily more and more vanishing, owing to the development of the bourgeoisie, to freedom of commerce, to the world market, to uniformity in the mode of the production and in the conditions of life corresponding thereto."[2] For Lambert, "comparative law must resolve the accidental and divisive differences in the laws of peoples at similar stages of cultural and economic development, and reduce the number of divergences in law, attributable not to the political, moral, or social qualities of the different nations but to historical accident or to temporary or contingent circumstances."[3] Fourteen years later, World War I would put a final end to the utopian project of a world law, but in a more realistic version the idea continued to animate the study of comparative law, as shown in the latter's predilection for the unification of law and for model laws (on this more below).

At the end of the twentieth century, the transnationalization of the legal field assumes characteristics which, though seemingly rooted in the tradition of world law or of Feuerbach's *Universaljurisprudenz*,[4] depart from it in significant ways.

Rather than being the product of an intellectual crusade by well-meaning jurists or philosophers, the transnationalization of the legal field is being promoted by practicing lawyers, state bureaucrats and international institutions, as well as by popular movements and NGOs. Far from being a monolithic phenomenon, it is extremely diverse, combining uniformity with local differentiation, top-down imposition with bottom-up creation, formal declaration with interstitial emergence, boundary-maintaining orientation with boundary-transcending orientation. Moreover, it cannot be accounted for by any monocausal explanation, and defies integration in any unidimensional cultural postulate, be it the idea of progress or the critique of progress, capitalist mass culture or anticapitalist folk culture, modern science or postmodern knowledge. It is, therefore, a highly complex and ambiguous phenomenon which but mirrors the complexity and ambiguity of the much broader, seemingly all-encompassing process of transnationalization, of which it is only a very partial manifestation. For this reason, I will begin this chapter by briefly describing the main features of this process, moving then to analyze the most prominent instances of the transnationalization of the legal field.

I. THE GLOBALIZATION PROCESS

In the last three decades, transnational interactions have known a dramatic intensification, from globalization of production systems and financial transfers, to worldwide dissemination of information and images through the mass media and communication technologies, and to mass translocation of people, as tourists, as migrant workers or as refugees. The extraordinary range and depth of these transnational interactions has led some authors to see in them a qualitative departure from previous forms of worldwide relations, a new phenomenon designated as "globalization,"[5] "global formation"[6] or "global culture."[7] Giddens defines globalization as "the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa"; he also reproaches sociologists for the undue reliance upon the idea of "society" as a bounded system.[8] Similarly, Featherstone challenges sociology to "both theorize and work out modes of systematic investigation which can clarify these globalizing processes and destructive forms of social life which render problematic what has long been regarded as the basic subject matter for sociology: society conceived almost exclusively as the bounded nation-state."[9] Robertson, who sees globalization as the unfolding of a temporal-historical path of ever higher degrees of global density and complexity, defines the current phase (which he calls Phase V, beginning in the 1960s: "the uncertainty phase") in a rather descriptive way as:

> Inclusion of Third World and heightening of global consciousness in the late 1960s. Moon landing. Accentuation of "post-materialist" values. End of Cold War and spread of nuclear weapons. Number of global institutions and movements greatly increases. Societies increasingly face problems of multiculturality and polyethnicity. Conceptions of individuals rendered more complex by gender, ethnic and racial considerations. Civil rights. International system more fluid—end of polarity. Concern with humankind as a species-community greatly enhanced. Interest in world civil society and world citizenship. Consolidation of global media system.[10]

Much to his credit, Immanuel Wallerstein has pioneered the critique of "society" as a useful starting point for analysis; for two decades he has been propounding a sophisticated analytical framework, the modern world system, specifically geared to account for the ever expanding and deepening of transnational intercourse. Though both Giddens[11] and Robertson[12] criticize Wallerstein for the economistic determinism underlying his approach, the critique is more correct when addressed to the earlier versions of the theory or to its more vocal followers[13] than when addressed to Wallerstein's more recent work.[14]

Be it as it may, an overview of the studies on the globalization process shows that we are before a multifaceted phenomenon with economic, social, political, cultural, religious and legal dimensions intertwined in most complex ways. Under such conditions, unilateral, explanatory or interpretative strategies seem least adequate. The more so in view of the fact that the globalization of the last two decades, rather than fitting the modernist pattern of globalization as homogenization or uniformization recurrently proclaimed from Leibniz to Marx and the developmentalist establishment, seems to combine worldwide sourcing and boundlessness with local diversity, national and ethnic identity, popular embeddedness and community grounding. Moreover, in view of its complexity, variety and amplitude, the globalization process is connected to other transformations in the world system which are nonetheless irreducible to it, such as growing world-level inequality, population explosion, environmental catastrophe, proliferation of weapons of mass destruction, formal democracy as a political condition for international assistance to peripheral and semiperipheral countries and so on.

Before attempting an interpretation of contemporary globalization, I will describe briefly its main features, viewed from an economic, a political and a cultural perspective, and present the most genuine debates it has generated. In the field of economic relations, Fröbel, Heinrichs and Kreye speak of a new international division of labor[15] based on the globalization of production carried out by the transnational corporations (TNCs), which are, more prominently than ever, the key agents of the new world economy. The main features of this new world economy are: worldwide sourcing; flexible systems of production and low transportation costs allowing for the production of industrial components in the periphery and export to the core; emergence of three great trading blocks: the U.S., based on privileged relations with Canada, Mexico and Latin America; Japan, based on privileged relations with the four little tigers and the rest of East Asia; and Europe, based on the European Community and on privileged relations with Eastern Europe and North Africa. These transformations have been packaged throughout the world system and particularly in peripheral and semiperipheral countries with a new political economy, which Barbara Stallings aptly calls the "market-oriented development model." The implications of these transformations for economic policy can be stated as follows: national economies should be open to trade, and domestic prices should conform to international market

prices; fiscal and monetary policy should be prudently directed to the maintenance of price and balance-of-payments stability; private property rights should be clear and inviolable; state-owned productive enterprises should be privatized; private decision making, guided by undistorted prices, should dictate national patterns of specialization, resource allocation and factor returns, with minimal government regulation or sectoral policy; the residual government budget should be directed to targeted education and social policy.[16]

The new international division of labor, coupled with the new, market-friendly political economy, have also brought about some important changes in the interstate system, the political form of the modern world system. On the one hand, the hegemonic states, by themselves or through the international institutions they control (particularly the international financial institutions), have strained the political autonomy and the effective sovereignty of peripheral and semiperipheral states to an unprecedented extent, even though the capacity for resistance and negotiation on the part of the latter may vary widely. On the other hand, there has been a tendency towards regional, interstate, political agreements that may include forms of sovereignty pooling, as is the case of the European Community. Last but not least, the nation-state appears to have lost its traditional centrality as the privileged unit of economic, social and political initiative. The intensification of cross-border interactions and transnational practices erodes the capacity of the nation-state to initiate, steer and control flows of people, goods, capital or ideas, as it had done in the past (more on this below). As concerns sociopolitical relations, it has been claimed that, although the modern world system has always been structured by a world class system, a transnational capitalist class is emerging today whose arena of social reproduction is the globe as such, and which easily outmaneuvers the workers' organizations that are still nationally based, as well as the externally weak states of the periphery and the semiperiphery.

The TNCs are the main institutional form of this transnational capitalist class, and the magnitude of the transformations they are bringing about in modern business is indicated by the fact that more than one third of the world's industrial output is produced by TNCs. Though the organizational novelty of the TNCs may be questioned from a world system perspective, it seems undeniable that their prevalence in the world economy, and the degree and efficacy of centralized direction they manage to achieve, distinguish them from older forms of international business enterprise.[17] The impact of TNCs on new class formations and on world-level inequality has been widely debated in recent years. Within the tradition of dependency theory, Evans analyses the "triple alliance" of TNCs, elite local capital and what he calls "state bourgeoisie," which he sees at the base of the dynamic industrialization and growth of a semiperipheral country like Brazil.[18] Becker and Sklar, who propound a highly dubious theory of postimperialism, speak of an emergent managerial bourgeoisie, a new social class emerging out of the relations between the state management sector and the large private enterprises. This new class consists of a local wing and an international wing. The local wing, the corporate national bourgeoisie, is a socially comprehensive category encompassing the entrepreneur elite, managers of firms, senior state functionaries, leading politicians, members of learned professions. For all their heterogeneity, these different groups constitute, according to the authors, a class, "because its members, despite

the diversity of their parochial interests, share a common situation of socio-economic privilege and a common class interest in the relations of political power and social control that are intrinsic to the capitalist mode of production." The international wing, the corporate international bourgeoisie, is made of foreign nationals who manage the TNCs and the international financial institutions (IFIs).[19]

On the issue of world-level inequality, the opinions vary widely. For Evans, the model of industrialization and growth based on the "triple alliance" is inherently inequitable, and capable of only one kind of redistribution "from the mass of the population to the state bourgeoisie, the multinationals and the state local capital. The maintenance of the delicate balance among the three partners militates against any possibility of dealing seriously with questions of income redistribution, even if members of the elite express support for income redistribution in principle."[20] In more recent comparisons between Latin American and East Asian development models and patterns of social inequality, Evans has added other factors (the autonomy of the state, the efficiency of state bureaucracy, land reform, the role of TNCs, the existence of an initial phase of decoupling from metropolitan capital) that may account for the striking contrast between Brazilian and East Asian models of development.[21] On the other hand, Becker and Sklar emphasize the positive aspects of TNCs' operations, as:

> they offer the "third world countries" access to capital resources, dependable markets, essential technologies and other services. . . . Beneath the usual differences regarding distribution of rewards, there lies a mutuality of interest between politically autonomous countries at different stages of economic development. At the deepest level, their interests are not fundamentally antagonistic and do not entail automatically the intensified domination of the less developed countries by the more developed.[22]

But even they are forced to recognize that, given the centralized direction of TNCs, "local concerns may be given short shrift. If, for instance, the corporate group's overall profitability would be enhanced by transferring an operation from one country to another, the *disposition* to make the shift probably will prevail within the managerial circles."[23] Though Chase-Dunn indicates that "it is by no means clear that there has been absolute immiseration over the long run,"[24] the distribution of relative shares of world wealth has worsened in the last decades. Bouigorgnon found that the poorest 40 percent of the world's population received 4.9 percent of world income in 1950 but only 4.2 percent in 1977.[25] Besides, there is dramatic evidence of the stagnation of many peripheral and semiperipheral countries in the 1980s, as a result, in part at least, of the oil price shocks of 1973 and 1979 to 1981 and of the explosion of international debt. Latin American countries entered the 1990s with lower standards of living than they enjoyed in the 1970s. Between 1982, when the debt crisis first hit, and 1987, net resources flows (loans, grants and foreign direct investment) to peripheral and semiperipheral countries fell by half. Due to sharp rises in the interest rates of the foreign debt (a 172 percent rise between 1970 and 1987) in many heavily indebted coun-

tries, the servicing of past loans still exceeds new revenues. For such countries as a whole, net transfers are in fact negative: 54 of the 84 less-developed countries saw their GNP per capita decrease in the 1980s; in 14 of them the decrease was about 35 percent; according to the estimates of the UN, around 1 billion people (one sixth of the world population) live in absolute poverty (with income of less than one dollar per day).

In the cultural field, the debate on globalization is equally intense. Indeed, the shifting emphasis in the social sciences in the last decade from socioeconomic phenomena to cultural phenomena has reactivated the question of the causal primacy in the explanation of social life.[26] The issue is whether the cultural and normative dimensions of the globalization process play a primary or secondary role. While for some (Chase-Dunn is one of them) they play a secondary role, since the capitalist world economy is integrated more by political-military power and market interdependence than by cultural and normative consensus,[27] for others (John Meyer and Bergesen, for example), political power, cultural domination and institutionalized norms and values precede market interdependence in the development of the world system and in the stability of the interstate system.[28] Wallerstein has made a sociological reading of this debate, asserting that "it is no accident . . . that there has been so much discussion these past 10 to 15 years about the problem of culture. It follows upon the decomposition of the nineteenth century double faith in the economic and political arenas as *loci* of social progress and therefore of individual salvation."[29]

The most important debate in the cultural field centers around the question of whether a world or global culture has emerged in the recent decades. To be sure, it has been long recognized that, at least since the sixteenth century, the ideological hegemony of European religion, politics, economics and science has produced, by means of cultural imperialism, obvious isomorphisms among the national cultures of the world system. But the question is whether, beyond that, certain cultural forms have emerged in recent decades that are originally transnational or whose national origins are relatively irrelevant as they circulate throughout the globe more or less disembedded from national cultures. Such cultural forms are identified by Appadurai[30] as mediascapes and ideoscapes, by Leslie Sklair[31] as culture ideology of consumerism, by Anthony Smith[32] as new cultural imperialism. From another perspective, the theory of international regimes has drawn our attention to the processes of consensus formation at the world level and to the emergence of a global normative order.[33] And from still another perspective, the theory of institutional structure has emphasized the extent to which Western culture has created social actors and cultural meanings throughout the world.[34]

The idea of a global culture is, of course, one of the main projects of modernity. As Stephen Toulmin has brilliantly shown, it can be traced from Leibniz to Hegel and from the seventeenth to our own century.[35] The sociological attention given to this idea in the last two decades has, however, a specific empirical base. The dramatic intensification of cross-border flows of commodities, capital, labor, people, ideas and information is believed to have given rise to convergences, isomorphisms and hybridizations among different national cultures, be they architectural styles, fashion, food habits or mass cultural consumption. Yet, most authors assert that, notwithstanding their relevance, these processes are far from

leading to a global culture. Culture is by definition a social process built in the intersection between the universal and the particular. As Wallerstein emphasizes, "defining a culture is a question of defining boundaries."[36] We might even say that culture is, if anything, a struggle against uniformity. The powerful and encompassing processes of diffusion, imposition and imperialism of the recent (and not-so-recent) past have been confronted throughout the world system with multiple and resourceful processes of cultural resistance, identification and indigenization. Nonetheless, the issue of global culture has had the merit of showing that the political struggle over homogenization and uniformity has transcended the territorial mould in which it took place from the nineteenth century until very recently, that is, the nation-state. In this respect, nation-states have traditionally performed a rather ambiguous role. While externally they have been the champions of cultural diversity, of the authenticity of the national culture, internally they have been the champions of homogenization and uniformity, crushing the rich variety of local cultures coexisting in the national territory, whether by the power of the police, the educational system or the mass media, and most of the time by all of them in conjunction. This role has been played in very different forms in core, peripheral and semiperipheral states, and may be changing now as part and parcel of the current transformations in the steering capacity of the nation-states.

Under the conditions of the capitalist world economy and the modern interstate system, there seems to be room for only partial global cultures. Partial, that is, either in terms of the aspects of social life they cover or the regions of the world they encompass. Smith, for instance, speaks of a European "family of cultures" consisting of overlapping and boundary-transcending cultural and political motifs and traditions (Roman law, Renaissance humanism, Enlightenment rationalism, Romanticism and democracy), "which have surfaced in various parts of the continent at different times and in some cases continue to do so, creating or recreating sentiments of recognition and kinship among the peoples of Europe."[37] Seen from outside Europe, particularly from regions and peoples intensively colonized by Europeans, this family of cultures is the quintessential version of Western imperialism in whose name so much cultural tradition and identity was destroyed. In view of the hierarchical nature of the world system, it becomes crucial to identify the groups, classes, interests and states that define partial cultures as global cultures, thereby setting the agenda for political domination under the guise of cultural globalization. Even if it is true that the intensification of cross-boundary encounters and interdependency have created new terrains hospitable to tolerance, ecumenicism, world solidarity and cosmopolitism, it is no less true that, side by side, new forms of intolerance, chauvinism and imperialism have likewise developed. Partial global cultures can thus be of a very different nature, range and political outlook. Under current conditions, nothing more than plural or pluralistic global cultures can be achieved.[38] That is why most authors assume a prescriptive or prospective posture whenever they speak of a global culture in the singular. For Hannerz, cosmopolitanism "includes a stance toward the coexistence of cultures in the individual experience . . . an orientation, a willingness to engage with the Other . . . an intellectual and aesthetic stance of openness toward divergent cultural experiences."[39] Chase-Dunn, on his part, while debunking Parsons's "normative universalism"[40] as a crucial feature of the existing capitalist

world system, propounds that such "universalism" be carried forth "to a new level of socialist meaning albeit with a sensitivity to the virtues of ethnic and national pluralism."[41] Finally, Wallerstein would imagine a world culture only in a future libertarian-egalitarian world, but even there there would be a permanent place for cultural resistance: the constant creation and recreation of particularistic cultural entities "whose object (avowed or not) would be the restoration of the universal reality of liberty and equality."[42]

Paradigmatic and Subparadigmatic Globalizations

In this section I will offer some interpretive orientations on the globalization process under way, having specifically in mind the transnationalization of the legal field to be analyzed later on in this chapter. The intensification of transnational economic, political and cultural interactions of the past two decades has assumed such proportions that it is deemed to have inaugurated a new period of societal development. The precise nature and duration of this period are at the center of current debates on the character of the transformations under way in capitalist societies and in the capitalist world system as a whole. If scrutinized in light of the metatheoretical explanatory asymmetries put forward by Wright, Levine and Sober,[43] some of these debates are actually false debates, since they are not trying to explain the same thing, and hence may be fruitfully reconstructed as complementary readings of the current societal transformations. The fact that such readings coincide in locating the beginning of the period in the late 1960s and early 1970s is significant in itself, but the type and the historical duration of the social dynamics then initiated will vary with the variations in the *explanandum*.

In Chapter Two I have already briefly mentioned the main alternative readings of current changes in the world system and of the directions they point to. As I said then, two such readings deserve special attention: *the paradigmatic reading* and *the subparadigmatic reading*. Though I subscribed to the former, and indeed to its most radical version, the relative merits of the two readings are today a topic of intense debate worldwide. The arguments they have generated derive from different rhetorical audiences in pursuit of alternative political agendas. Such audiences and agendas are associated with the different forms of globalization and transnational agency analyzed below. For this reason, a few comments on rhetorical audience and political agendas are in order. But before that, the differences between the two alternative readings must now be analyzed in greater detail.

The *paradigmatic reading* asserts that the late 1960s and early 1970s inaugurated a period of paradigmatic transition in the world system, a period of final crisis and of radically new social and political creativity. As one might expect, this reading includes many different readings. One that is particularly suggestive has been recently proposed by Wallerstein and his collaborators.[44] According to Wallerstein, the modern world system has entered a period of systemic crisis which will stretch between 1967 and the middle or the end of the twenty-first century. In his view, the period between 1967 and 1973 is a crucial beginning, because it marks a triple conjuncture of breaking points (turns from *A* to *B* phases) in the world system: (a) the breaking point in a Kondratieff long wave (1945–1995?); (b) the breaking point in U.S. hegemony in the world system (1873–2025?); (c) the breaking point in the modern world system (1450–2100?).

Wallerstein cautions that the evidence is easier to assess for (a) than for (b), and for (b) than for (c), in part because the putative end point of each cycle is successively further into the future. In any case, it is suggested that we may have entered a period of bifurcation in Prigogine's sense. World economic expansion is coming close to the asymptotes of total commodification and total polarization (not merely quantitatively but socially) and, in consequence, is using up its last margin of rectification, and will soon exhaust "its ability to maintain the cyclical rhythms that are its heartbeat."[45] The breakdown of the structural adjustment mechanisms opens a wide terrain of social experimentation and real historical choices, by nature very difficult to predict. In fact, modern social sciences are of little use here, unless they themselves are submitted to radical revision and integrated in a broader inquiry. Such inquiry Wallerstein designates as utopistics (as distinct from utopianism), that is, "the science of utopian utopias . . . the attempt to clarify the real historical alternatives that are before us when an historical system enters into its crisis phase, and to assess at that moment of extreme fluctuations the pluses and minuses of alternative strategies."[46]

On the other hand, the *subparadigmatic reading* sees the current period within the confines of capitalism as a major process of structural adjustment, for the accomplishment of which capitalism does not seem to lack either the required resources and imagination or the social time-space. The adjustment is a major one because it involves the transition from one regime of accumulation to another, from one mode of regulation to another, as has been claimed by regulation theories.[47] But curiously enough, according to some authors, the current transitional period shows the conceptual and historical limits of theories of regulation, in terms of which the concepts of "regimes of accumulation" and "modes of regulation" became a common parlance.[48] Theories of regulation, it is argued, took the nation-state as the unit of economic analysis, which probably made good sense in a specific historical period of the capitalist development in some core countries. But today, out of the ruins of national regulation, a transnational regulation is emerging, a "global wage relation" that drastically changes the regulatory role of the nation-state, forcing the withdrawal of state protection of national markets in money, labor and commodities, and bringing about a profound reorganization of the state. Indeed, a new political form may well be in the making: the "transnational state." As one might expect, all this is questionable, and is being questioned. On the one hand, it is not true that regulation theory is solely concerned with national regulation. Regulation theory is a catchword for an ensemble of theories, some of which are quite concerned with international regulation.[49] On the other hand, the extent to which the regulatory functions of the nation-state have weakened is also a matter of debate. Unquestionable is only the fact that such functions have changed (or are changing) dramatically, and in ways that question the traditional dualism between national and international regulation.[50]

Within the subparadigmatic reading of the current period of capitalist development there is, however, some consensus around the following issues. Given the antagonistic nature of capitalist social relations, the routine reproduction and sustained expansion of capital accumulation is inherently problematic. In order to be achieved, it presupposes (a) a dynamic correspondence between a given pattern of production and a given pattern of consumption (that is, a regime of accumula-

tion); and (b) an institutional ensemble of norms, institutions, organizations and social pacts, which guarantees the reproduction of a whole range of social relations upon which the regime of accumulation is based (that is, a mode of regulation). There may be crises *in* and crises *of* either the regime of accumulation or the mode of regulation. Since the late 1960s, the core countries have been undergoing a crisis both of the regime of accumulation and mode of regulation. The regulatory role of the nation-state tends to be more decisive in crises *of* than in crises *in*, but the way it is exercised depends heavily on the international environment, the insertion of the national economy in the international division of labor, and the specific institutional capacities and resources of the state to articulate, under hostile conditions of crisis, accumulation strategies with hegemonic strategies and trust strategies.

My argument in this section is that the coexistence of the paradigmatic and subparadigmatic readings points to the crucial interpretive dilemmas of our time. Recognizing this will help us to understand the wide variety of adaptive and transformative practices and discourses as they emerge, spread and collapse across the globe, as well as the dramatic transformations in the legal field analyzed below. The paradigmatic reading is much broader than the subparadigmatic reading, both in substantive claims and in time-space range. In its terms, the crisis of the regime of accumulation and mode of regulation are mere symptoms of a much deeper crisis: a civilizatory or epochal crisis. The "solutions" of the subparadigmatic crises are the workings of the system's structural adjustment mechanisms; since the latter are being irreversibly eroded, such "solutions" will be increasingly provisional and unsatisfactory. The subparadigmatic reading, on the other hand, is, at the most, agnostic in relation to the paradigmatic claims. It is either unconcerned with long-term developments, or dismisses their cognitive basis as unscientific. It claims that, if the past has one lesson to teach us, it is that, so far, capitalism has solved its crises successfully and always in a relatively short-term framework.

My suggestion is that the two readings are, in fact, two major arguments about our time, prompted by two major audiences: the paradigmatic reading, by the transformative audience; and the subparadigmatic reading, by the adaptive audience. These are ideal-typical audiences. Some social actors (individuals, groups, classes, organizations) participate in only one of them; but many of them participate in both, according to time or issue, moving back and forth between the two without pledging irreversible or exclusive allegiance to one or the other. Both audiences are constituted by heterogeneous and conflictual social bases, but the conflicts (classist, ethnic, gender conflicts) are played out differently in the two audiences. The transformative audience is probably more apocalyptic in the evaluation of fears, risks, dangers and breakdowns emerging in our time, but it may also tend to be more ambitious as to the range of historical possibilities and choices that are being opened up. According to the issues and circumstances, the process of globalization may thus be seen either as highly destructive of irreplaceable identities and equilibria, or as the propitious inauguration of a new era of global or even cosmic egalitarian solidarity. Conversely, for the adaptive audience the current global transformations in economy, politics and culture are either to be resisted or encouraged, given the circumstances; but notwithstanding their undoubted relevance, they are forging neither a Brave New World nor a new utopia. They merely express the transitory turbulence and partial chaos that usually accompany any changes in routinized systems.

From a discursive and phenomenological point of view, the paradigmatic and the subparadigmatic readings are, thus, two lived experiences, two modes of social praxis. Different social actors in different times and spaces build their social experiences as constellations of praxis, in which elements of the two archetypical interpretations of our time are combined in different ways and weights. Some actors may experience the transnationalization of the economy in the subparadigmatic mode, and the transnationalization of culture in the paradigmatic mode, while others may experience them inversely. More importantly, some actors may conceive as economic the same processes of transnationalization that others conceive as cultural or political. This is the phenomenological side of the epistemic changes under way. The distinctions traditionally used to identify different sectors of social life, such as economy, politics, culture, have become increasingly problematic, as the new transnational practices are packaged in an infinite number of totalities in which economic, political and cultural dimensions are inextricably intertwined. As an example, the culture ideology of consumerism is as cultural (it refers to symbols, values and lifestyles) as it is economic (there would be no consumerism without the possibility of mass production and consumption) and political (the quantity, the quality and the social distribution of mass consumption is one of the central political conflicts in any of today's nation-states, and consumerism is conceived as being an important ingredient of the "new political culture," of political conformity and electoral abstentionism). For the lack of better concepts, we may continue to resort to the old ones, provided that we keep in mind that they no longer correspond to real entities existing out there; they are, rather, different perspectives on the same phenomena socially constructed by actors clustering their social experiences around different archetypical readings of our time.

The coexistence of paradigmatic and subparadigmatic interpretations is probably the most distinctive feature of our time. It endows our time with a new and broader epistemological and social openness, a measure of chaos that measures both uncontrollable dangers and unsuspected emancipations. For the time being, which, as I argue in Part One, is the beginning of a paradigmatic transition in forms of sociability, such openness and chaos are still interstitial and marginal, and coexist with a sense of global closure, blockage and even catastrophe. However, despite their marginality and interstitiality, they challenge entrenched epistemological and social determinisms. Some of the features of the transnationalization process, although connected with changes of regimes of accumulation, are not reducible to them; on the contrary, they represent logics of collective action antipodal to capitalist logic. The coexistence of a paradigmatic mode and a subparadigmatic mode of social evaluation and praxis manifests itself in the composition of the central features of the globalization process. While some features have a predominantly subparadigmatic outlook, others have a predominantly paradigmatic one, and the same is true of the different features of the legal transnationalization. Before turning to the latter, I will briefly analyze two of the features of globalization which in my view have a more direct bearing on the

transnationalization of the legal field: the nature of globalization and the social basis of transnational agency.

The Nature of Globalization

Far from being linear or unambiguous, the process of globalization is highly contradictory and uneven. It takes place through an apparently dialectical process, whereby new forms of globalization occur together with new or renewed forms of localization. Indeed, as global interdependence and interaction intensify, social relations in general seem to become increasingly deterritorialized, opening the way to new *rights to options*, crossing borders up until recently policed by customs, nationalism, language and ideology, oftentimes by all of them together. But, on the other hand, and in apparent contradiction with this trend, new regional, national and local identities are emerging that are built around a new prominence of *rights to roots*. These localisms, both old and new, are often adopted by such varied translocalized groups of people as Islamic fundamentalist groups in Paris or London, Turkish migrant workers in Germany, Latino-Latina migrant workers in the U.S. Therefore they cannot be traced back to a specific *genius loci* or sense of place; but they are nevertheless always grounded on the idea of territory, be it an imagined or symbolic, real or hyperreal territory. This reterritorialization occurs usually at an infrastate level, but it can also occur at a suprastate level. A good example of the latter is the European Community, which is in the process of deterritorializing social relations at the state level only to reterritorialize them at a suprastate level (the EC as a fortressed territory vis-à-vis the outside world).

The process of globalization is, thus, selective, uneven and fraught with tensions and contradictions. But it is not anarchic. It reproduces the hierarchy of the world system and the asymmetries among core, peripheral and semiperipheral societies. There is, therefore, no genuine globalism. Under the conditions of the modern world system, globalism is the successful globalization of a given localism. The English language, as *lingua franca*, is one such example. Moreover, once a given process of globalization is identified, its full meaning and explanation may not be obtained without considering adjacent processes of relocalization occurring in tandem and intertwined with it. The globalization of the Hollywood star system may involve the ethnicization of the Hindu star system produced by the once-strong Hindu film industry. One of the transformations most commonly associated with globalization is time-space compression, that is, the social process by which phenomena speed up and spread out across the globe. Though apparently monolithic, this process does combine highly differentiated situations and conditions, and for that reason it cannot be analyzed independently of the power relations that account for the different forms of time and space mobility. On the one hand, there is the transnational capitalist class, really in charge of the time-space compression and capable of turning it to its advantage. On the other hand, the subordinate classes and groups, such as migrant workers and refugees, are also doing a lot of physical moving, but are not at all in charge of the time-space compression. And there are also those who heavily contribute to globalization, but who, nonetheless, remain prisoners of their local time-space. The peasants of Bolivia, Peru and Colombia, by growing coca, contribute decisively to a world drug culture, but they themselves remain as "localized" as ever; just like the residents of Rio's *favelas*, who remain prisoners of the squatter settlement life while their songs and dances are today part of a globalized musical culture.

In order to account for these asymmetries, I distinguish two forms of globalization. They may apply to different phenomena, but they may also be different dimensions of the same phenomena. The first one I would call *globalized localism*. It consists of the process by which a given local phenomenon is successfully globalized, be it the worldwide operation of TNCs, the transformation of the English language into *lingua franca*, the globalization of American fast food or popular music, or the worldwide adoption of American copyright laws on computer software. The second form of globalization I would call *localized globalism*. It consists of the specific impact of transnational practices and imperatives on local conditions that are thereby destructured and restructured in order to respond to transnational imperatives. Such localized globalisms include: free trade enclaves; deforestation and massive depletion of natural resources to pay the foreign debt; touristic use of historical treasures, religious sites or ceremonies, arts and crafts, and wildlife; ecological dumping; conversion of sustainability-oriented agriculture into export-oriented agriculture as part of the "structural adjustment"; the ethnicization of the workplace. In this context, the international division of globalism assumes the following pattern: the core countries specialize in globalized localisms, while upon the peripheral countries is imposed the choice of localized globalisms. The world system and, more specifically, what in it is designated as globalization are a web of localized globalisms and globalized localisms. The dynamics of this web and the structural conflicts they create, express or reconstruct (class, national, gender, ethnic, religious, generational conflicts) may be adequately captured by subparadigmatic analyses of the hierarchies of social production and reproduction on a world scale. From a phenomenological perspective, the social relations constituted by both globalized localisms and localized globalisms tend to reproduce themselves in adaptive practices and to be rendered discursively in adaptive audiences dominated by subparadigmatic arguments.

However, the intensification of global interactions entails two other processes which are not adequately characterized as either globalized localisms or localized globalisms, and which, in contrast with these, invite a paradigmatic reading of current worldwide transformations. The first one I would call *cosmopolitanism*. The hierarchy of the world system and the power relations and interdependencies it entails are played out in complex ways. The prevalent forms of domination do not exclude the opportunity for subordinate nation-states, regions, classes or social groups and their allies to organize transnationally in defense of perceived common interests, and use to their benefit the capabilities for transnational interaction created by the world system. Such organization is intended to counteract detrimental effects of hegemonic forms of globalization, and evolves out of the awareness of the new opportunities for transnational creativity and solidarity created by the intensification of global interactions. Cosmopolitan activities involve, among others, South-South dialogues and organizations; worldwide labor organizations (the World Federation of Trade Unions and the International Confederation of Free Trade Unions); North-South transnational philanthropy; international networks of alternative legal services, human rights organizations,

transformative advocacy NGOs, literary and artistic movements in the periphery of the world system in search of alternative, nonimperialist cultural values and so on.

The use of the term "cosmopolitanism" to describe counterhegemonic practices and discourses may seem inadequate in light of its modernist pedigree, so eloquently described by Toulmin,[51] as well as in light of its common usage to describe practices that are here conceived either as globalized localism or localized globalism (not to mention its usage to describe the worldwide operations of TNCs, as in the designative "cosmocorp"). I use it, nonetheless, for several reasons. First, I want to signal that, contrary to the modernist creed (particularly in its *fin de siècle* moment), cosmopolitanism is only possible interstitially, at the margins of the capitalist world system as a counterhegemonic practice and discourse. Second, cosmopolitanism is achieved by progressive coalitions of oppressed classes or groups and other classes or groups coalescing with them or acting in their name and/or in their interest. In this respect, cosmopolitanism may resonate Marx's belief in the universality of those who, under capitalism, have only their chains to loose. I do not dismiss such resonance, but I would nevertheless distinguish cosmopolitanism, as I use it, from Marx's universalism of the chained working class, if for no other reason, because the situation described by Marx is very different from the one we are experiencing today. The dominated classes of our world seem to fall into two categories, none of them reducible to the only-chains-to-lose class. On the one hand, sizable sectors of the working classes have more to lose than their chains, even if that "more" is not much more, or is more symbolic than material. On the other hand, vast populations throughout the world do not even have chains, that is, are not even strong or "useful" enough to be directly exploitable by capital and, as a result, the eventual occurrence of such exploitation would sound to them as liberation. In their enormous variety, the cosmopolitan coalitions aim at struggling for the true liberation of these two strata of oppressed classes, as well as of those strata that might eventually fit Marx's mould. Another, probably more important, difference between my conception of cosmopolitanism and Marx's universality of the oppressed is that the progressive, cosmopolitan coalitions have no essentialist class base. They can be rather mixed in their class composition and formed along nonclass lines, such as ethnicity, gender or nationality. In part for this reason, the progressive character of cosmopolitan coalitions can never be taken for granted. It is, rather, intrinsically unstable and problematic, and can only be sustained through permanent self-reflexiveness. Finally, contrary to Marx's conception, cosmopolitanism does not call for uniformity and the breakdown of local differences, autonomies and identities. Cosmopolitanism is nothing more than the networking of local progressive struggles with the objective of maximizing their emancipatory potential *in locu* through translocal/local connections.

The other process that cannot be adequately described either as globalized localism or as localized globalism is the emergence of issues which, by their nature, are as global as the globe itself and which I would call, drawing loosely from international law, the *common heritage of humankind*. I said above that there is no genuine globalism. This, of course, does not apply to issues that only make sense as referred to the globe in its entirety: the sustainability of human life

on earth, for instance, or such environmental issues as the protection of the ozone layer, the Amazon, the Antarctica or the oceans. Since nuclear weapons pose an indiscriminate and global threat to the survival of human and nonhuman life on earth, the struggle against the proliferation of mass destruction weaponry can also be conceived as being waged in the name of the common heritage of humankind. I would also include in this category the exploration of outer space, the moon and other planets, since the interactions of the latter with the earth are also a common heritage of humankind.

The concern with cosmopolitanism and the common heritage of humankind has known a great development in the last decades; but, as we shall see below, it has also provoked powerful resistance. The common heritage of humankind in particular, which originated in public international law, has been under sustained attack by hegemonic countries, specially the U.S. The conflicts, resistances, struggles and coalitions clustering around cosmopolitanism and the common heritage of humankind show that these two forms of globalization are arenas in which adaptive practices and audiences collide with transformative practices and audiences, in which subparadigmatic readings of the issues involved collide with alternative paradigmatic readings, in which both the negative and the positive horizons of expectations vary widely. While for some the issues calling for a cosmopolitan or a common heritage of humankind response can be adequately tackled by possible short- or middle-range measures—even if against much resistance within the current capitalistic world order—for others, on the contrary, such issues are constitutive features of the capitalist world (dis)order and, consequently, irresolvable as long as this order is in place. For this reason, cosmopolitanism and the common heritage of humankind, though obviously connected with the process of globalized localism and localized globalism, are irreducible to them. They, rather, create the space for social practices that transcend the hierarchies established by asymmetric globalisms, and for credible emancipatory discourses beyond the confines of capitalist reasoning and reasonableness.

Social Basis of Transnational Agency

The intensity and wide range of processes of globalization have resulted in the decline of forms of national or subnational collective action which up until now were considered of utmost importance and effectiveness, such as the organized labor movement. Moreover, out of the process of globalization have emerged new forms of collective action—local, national, international and transnational action. Some such forms are not new in themselves, but have assumed a new strength, range or efficacy. In the concomitant decline of old forms of collective action and the emergence of new ones lies the issue of transnational agency. In the preceding sections, I have already made some references to changes in class structures and strategies occurring in connection with globalization. Traditionally, class analyses have taken the national territory as the privileged if not the "natural" unit of analysis. The only exception was the world system theory, according to which both the bourgeoisie and the proletariat were constituted by a single transnational division of labor. In its terms, the role of states in the interstate system and the uneven development of the world system accounted for the emergence and political relevance of nationally-based class struggles, but the full understanding of the

latter would not be possible without considering the dynamics of the world system as a whole. In the last two decades, and mainly as a result of the globalization of production systems, the existence of a world capitalist class *in sich* has been widely accepted, and the question has in turn become whether this class has also become a class *für sich*. Through its privileged institutional form, the TNCs, the corporate transnational bourgeoisie I mentioned above has become the principal actor in the globalization of the economy. In fact, the transnational agency of this class takes place not just through an institutional form, the TNC, but rather through a network of institutions clustering around the TNCs. Among such institutions, the international financial institutions, such as the IMF and the World Bank, as well as the American corporate law firms loom large, though for different reasons.

But the question of transnational agency cannot be reduced to the transnational bourgeoisie. Worldwide capital does not exist without worldwide labor. As is well known, Marx's call for a world working class *für sich* has found little response; on the contrary, capital has been far more successful than wage labor in uniting its forces on a global scale. In our century and particularly in core countries, the organizations of the working class have grown more and more dependent on the nation-state, and their institutional settings, their struggles, their proletarian culture have taken the national territory as their unit of reference and as their symbolic universe. Consequently, the relative strength of these organizations in the core countries has been of little use in promoting the transnationalization of labor militancy. In this respect, the labor organizations of the EC countries provide a striking illustration. So far, they have not been able to generate, collectively and at the level of the Community, the same organizational strength and the mobilization capacity that each one of them has in its own national space. Nevertheless, the transnationalization of labor organizations and mobilizations has some tradition, in spite of all the difficulties. As international labor organizations are part of the cosmopolitan globalization I mentioned above, so is the cooperation of different national labor unions in negotiations with and strikes against the same TNC operating in their respective countries. Moreover, the concept of "global wage relation," however problematic, may point to a future reality, already surfacing in transnational regional agreements, be they the EC or NAFTA.

In the light of the broad perspective on globalization I have been propounding in this chapter, it becomes evident that the issue of transnational agency cannot be reduced to the social actors clustered around the capital-labor relations. In the last two decades, new forms of transformative social action have emerged throughout the world. I mean popular movements or new social movements either with new political and ideological agendas—sometimes called "postmaterialistic," such as ecology, peace, antiracism, antisexism—or, particularly in peripheral countries, with old "materialistic" agendas—around economic survival, housing, land, social welfare, education. In either case, forms of organization and mobilization are adopted that are very different from those typical of the labor movement (trade unions, political parties). These movements have been emphasizing democratic empowerment (human rights, collective or group rights, participatory democracy), institutional autonomy and equality, cultural (or grassroots) identity,

the expansion of freedom against state authoritarianism or mass cultural domination. Most of these movements have been locally based, but have developed transnational ties of various sorts with movements in other parts of the world. Indeed, they constitute the backbone of the transnational agency clustering around the concerns with cosmopolitanism and with the common heritage of humankind. This transnational agency has been furthered by a privileged institutional form which, though not new, has in the last two decades assumed an unprecedent prominence: the nongovernmental organizations (NGOs) and, in particular, the transnational NGOs. By the designation of NGOs are meant institutions of the most varied nature and political or ideological outlook, some of them "nongovernmental" only in name; they are described in general as nonprofit or as private voluntary organizations, and as having emerged out of the social movements or being connected with them in more or less direct ways. Clark distinguishes six types of NGOs: (1) relief and welfare agencies; (2) technical innovation organizations; (3) public service contractors; (4) popular development agencies; (5) grassroots development organizations; and (6) advocacy groups and networks.[52] Focusing on the NGOs' connections with social movements and with social constituencies, Miller distinguishes between *democratic, voluntary membership associations*, on the one hand, and *social agencies* and *public interest organizations*, on the other.[53]

In view of my concern with transnational agency, I will concentrate on transnational NGOs. Transnational NGOs may develop out of more or less formal transnational networks among local NGOs, or may be originally created with a transnational scope and with the purpose of collaborating with local NGOs and other social organizations or movements in different parts of the world (providing technical or legal expertise to popular social movements, representing social movements in international forums, forging lateral ties between social movements and offering expert testimony in international settings). Transnational NGOs have grown tremendously in the last decade. In 1981 there were about 1,700 development-oriented NGOs in the OECD countries; in 1990 there were over 2,500. The World Resource Institute alone collects information by and about approximately 450 NGOs focusing on environmental issues, and about 3,300 organizations subscribe to its newsletter (the *NGO-Networker*). The number of participants and the range of issues dealt with in the NGOs' global forum during the United Nations Environment Conference (Earth Summit) in Rio in June of 1992 is an eloquent demonstration of the dynamism of transnational NGOs. A simple enumeration of the alternative treaties elaborated by them shows how they are emerging as a global transformative audience in charge of the agendas of cosmopolitanism and common heritage of humankind: treaty on alternative economic models; citizens' commitment on biodiversity; treaty on "*cerrados*" (scrubland); climate change NGO treaty; communication, information media and networking treaty; treaty on consumption and lifestyle; NGO debt treaty; the earth charter; global forum '92 NGO treaty on energy; treaty on environmental education for sustainable societies and global responsibility; fisheries treaty; NGO food security treaty; NGO fresh water treaty; Rio framework treaty on NGO global decision making; NGO treaty on militarism, the environment and development; treaty for NGO cooperation and sharing of resources; treaty of the peo-

ple of the Americas; treaty on population, environment and development; treaty against racism; NGO sustainable agriculture treaty; treaty on technology bank; NGO treaty on TNCs; democratic regulation of TNC conduct; alternative treaty on trade and sustainable development; treaty on urbanization; treaty on waste.[54]

The increased prominence of transnational NGOs has prompted research on both the factors behind it and the direction it will take. The new prominence of transnational advocacy NGOs (TANGOs) is connected with recent trends in the world system and in particular with the collapse of the Communist regimes, the exhaustion of command-economy development models, the antistatist ideology associated with neoliberal economic policy and crisis of the public sector in many states, the globalization of the economy, the political culture of neocommunitarianism and the new communication and information systems.[55] One of the consequences of the dramatic increase of transnational NGOs is their enormous heterogeneity. Not all transnational NGOs are progressive, transformative and oriented toward paradigmatic change. Some of them are conservative, adaptive, oriented toward subparadigmatic change and indeed see themselves (and are seen and used by international agencies) as neoliberal alternatives to the state. The relations between transnational NGOs and local NGOs and social movements have also become problematic. For example, a recent report by an African regional NGO, the Zimbabwe Energy Research Organization (ZERO), assessing the regional NGOs in the development process, raises some important issues in this respect. It is argued that the unquestionable acceptance of NGOs as the panacea of rural development must be reviewed; that NGOs have little influence in the design of development policies; that the dependence of NGOs on international donor agencies has resulted in an identity crisis: they have been facing the dilemma of choosing between comfortable relations with donors, on the one hand, or enhancing an indigenous contribution and participation in development on the other. The report concludes that the role of NGOs as agents of change at the grassroots level may have been overstated and sometimes romanticized.[56]

The transnational NGOs have thus become a contested terrain. But the contestation also shows how successful has been the attempt to create a transnational agency alternative to the TNCs and their supporting institutions. Without pushing risky symmetries too far, there is some evidence that transnational NGOs represent for the agendas of cosmopolitanism and common heritage of humankind what the TNCs represent for the agendas of localized globalism and globalized localism. It is therefore not surprising that one of the alternative treaties coming out of the Global NGOs Forum in Rio 1992, the treaty on the democratic regulation of TNCs, represents a direct confrontation between two alternative models of global development endorsed by two alternative transnational institutions.

II. THE TRANSNATIONALIZATION OF THE LEGAL FIELD

The transnationalization of the legal field is a constitutive element of the processes of globalization I have been analyzing. The analytical framework proposed here is a very broad one, not only because, as should be clear by now, globalization

comprises, by its very nature, a very broad set of phenomena and dimensions, but also because it is my purpose to counteract a certain economistic bias that has been dominating the analysis of the globalization of legal phenomena. Far be it for me to say that the transnationalization of production and of market relations is not a key factor in recent changes in the legal field. I just want to argue that it does not cover the whole spectrum of global interactions, and that an exaggerated focus on it may lead us to disregard other equally important developments.

While some, admittedly the most significant, instances of the transnationalization of law can be directly traced back to the networking of globalized localisms and localized globalisms which go together with the transformations of capital accumulation and Western cultural imperialism on a global scale, other instances, although connected with these transformations—if for no other reason, to resist against them—stem from autonomous political and cultural considerations, such as those lying behind the agendas of cosmopolitanism and common heritage of humankind. And there are still other instances of legal change in which the four patterns of globalization (globalized localism, localized globalism, cosmopolitanism and common heritage of humankind) are present in complex combinations. The coexistence of equally credible paradigmatic interpretations and subparadigmatic interpretations of current global changes bears witness to the relative underdetermination of social praxis in our time, and calls for multifactorial analyses. As regards the transnationally-induced changes in the legal field, I start from the assumption that even the changes most closely associated with the accepted/imposed diffusion of the neoliberal, market-oriented, development model, such as changes in commercial codes in many different countries, must be analyzed within interpretive constellations of economic, political, historical, cultural and even religious factors.

Comparative analysis of the transformations of the legal fields throughout the world system have been far too narrow to capture diversity in historical temporality, social embeddedness and cultural identity, particularly when such diversity is hidden or declared irrelevant by the simultaneity and convergence of changes using the same transnationalized knowledges and discourses. The inadequacy of such comparisons is all the more evident in an analytical framework such as the one I am proposing here, based on a paradigmatic reading of our time and calling for the unthinking of law as a critical task for a transformative audience. Along these lines, I propose, in the following, a research agenda comprising seven broad areas of legal transnationalization to be analyzed within the framework of a three-layered comparative approach: the position of the country in the hierarchy of the world system; the historical trajectory of the country up to and through modernity; the historical family or families of law and legal culture dominant in the country. A brief comment about each one of these factors is in order.

The Position of the Country in the World System

The comparative analysis of social-legal fields that the world system theory makes possible focuses mainly on the interstate system and on the relative strength of different nation-states. The world system theory claims that the world economy is constituted by a web of interlinked productive processes and commodity chains in which core processes are concentrated in core areas, whereas peripheral processes

are concentrated in peripheral areas; the unequal exchange upon which this hierarchical division of labor is forged results in economic and political polarization between stronger states in core areas and weaker states in peripheral areas. According to Wallerstein, one state is stronger than another to the extent that it can maximize the conditions for profit-making by its enterprises (including state corporations) within the world economy.[57] Wallerstein's generalization that core states tend to be strong, both internally and externally (vis-à-vis other states), while peripheral states tend to be weak, has been criticized for its economism[58] and for the vagueness and problematic operationalization of the concept of state strength, both internal and external. Though agreeing with Wallerstein that not everything about political action and state structure can be explained by just knowing "how and where a country is inserted into the world hierarchical division of labor," Chase-Dunn still considers that the question of internal strength is much more problematic than the question of external strength. "It is generally agreed," he says, "that in external state-to-state relations Wallerstein's generalization holds."[59] In Section II.1, I will argue that the external strength of the state is of crucial importance in understanding the first variety of legal transnationalization analyzed below.

Routes to and through Modernity

I have been emphasizing that globalization should not be equated with homogenization, uniformization or unification. Globalization goes together with old and new forms of localization; deterritorialization of social relations coexists with reterritorialization of social relations; cultural diffusion is often confronted at the receiving end by syncretisms and creolizations. The explanation for these countervailing movements and their different combinations and articulations in different countries or areas of social praxis requires broad and complex explanatory strategies with wide-ranging time-space frameworks. The world system theory has made an important contribution in elucidating how, from the sixteenth century on, the different countries of the world were incorporated into the modern world economy. However, the quality of the economic historical analysis of the incorporation process has not been matched so far in depth and detail by its political and cultural historical analysis. In both Chapters One and Two I spoke of modernity as a vast, European, sociocultural project whose ambitions and revolutionary promises have been curtailed, cancelled out or fulfilled in a perverse manner under the structural developmental limits imposed by world capitalism. I then tried to trace this process in the two main motors of modern rationalization of social life: modern science and modern (state) law. Given the general theoretical level of the argument, I did not consider the historical specification of the diffusion of the project of modernity outside its European base. However, the globalization process analyzed in the current chapter calls for such specification, because the dramatic intensification of global interactions in the last two decades purports to represent the ultimate expansion of the modernity project, even if it is nothing more than the final unfolding of its historical inertia, the culmination of its excesses and deficits.

The historical unfolding of late modernity in each of the four processes of globalization distinguished above reveals how much destruction and marginalization is involved in the incorporation of the whole planet into the hegemonic forms of capitalist modernity. But it also reveals the contradictory encounters of modernity with other civilizatory projects and the complex combinations that have emerged out of them, new constellations of civilizatory meaning which, for the lack of a better name, we may call postmodern constellations. The most promising transformative practices in the agendas of cosmopolitanism and common heritage of humankind in recent decades have come from the "South," the "periphery" or the "margins," from social actions and worldviews in which modern Western concepts, such as human rights, are combined with the struggle for modes of communal and cultural identity foreign to modernity, a struggle, indeed, to protect them from hegemonic projects of modernization. Learning from the South is thus no vain slogan. It is an invitation to a de-Westernized, decentered conception of globalization and what it means as a civilizatory process. To learn from the South, however, it is necessary to know the historical trajectory of its encounter with Western modernity.

Following Therborn, I distinguish four passes of entry into modernity: the European gate; the New Worlds; the colonial zone; modernization in the face of modernity as an external threat.[60] The European gate is "the pioneering route," an endogenous process both in relation and in resistance to change. The New Worlds is the pass through transcontinental migration and genocide and through the independence proclaimed by settlers of a major part of North America, soon followed by that of the South and central parts of the hemisphere and also of Australia, New Zealand and Hawaii. The gate of the colonial zone runs from Northwestern Africa via the Indian subcontinent to the Archipelago of Southeast Asia, where modernity arrived by conquest, subjection and appropriation. Finally, the externally induced modernization is the gate of drastic, defensive change promoted by local elites who considered modernity a foreign menace, as in Japan's Meiji Restoration, in early nineteenth-century Egypt, and later on in China, Iran, Thailand.

According to Therborn, the four routes to modernity can be conceived as ideal-types occurring historically in different combinations in different societies. From my perspective, however, a genuinely de-Westernized conception of the global process of modernization demands that the European route be conceived as nonsymmetric with all the other routes. Europe did not just enter modernity; it invented it and imposed it upon other civilizatory projects throughout the world, with the exclusive purpose of extracting benefits thereby. For the non-European countries, modernity was never the broad sociocultural project we have outlined in Chapters One and Two. It was rather a partial and, to a great extent, painful experience of unequal contact and exchange. Due to their position in the world system, such countries were not able, in general, to set the agenda or the pace of modernity, and only to a very limited extent could they modify it to their advantage. The success of Japan in the gate of externally induced modernization and of North America in the gate of New Worlds—where success involved the genocide of indigenous peoples—were exceptional and reproduced the same asymmetry in the surrounding regions. This original asymmetry lies at the heart of the asymmetries through which globalization unfolds today. The merit of this comparative dimension resides in the idea that the different entry routes into Western moder-

nity conditioned the subsequent processes of social structuration, cultural development, nation-building and state-building. Such routes are thus historical marks that surface, sometimes unexpectedly, in the current globalization and legal transnationalization that the different countries of the world system are going through.

Such historical marks, however, should not be conceived as tattoos, as fixed entities impressed upon the social processes. The promise of the comparative analysis of the routes to and through modernity depends upon a reading of the latter that opens up rather than closes opportunities for social transformation. A historicist, determinist reading is out of the question. The routes into modernity are broad patterns which continue to unfold in a sea of contingent variables. Moreover, they are hermeneutic constructs that justify their explanation of the past as a choice of the present, which is also a normative consciousness of a future to build. In other words, in order to be fruitful, the history of the routes into modernity must be conceived as a genealogy, following Nietzsche's and Foucault's metaphor, or as an archeology, following Freud's metaphor, or still as a Marxist history without determinism. In any case, it is a history that works backwards, from the present to the past.

Families of Legal Cultures and Kinship Ties

Besides the knowledge of the hierarchies in the political economy of the world system and the knowledge of the historical trajectories of the different routes to and through modernity, the full understanding of the processes of legal transnationalization under way requires the knowledge of the different historical legal cultures and legal styles prevalent in the different regions and countries of the world system. Some such legal cultures are part of Western modernity itself, while others existed long before their contact with it, and later evolved in conjunction, conflict or complementarity with the Western legal cultures. Like the broader cultural premises they are part of, legal cultures are deeply rooted in the history and social praxis of societies throughout the world system. They operate as filters—more selective or effective in some legal fields than in others—through which transnational influences get localized. Aggregating the vast number of legal systems existing in the world into a small number of "legal families" has been the traditional task of comparative law. Throughout our century several different criteria have been proposed to devise such groupings, each one of them leading to a different classification. Let me mention just a few: using the sources of law and general structure as a criterion, Esmein divided the legal world into the Romanistic, Germanic, Anglo-Saxon, Slav and Islamic families;[61] based on the criterion of race, Sauser-Hall distinguished Indo-European (subdivided into Hindu, Iranian, Celtic, Greco-Roman, Germanic, Anglo-Saxon and Lithuanian-Slav subgroups), Semitic and Mongolian legal families, as well as, as one might expect, a residual family of "uncivilized nations";[62] using the sources of law as the main criterion, Levy-Ullmann distinguished among the Continental legal family, the family of English-speaking countries and the Islamic family;[63] based on what they called the substantive, internal characteristics of the law, Arminjon, Nolde and Wolff identified seven legal families: French, German, Scandinavian, English, Russian, Islamic and Hindu;[64] using ideology as his criterion, one of the most distinguished

comparatists, René David, started out by distinguishing five legal families—Western systems (French group and Anglo-American group), socialist systems, Islamic law, Hindu law and Chinese law—which he later on collapsed into three major legal families—the Romanistic-German family, the common law family and the socialist family—alongside a loose group of "other systems," in which he included Islamic law, Hindu law, the law of the Far East, as well as a new group of African and Malagasy law;[65] finally, based on the criterion of style (in which the following five factors are included: historical background and development; mode of legal thinking; distinctive institutions; legal sources; and ideology) Zweigert and Kötz propose the classification of the legal world into eight legal families: the Romanistic family, the Germanic family, the Nordic family, the common law family, the socialist family, Far Eastern systems, Islamic systems and Hindu law.[66]

A sociology of the criteria used throughout the century by legal comparatists to classify legal families would show how their classifications tell us more about the ideology of Eurocentered comparative law than about the ideology of the different legal families (particularly the non-European ones). Although, since René David's *Traité*, legal comparatists have called for a contextual analysis of law, only very selectively have they incorporated the findings of legal sociology and legal anthropology in their analyses. Moreover, they have tended to assume a Eurocentric conception of law—usually reduced to state law—and to overevaluate the social engineering, instrumentalist functions of law, oftentimes connected with a rather acritical readiness to promote or to legitimate the export or imposition of Western law in the peripheries of the world system. Despite all this, today—in a period of such intense legal transnationalization—the enterprise of legal comparison is more relevant and urgent than ever, and the wealth of knowledge accumulated throughout the century by legal comparatists cannot be dismissed out of hand.[67] On the contrary, once criticized and trimmed along the lines I have indicated, it remains an invaluable source of information in some areas. Once extracted from its ideological mould, the comparative law tradition can be reinvented with totally new emphases: the emphasis on the use-value of law, as a grounded phenomenon, rather than on the exchange-value of law; the emphasis on the diversity of the legal landscape and the articulation of diversity, rather than on absorption, unification and standardization, which are the avatars of the modernist tradition, from the *more geometrico* (Grotius) and the *ars combinatoria* (Leibniz), to the *Universaljurisprudenz* (Feuerbach) and the *droit commun de l'humanité* (Lambert); the emphasis on the plurality and diversity of laws (and conceptions of law) within the same geopolitical space, rather than on the state and law equation; the emphasis on the contextual plasticity of law, rather than on monotonic instrumentalism; the emphasis on legal reasoning as the privileged meeting ground between "values" and "facts," rather than on abstract norms which, particularly outside the Western legal families, are nothing more than legitimating abstractions of expedient, often oppressive, ruling systems; and, finally, the emphasis on the embeddedness of the legal processes in the political economy of the world system and in the trajectories to and through modernity, rather than on the abstract autonomy or autopoiesis of law.

This shift of emphases will permit us to combine a political economy of legal comparison with a cultural politics of legal comparison, without which the dif-

ferentiated vibrations of legal transnationalization, across time and space, on different systems of law and on different legal fields within each system, will remain unaccounted for. Since, in order to build such analytical tools, we have to start from what exists, I suggest that we take, as a starting point, Zweigert's and Kötz's classification. In spite of its Eurocentric bias, it has greater openness than other classifications. It is based on a complex criterion in which legal reasoning plays an important role. It is sensitive to institutional specificity to differentiation among legal fields and historical periods, as well as to vertical and horizontal comparison. Because it distinguishes among a large number of legal families, it allows for the identification of more combinations of different legal traditions in a more vast number of legal fields within the same geopolitical legal pluralistic constellation.

An adequate understanding of the current processes of legal transnationalization is thus premised upon three explanatory factors: the position of the country in the hierarchy of the world system; the historical trajectory of entry and pass to and through modernity; and the specific kinship ties that link the different legal orders existing in the country with the larger families of the legal world. This multilayered comparative strategy is difficult to implement: three positions in the world system must be combined with four trajectories into modernity and with eight world legal cultures. This is the task for a research agenda which I will only outline here. Table 2 presents, in a synoptic form, the way I view the quilt of legal transnationalization.

In the following I will make some reference to each one of the seven types of legal transnationalization. Given the overriding commitment of this book to unveil emancipatory possibilities upon which transformative audiences and transnational coalitions of oppressed groups struggles can be built, I will deal in greater detail with the forms of cosmopolitan legal transnationalization, specially with the transnationalized, infrastate law of the indigenous peoples, the law of people on the move and the cosmopolitan law of human rights.

1. Transnationalization of Nation-State Regulation: The Heterogeneous State

I speak of transnationalization of nation-state legal regulation whenever it can be determined that the changes in the state law of a given country have been decisively influenced by formal or informal international pressures by other states, international agencies or other transnational actors. Such pressures tend to be exerted in similar ways or with similar goals in different parts of the interstate system. The impact of the international context on nation-state legal regulation, rather than being a new phenomenon, is inherent to the interstate system, and can be traced back to the Westphalia Treaty itself (1648). Nor is it new that the international context tends to exert a particularly strong influence in the field of legal regulation of the economy and commercial life, as witness the many projects for the unification of law, restatement of laws and modelization of law developed throughout our century by legal comparatists, and carried out by international organizations and national governments. As the names of the projects themselves indicate, the international pulling effect has traditionally been in the direction of uniformization and standardization, best illustrated by the pioneering projects of

Table 2 The Transnationalization of the Legal Field

Types / Features	*Transnationalized State Law*	*Law of Regional Integration*	*Lex Mercatoria*	*Law of People on the Move*	*Transnationalized Infrastate Law*	*Cosmopolitan Law*	*Jus Humanitatis*
Main focus of globalization	globalized localism and localized globalism	globalized localism and localized globalism	globalized localism and localized globalism	globalized localism, localized globalism and cosmopolitanism	cosmopolitanism, localized globalism	cosmopolitanism, globalized localism	common heritage of humankind, cosmopolitanism, localized globalism, globalized localism
Main contested terrain	worldwide accumulation and division of labor; accumulation, trust and hegemony strategies of the state	worldwide accumulation and division of labor; accumulation, trust and hegemony strategies of the state	worldwide accumulation and division of labor	trust strategies of the state; "global wage relation"; exclusionary identities	local autonomies and identities; hegemony and trust strategies of the state; sovereignty	transnational identities; hegemony and trust strategies of the state	global identities; trust strategies of the state; planetary accumulation
Transnational agency	international financial institutions; TNCs; states	states; suprastate government; corporatist organizations	TNCs; American corporate law firms	states; international organizations; NGOs	grassroots movements; NGOs; international organizations	NGOs; grassroots movements; states; international organizations	NGOs; grassroots movements, TNCs; international organizations
Normative and institutional setting	regulation—deregulation; structural adjustment; heterogeneous state; parallel state	regional institutions and norms; sovereignty pooling; subsidiary principle	transnational contracts and agreements; international arbitration	international private law; international conventions; politics of rights	politics of rights; collective rights; right to self-determination; local self-government	politics of rights; international conventions and tribunals; NGOs, alternative treaties; Amnesty International and other human rights organizations' reports	politics of rights (nature rights, environment rights); international conventions; NGOs' alternative treaties

Ernest Rabel, in the early thirties, and the setting up of the International Institute for the Unification of Private Law (UNIDROIT) with the objective of unifying the law on the formation of international contracts, which led, for instance, to the Uniform Law on the Formation of International Sales Contracts (ULFIS, 1964) and the Convention on the International Sale of Goods (CISG, 1980).[68]

Despite this historical tradition, the current process of transnationalization of state legal regulation seems to be a qualitatively new phenomenon for two main reasons. First, it is a very broad and far-reaching phenomenon, covering a wide range of state intervention, and calling for drastic changes in the pattern of intervention. The core pressure is relatively monolithic, as it stems from the "Washington consensus," in whose terms the market-oriented development model is the only feasible model for a new global regime of accumulation, and accordingly, the structural adjustment it calls for must be carried out worldwide. Combined with this core pressure, others are in place that, in a sense, reinforce it, such as the end of the Cold War, the dramatic innovations in communication and information technologies, the new systems of flexible production, the emergence of regional blocs, a newly packaged ideological mix of economic liberalism and liberal democracy. The scope of these pressures is also wider ranging when compared with previous processes of transnationalization, because the current one takes place after decades of active state regulation of the economy in core, peripheral and semiperipheral countries. The creation of the normative and institutional requisites for the operation of the "market-friendly" model involves, therefore, such massive normative and institutional destruction, that it is likely to affect not only the accumulation strategies of the state, but also its hegemony and trust strategies. The second factor for the novelty of current legal transnationalization is that the asymmetries of transnational power between the core and the periphery of the world system, that is, between the North and the South, are more dramatic today than ever. Actually, the sovereignty of the weaker states is now directly threatened not so much by more powerful states, as used to be the case, but rather by international financial agencies and other "private" transnational actors, such as the TNCs. The pressure is thus supported by a relatively cohesive transnational coalition, drawing on powerful and world-embracing resources.

Though not restricted to it, it is in the field of the economy that the legal transnationalization of state law assumes greatest salience. The policies of "structural adjustment" particularly cover an enormous range of economic, commercial and social interventions of the state, provoking turbulence in wide legal fields and institutional settings. Trade liberalization, privatization of industries and services, agricultural liberalization, dismantling of regulatory agencies and licensing mechanisms, deregulation of the labor market and "flexibilization" of the wage relation, reduction and marketization of social services (like cost-sharing mechanisms, more strict criteria for eligibility to social provision, social exclusion of most vulnerable groups, market competition among state institutions such as public hospitals), less concern with environmental issues, educational reforms geared to job training rather than to citizenship-building, family policies that further aggravate the condition of women and children—all these are intended/unintended features of the "Washington consensus," and often require massive legal changes. Because these changes take place at the end of long periods of state intervention in economic and social life (notwithstanding sizable differences across the world system) the shrinking of the state cannot but be achieved by wide-ranging state intervention. As I have already said, the state must intervene in order not to intervene.

One of the most striking instances of legal transnationalization in line with the "market-friendly" approach, and connected with recent technological innovations, has occurred in the field of telecommunications. This is a domain in which, up until the mid-seventies, the legal field was absolutely dominated by the principle of the state. Most countries adopted the idea of a "natural monopoly" over telecommunications, which operated as an extension of the respective government department. Monopoly of services and equipment, so it was believed, was the most efficient and equitable way of providing public service, both domestically and internationally. It was also believed that national security would be best served by such state controlled monopolies. Besides, politicians saw in the monopolies and in the corresponding control over national bureaucracies a virtually infinite source of political payoffs. As Peter Cowhey emphasizes:

> Since the most costly people to serve were in less densely populated areas and since these populations usually had disproportionate voting and political power in industrialized nations, it was attractive to politicians to build monopolistic systems that encouraged average cost pricing for a set of uniform services. Technological innovation kept absolute costs down, cross-subsidies kept key constituents happy, and the governments could point to their role in providing fairness, defined as universal service on roughly comparable terms throughout the nation. Over time, the special beneficiaries of the system could be counted on to rally quickly to attack any disturbing factor. No commercial player or politician could spot any conceivable benefits from questioning the telephone cartel, given the stiff political barriers to entry.[69]

State control over domestic communications extended to international communications through jointly provided services, standardized networks and equipment and organized global commons. This mode of regulation, which lasted for over a hundred years, began to change in the 1970s, and the changes became dramatic in the last decade. At this point no unified mode of regulation has as yet replaced the old one, and the field of telecommunications is going through a period of great turbulence. The general trend consists in strengthening the principle of the market over the principle of the state, and entails pressures both by core countries and TNCs upon peripheral and semiperipheral countries to adopt or comply with legal transformations occurring in the core. Two strategic factors seem to be behind this development. On the one hand, technological innovation and diffusion: the microchip revolution; satellite communications; the emergence of digital technology blurring the line between communications and data processing. On the other, the oligopsony structure of the telecommunications market and the political clout of the main actors: the largest users of communications are few in number and economically powerful; they can easily and efficiently organize political lobbying.

Not at all surprisingly, this legal transformation began in the U.S., and has been spreading throughout the globe. Having won the battle at home, the American telecommunication TNCs became the most prominent exponents of regulatory reform in many countries, using the U.S. bargaining power to make global reform feasible. Two paths are being followed by the core countries to change the regime of telecommunications.[70] The first one is the "big bang" path followed by the U.S., the United Kingdom and Japan, which together constitute sixty percent of the world's telecommunications market. It consists in the overall, unilateral liberalization of telecommunications, including basic and enhanced services, equipments and facilities. The second one is the "little bang" path followed by the other core countries, basically the European countries.[71] It consists in partial liberalization through various means such as: separating postal services from telephone services and basic services from enhanced services (for instance, express mail, electronic mail and video conferences) with the purposes of reducing cross-subsidies; creating regulatory agencies with greater autonomy vis-à-vis the government; granting special rights and facilities to large users; reducing subsidies for average households and small businesses, though doing it very slowly so as not to alienate them politically. It is not relevant for my argument to inquire why some of the core countries follow the big bang and others the little bang path, or which of these paths will prevail in the future, if the trend is indeed toward homogenization. It suffices to note that, despite their differences, the two paths have much in common, and that their common features are being diffused throughout the world system. Since less than twenty industrialized nations constitute the overwhelming share of the world telecommunications equipment and service markets, they have clearly the market power to ensure major changes in the telecommunications regime.[72] This fact illustrates part of the dynamics of globalization outlined above. The reforms being promoted throughout the world system are successfully globalized local institutional solutions, that is to say, they are globalized localisms.

The transnational pressures for legal transformation are as strong as they are selective, in my judgment, and they are likely to reinforce the heterogeneity of state regulation (more on this below). For instance, the states that have adopted the "little bang" path are using two different logics of regulation within the same field of legal regulation of telecommunications: one, for small users, households and small business, in which the principle of the state seems to dominate, as the political use of the subsidies is retained, even if in an attenuated form; the other, for large users, in which the principle of the market appears to reign supreme through liberalization, competition and free entry, but indeed also compromising with the principle of the state, through the concession of special rights and the establishment of friendly specialized committees for policy grievances. As the provision of relatively similar services becomes the object of dualistic regulation, the principle of equality before the law is bent beyond recognition.

The Relative Weight of Transnational and National Factors

The debate on the relative weight of transnational and national factors in processes of social transformation is as old as social science itself, and this is not the place to review it in great detail. Without needing to go further back, it has been central to

modernization and development theories since the fifties. The initial emphasis of these theories on national factors led, in the seventies, to both the dependency and the world system theory, in which international factors were given primacy.[73] In the eighties, the emphasis changed again in favor of national factors, this time as part of an analytical dislocation from class-centered to state-centered approaches, or from economy to politics.[74] As Frieden says, with reference to the "postimperialist" approach of Becker and Sklar, "politics remains primarily a national matter, despite the internationalization of investment and finance."[75] But precisely for this reason the debate has been fueled by new issues in the most recent years. In view of the unprecedented increase in transnational productive interdependence and the continued (and even enhanced) relevance of political factors and state intervention in large investment or finance projects, a heightened contradiction between international or transnational variables, on the one hand, and national, domestic variables, on the other, seems to be evolving. While some authors continue to give primacy to national variables in the resolution of such a contradiction, others believe that, rather than a contradiction, there is emerging a complementarity between national and transnational factors, and to such an extent that eventually the distinction between them will cease to make sense.[76] Other authors still think that the contradiction exists, but is being resolved by such a dramatic supremacy of transnational factors that the nation-states, particularly in the periphery and semiperiphery, lose control of their steering mechanisms, and in this sense become "transnationalized" themselves (the "transnational state").[77]

In my view, given the complexity and diversity of current transformations, unilateral and unidimensional explanations are totally inadequate. The ideology and practice of economic liberalism boosted by domestic and international political forces, combined with the practices of the TNCs, have indeed led to a relative decentering of the nation-state as an actor in the world system. Most authors tend to agree that, in decisive areas, the state is being uncoupled both from national capital and national labor, thereby losing the capacity to guarantee by itself the institutional arrangements needed for a stable reproduction of accumulation. This is, however, a very complex process that is full of contradictory developments. For one thing, much of the decentering of the state is indeed conducted by the state itself. For instance, the privatization of the state industrial sector requires a complex intervention of the state that extends far beyond the process of privatization. In such cases, the centrality of the state is somehow confirmed in the very process of its demise. On the other hand, state activity is increasingly becoming so heterogeneous, with different branches developing at different paces and sometimes in opposite directions, that sometimes a coherent pattern of state action can no longer be discerned. The decentering of state action in certain areas (labor relations, social welfare) may thus coexist with the recentering of state action in other areas (job training, political surveillance, tightening foreign policy to TNCs' operations).

Moreover, the relation between the nation-state and transnational capital varies not only from state to state but also, within the same state, from sector to sector, for example, from the extractive sector to the agro-industrial sector, from the industrial sector to the financial sector. It should be borne in mind that the externality of the state in relation to capital and the relations of production is as fundamental for transnational capital today as it was for national capital in the

past. Only the nation-state can formulate credible nationalist ideologies to compensate for impossible nationalist practices, and a strong repressive state may often be needed to facilitate the requirements of global capital. Besides, the state can, according to the circumstances, either absorb transnational regulatory consensus (for example, privatization of the national industrial sector under IMF pressure) or stick to national differences (for example, keep wages and welfare benefits at lower levels than in competing states). There is room for opportunism, and only the nation-state can convert it ideologically into room for opportunity. This is specially evident in the area of social welfare, an area where the accumulation strategies of the state have traditionally been inextricably intertwined with hegemonic strategies. It is also an area that most clearly reveals how the vibrations of the transnational practices and pressures resonate unevenly throughout the whole spectrum of state regulation. Just one example: in a manner similar to what is happening with respect to the "little bang" telecommunication reforms, in states where a national health service has been in place, the local "reform coalition," usually in alliance with the medical equipment and pharmaceutical TNCs, rather than pretending a privatization across the board, is instead proposing a separation between basic services (primary medical care, labor intensive or hospital intensive care) and enhanced services (elective surgery, high-tech, capital-intensive care). As a result, the former will remain public and under state control, and the latter will be privatized, almost always through joint ventures between national and transnational capital. This example also illustrates the fact that, while the principle of the state showed in the past an indiscriminate capacity to cover the most different sectors of social practice, the principle of the market is highly discriminatory and selective, and by no means wants to be engaged in a generalized conflict with the principle of the state.

In light of the preceding, the development of an analytical framework adequate to capture the new complexities of the interplay between transnational and national factors is definitely an urgent task. Within a tradition of international political economy, Stallings argues: "International factors are crucial in explaining broad shifts in policy, both in contrasting the 1980s with the 1970s and in explaining changes within the decade of the 1980s. They are also useful in accounting for variations across countries, but for that purpose domestic factors are essential too."[78] Using as an empirical base three big clusters of policies, all of them "orthodox" and "market-oriented," which are followed by "Third World" countries (debt, stabilization and structural adjustment), Stallings specifies three mechanisms whereby international variables influence peripheral countries, and identifies the conditions under which the different mechanisms are relevant, that is to say, the conditions under which peripheral countries are made vulnerable to them. The three mechanisms are: *markets*, *linkages* and *leverages*. Each one of these mechanisms points to a main type of relationship between external and internal structures and actors. The first mechanism concerns the operation and impact of international markets that constitute the constraints—and the opportunities—within which peripheral actors must operate. The second mechanism stresses the economic, political and ideological linkage between domestic groups and international actors. Finally, the third mechanism concentrates on the power relations between international actors and peripheral governments. Combined with the conditions under which they operate, these mechanisms help to clarify the intricate interrelations between transnational and national (mainly state) factors.

As research on this type of legal transnationalization progresses, the somewhat sterile debate on the relative weight of transnational and national factors will yield to a more promising one on the increasing internal heterogeneization of state regulation. Legal heterogeneity is a characteristic of state regulation as a whole, and can be said to exist whenever different political and ideological logics of regulation or different styles of law are identified in different areas of state intervention. Described in this way, legal heterogeneity is hardly a new phenomenon. It has always existed as a result of a plurality of factors, such as: the historical trajectories of state regulation in different areas of social life related in general to the trajectories of the country into modernity; the impact of religious or ethnic factors, greater in some areas than in others; the extent to which colonial legal heritage has been kept and in what combinations with new postindependence regulation; the differences in legal style in accumulation, hegemony and trust strategies. However, in my view, owing in great part to the intensity, selectivity and pace of the transnational pressures of the current period, the differentiated impact of transnationalization upon the state legal field, taken as a whole, is provoking a new and more accentuated heterogeneization of state regulation. The policies clustering around "structural adjustment," forced upon peripheral and semiperipheral states, are provoking drastic restructurations in both political pacts among sectorial interests, and institutional settings of the state. The changes called for have such a sense of urgency and single purposefulness that, in the areas affected by them, the state regulatory functions appear clearly as derivative, extraterritorially originated, a kind of political franchising or subcontracting, whereby "semi-autonomous legal fields"[79] seem to be developing *inside* state law, rather than outside it, as used to be the case when the legal anthropological and sociological literature drew our attention to them. We may be witnessing the emergence of a new form of plurality of legal orders: partial legal fields constituted by relatively unrelated and highly discrepant logics of regulation coexisting in the same state legal system. As it loses coherence as a unified agent of social regulation, the state becomes a network of microstates, each one managing a partial dimension of sovereignty (or of the loss of it) with a specific regulatory logic and style.

As an hypothesis for future research I would suggest, drawing on the three comparative factors identified above, that the heterogeneity of state legality will tend to be higher (a) in those states that occupy an intermediate position in the world system, the semiperipheral states; (b) in states whose routes into modernity were the colonial gate and the gate of top-down modernization in the face of external threat; (c) in states whose dominant legal culture has traditionally been part of legal families with strong religious influence, such as Islamic and Hindu law, as well as, and to a certain extent, the Far Eastern systems.

2. The Law of Regional Integration: The EC

This type of transnationalization of the legal field occurs whenever a group of states combines to create supernational institutions and legal competences which will assume direct regulatory functions that previously did not exist or, if they did,

were performed by the individual states as prerogatives of their sovereign powers. Though there have been attempts at regional integration in different parts of the world system, in South and Southeast Asia, in the Middle East and the Magreb, and in the Americas (lastly, the NAFTA), the European Community remains so far the most advanced instance of regional integration and, for that reason alone, deserves to be singled out in the research agenda I am outlining here. Built over three decades by a mixture of diplomacy and interstate democracy, of intergovernment politics and supranational institutionalism, the EC is today an innovative transnational entity both in political and legal terms. Comprising twelve member states with a population of 350 million citizens and an institutional staff—Council, Commission, Court and Parliament—of some 22,000 people, of whom almost a quarter are involved in translation, the EC is the largest trading bloc in the world.

Inducing astonishingly little political debate up until recently, over the years the EC developed a supranational legal and political constitution aimed at creating an internal market comprising the four freedoms of movement (of goods, persons, services and capitals) which is today already in effect and which, for all its ambitious goals, is only part of a broader process of economic and political integration to be culminated in a political union. After a period of "Europessimism" and "Eurosclerosis" in the late 1970s and early 1980s, the Single European Act, approved by the European heads of government in 1986, inaugurated a new period of "Europhoria." It linked the liberalization of the market to procedural and institutional reforms that included a new approach toward harmonization of standards for domestic economic regulations—known as "mutual recognition"—and the expansion of the qualified majority voting in the Council of Ministers on matters pertaining to the internal market. Though neither of these reforms applied to other potential areas of European integration—such as political cooperation, social legislation, monetary policy, enlargement of EC membership—from then on, the broader political agenda lay at the core of the EC project. In December of 1990 the Intergovernmental Conference discussed five major topics in the direction of a political union: creating a concept of European citizenship parallel to and eventually replacing national citizenship; extending and improving EC policy competences, in the spirit of subsidiarity; increasing the democratic legitimation of EC decision making, primarily by upgrading the role of the European Parliament as a legitimate expression of the will of the people of Europe; improving effectiveness and efficiency of EC institutions, particularly through the extension of majority voting and improving cooperation between member states in the area of "internal competences and the administration of justice"; improving cooperation and coordination in the area of foreign policy, security and defense with a view to acquiring political weight in international affairs which the economic power of the EC deserves.[80] Culminating this ambitious political agenda, in a continent that has seen the modern nation-state arise, the Treaty of Maastricht has finally sparkled a broad ideological and political debate throughout Europe. Even so, the debate was intense only in some member countries. On the other hand, although the political debate was kept latent for a long time, the EC, both as a transnational political field and as a transnational legal field, has been the object of much scientific discussion, and the bibliography meanwhile accumulated is

immense. Suffice it here to enumerate the topics that are more pertinent for the research program outlined in this chapter: the national and the transnational; the state and the market; democracy, social cohesion and interest representation; Europe, the world system, and the history of Europe.

The National and the Transnational

The above-mentioned debate over the relative weight of national and transnational factors in the current processes of globalization assumes very specific characteristics in the case of the EC. The EC project started before such processes had gained much visibility in either political or scholarly circles. For almost four decades it has gone through periods in which national politics seemed to dominate and the theories of integration were in disarray (the periods of Europessimism) and through periods in which the idea of the obsolescence of the nation-state and the uncontrolled growth of supranational institutionalism took center stage (the periods of Europhoria). Some authors have emphasized the role of transnational factors in the development of the EC project. They consider, for example, pressures from EC institutions, particularly the Parliament and the Court; lobbying by transnational business interest groups; or the political entrepreneurship of the Commission under the leadership of Jacques Delors. Other analysts, on the contrary, have put the emphasis on interstate bargains, intergovernmental institution-building, veto power, and national interests, particularly where core states are concerned (France, Germany and Britain).[81] While the first view runs against the evidence that, even as an idea, there is as yet no European state endowed with the political prerogatives and regulatory competences of the nation-states, the second view fails to explain adequately the emergence of a coherent and effective Community legal system, in which the EC law is a direct source of law within the member states and prevails over conflicting national laws. Analyzed by conventional concepts, the EC integration process seems inherently contradictory. If, on the one hand, the member states seem to determine essentially the Community decision-making processes, on the other hand, the EC legislation has detached itself from the kind of national political accountability that is applicable to national legislation. If, on the one hand, the member states may exert regulatory influence in the European standardization organizations which sometimes act as combinations of national organizations, on the other hand, the formation in the European context of private systems of government without transparency and public involvement cannot be further denied.

To my mind, the complexities of the EC integration as a legal and political transnational phenomenon call for an archeological excavation into the modern concepts of sovereignty, state and law. As the equation among nation, state and law gets eroded, new political configurations emerge, not duly accounted for so far. First, the sharing of sovereignty is selective, and expands or retracts not only according to national or European conditions, but also to world system conditions. Second, not every sovereign power that is lost at the nation-state level can be reconstituted at the European level. What this means is that new, partial, shared, sovereignty paradigms may well be in the making, soon to be exported to other regions of the world system as the worldwide accumulation of capital so requires or recommends. Third, the external sharing or pooling of sovereignty

may go together with the increasing, rather than decreasing, centrality of the nation-state in the internal, domestic processes of social and political regulation. This has been particularly the case of the semiperipheral member states, such as Greece, Ireland, Portugal and Spain.[82] In a kind of positive-sum game, the member nation-states become internally strengthened as the transnational field they integrate strengthens itself.[83] Fourth, the concepts of "national" and "national interest" have been surreptitiously changing. As the concept of "national" gradually concentrates on the political process (on an increasingly narrower conception of it, that is), economic and cultural relations become more and more denationalized, thereby opening spaces for nationalistic and even chauvinistic backlashes. Concomitantly, as a kind of a retroactive liberal entitlement, the state reassumes the titularity of the national interest which it had lost in the period of organized capitalism. In the European context, the state presents, as national interest, a selective set of particularistic social, economic, cultural and political interests, sometimes with the support of the same national interests organizations, of capital as well as labor, which, in the past, had actively denied the delegation of the national interest to the state. Thereby, the state increases its "relative autonomy" vis-à-vis the national civil society in a process that, apparently at least, is hypercorporatist. Fifth, the issue of the division of powers between the member states and the Community should not be viewed in quantitative terms. Powers change as they are divided, and so do the institutional mechanisms to exercise them. For instance, even if the member states remain key actors in the steering of the integration process, their institutional focus and strength may be dislocated from legislative initiative to control over the internal implementation of Community law and uniformization of national law, in conformity with Community guidelines and directives. Finally, the prospective political debate on the ideal-typical Europe of the future, that is to say, on the very ethos of European integration, is sometimes smuggled into the debate on the national-transnational explanations of the process of integration.[84] While the "transnationalists" point toward a full political union, toward a federalist European state, the "nationalists" favor the community, rather than the unity, "premised on limiting or sharing sovereignty in a select albeit growing number of fields, on recognizing, and even celebrating, the reality of *interdependence* and on counterpoising to the exclusivist ethos of stated autonomy a notion of *community* of states and peoples sharing values and aspirations."[85]

The State and the Market

The Treaty of Rome is based on a seemingly clear-cut distinction between the economic, on the one hand, and the social and the political, on the other. The economic, that is, the creation of the internal market, will be a matter for Community decision making, while the social and the political will be left to the sovereignty of the member states. This distinction, which is probably to be blamed for the relative poverty of the political debate about the EC integration, has been shown to be increasingly artificial, if not outright false. The truth is that the disputes over the division of powers on economic policy between the Community and the member states have become political issues in themselves, and have resulted in decisions and nondecisions with important social and political consequences across

the Community. Moreover, as regards competition, an area that clearly pertains to European policy, the replacement of national by European regulations has become a highly sensitive political question.

In terms of our research agenda, the most important issue here is the fate of regulation in the triple time-space of locality, nationality and transnationality. According to the original EC blueprint, the balance between the market and regulation was to be accomplished by the member states. The harmonization of laws that should have ensued failed, not only because the member states revealed a nationalistic bias, but also because the legislative processes at the European level (in the Council) suffered recurrent bottlenecks. As a consequence, the European Court of Justice, in cooperation with the Commission, had to assume the role of decision maker, a role that has been very active indeed. Performed both with a federalist and a deregulatory bias, it has favored the Community to the detriment of individual members, and the market to the detriment of the state. This development is significant in itself, because it reveals a new dimension of the relations between the legal and the political fields. The judicial engineering carried out by the Court from the 1960s onwards decisively affected the European integration process. Through the doctrines of direct effect and supremacy of the European law, the court "constitutionalized" the Community legal structure as a legal order of its own. Much of this occurred without political debate, as a judicial rather than as a political process, which led Weiler to state the apparent paradox that while European law developed firmly in a continuing process of evolution, the Community went through one political crisis after another.[86]

The denationalization of regulation accomplished by the Court is still going on in the new approach to harmonization policy known as mutual recognition. Contrary to the "traditional" "positive" harmonization policy, the new approach conceives of the regulatory process as a competition among national legislations founded on three bases: Community legislation as mere basic standards or minimum requirements; mutual recognition of national legislations; acceptance of reverse discrimination (states can impose higher requirements on their nationals). The new approach aims at overcoming the legislation bottlenecks at the Community level by granting some measure of autonomy to the member states, in the anticipation that, through the competition between different national legislations, a better legislation will emerge.[87] Herein lies the relevance of the new approach for the issue of regulation in a transnational space. Since the states can impose their own regulations on in-state products but have to accept out-of-state products in accordance with other, eventually lower regulations, the pressure will be toward deregulation at the national level, that is, toward a race-to-the-bottom rather than a race-to-the-top. In a seemingly total subversion of the distinction between market and regulation, the market will be allowed to choose the best regulation to which it wants to be submitted, which means that the legislative competition will result in the best legislation not in regulatory, but in market terms. The integration at the community level seems to involve the disintegration at the national level. But it is not clear the extent to which the denationalization of regulation will amount to a global net decrease of transnational Community-wide regulation. It will all depend on how minimal the minimum standards to be established by the community will be. With the regulatory powers entrusted to an ever-

growing number of standardization organizations, that is to say, advisory, administrative and regulatory committees of all kinds, we may conclude that the deregulation at the national level is taking place alongside the reregulation at the Community level. Durkheim's idea that market relations will grow in tandem with state relations seems to be confirmed, except that the state is here a kind of suprastate. This is one of the main mechanisms through which the EC deterritorializes social relations in the national time-space, while at the same time reterritorializing them in the transnational time-space, as well as, eventually, in the local time-space (the so-called "Europe of the regions").

Democracy, Social Cohesion and Interest Representation

In recent years, the democratic deficit of the EC has become a topic for heated political debate. The relevance of this topic for the research agenda outlined here lies in the fact that it shows the extent to which the hegemonic model of modern democracy is tied up with national time-space and state action, making highly problematic both the extension of the model to transnational or local time-spaces, and the invention of other alternative models adequate to the latter. The democratic deficit has several dimensions, and only some of them have been actually debated. The most visible dimension is, of course, the fact that the only elected institution, the European Parliament, is not the legislative body of the Community. Even given that the Parliament's role in the decision-making process has been increased by the European Single Act and the Maastricht Treaty, the fact remains that the EC law is made by the Council, the Commission and the Court, not by the Parliament. The legitimacy of EC law is, therefore, grounded on the legitimacy of the member states. However, while at the national level the democratic control and legitimation is exercised by the national parliaments, the latter have so far been unable to control effectively what their governments do in Brussels. On the other hand, and since there are no genuinely coherent European parties (the current political groups being nothing more than loose associations of national political parties), if more democratic control were to be granted the European Parliament, national parliaments would surely react negatively. The EC represents a loss of direct democratic control over (and participation in) the actual processes of governance. The probability that this loss brings with it the erosion of the legitimacy of the integration process as a whole depends to a great extent on whether a tangible and socially visible demonstration can be made that the total welfare of the citizenry has enhanced as a result of integration.[88]

Another dimension of democratic deficit which has received little critical attention (particularly before Maastricht) has to do with the above-mentioned growth of committees, the exact number of which is unknown, which operate without any kind of democratic control or public involvement. This "commitology" is greatly responsible for the lack of transparency and bureaucratic overload in the process of EC policy implementation. Should the commitology syndrome expand (as is likely) and the enhancement of general welfare become problematic (as is also likely, at least in periods of recession), the legitimacy problems of the EC might be complicated by two further questions: social cohesion, and interest representation. The first question refers to the economic and social disparities between the more and the less-developed regions or countries of the Community. In spite of the sizeable structural funds allocated to eliminate them, the disparities continue to exist, particularly those created by the last enlargement of the Community. The less-developed EC countries may end up concluding that, beyond the new physical infrastructures, the "structural funds" have not at all closed the gap that separates them from the more developed countries, and furthermore, that the latter have overbenefited from the internal disintegration of the weaker national economies resulting from the integration process. On the other hand, incensed by chauvinistic regionalisms already present in the European scene, the more developed countries may well end up concluding that the social cohesion funds have been draining resources that might otherwise have been kept where they were generated. Since the nationalistic bias will continue to count on the member states to reproduce itself, it seems that, in terms of social cohesion and global welfare, only a positive-sum game will guarantee the legitimacy of the European *Community*.

The question of interest representation has to do both with democracy and with social legitimacy. The role of European business interest groups in the development of integration is an object of dispute. Nevertheless, to the extent that both capital organizations and labor organizations have played a role, the EC has undoubtedly been more of a capital game than of a labor game. With the unfolding of the integration process, the relative balance between capital and labor, which in some countries was achieved in the period of organized capitalism, has collapsed in favor of capital (in the southern European countries the balance was never consolidated). The shift of administrative competences to the community level is bound to have effects on the organization of interest representation. It seems, however, that, as Streeck and Schmitter have argued, the forms of national corporatism are not likely to reproduce themselves at the community level, and that, instead, some kind of transnational pluralism will emerge.[89] If so, the preservation of the nation-states as key actors in the process of integration may provide, ironically enough, a safety valve against the consequences of greatly unbalanced representations of interests at the community level.

Europe, the World System and the History of Europe

This topic concerns me here only to the extent that it impinges upon the three-layered comparative framework I have proposed for the analysis of the different forms that the transnationalization of the legal field is taking. The EC comprises core and semiperipheral countries in the world system. I have argued elsewhere that the concept of semiperiphery should be regionalized in order to account for the social, historical and functional differences among the semiperipheral countries in the European, American and Asian contexts.[90] The specific political shape of the EC would probably not have been possible if the semiperipheral countries did not share with the core countries the same hegemonic route into modernity, that is to say, broadly speaking, the same modern history. Still, this same general history covers also different histories. Both Portugal and Spain entered modernity in a relatively subordinate position and at a later period. Although they did make pioneering and crucial contributions to the early phases of modernity (the overseas discoveries), they receded to the margins as the project unfolded. The case of Portugal is even more striking. It continued to be a colonial power until 1975, despite (or because of?) its semiperipheral position in the world system, having

acted as an intermediary between the periphery (the colonies) and the center (England) for more than two centuries. What will be the impact of this complex history on EC integration in the future? I speculated above that integration may have contributed to the enhancement of the internal strength of the semiperipheral states. In a sense, these states have been "corefied" as a result of integration. But on the other hand, it seems that the economies of these countries continue to be as semiperipheral as ever, even if the specific terms of this position are being drastically restructured. It might even be speculated that EC integration is contributing both to the corefication of the semiperipheral states and to the peripheralization of their economies, thus giving rise to new articulations (both national and transnational) among the economic, the political and the cultural, which at this point are hard to predict.

Future enlargements of the Community, particularly to include the Eastern countries, will compound these issues, if for no other reason, because the heterogeneity of the routes into modernity will increase. But issues will also be compounded by the increased heterogeneity of the families of laws and legal cultures in presence: the Romanistic, Germanic, Nordic, common law and socialist family. If it is true that the demise of the Communist regime has put an end to the reproduction of the socialist family, it should not be assumed that, after several decades of domination, such style of legality will disappear without a trace. As it disintegrates, it may reappear in unsuspected combinations in the new hegemonic legal culture. Moreover, to the extent that it disintegrates, it creates a void that must eventually be filled. Which of the European legal families will prevail in filling it? The problem is not completely new. As EC law evolves into a supranational legal order of its own, a *tertium genus* over and above the national legislations, the different legal families and legal styles that are superseded by the new legal order are still present in it, even if in unequal terms.

In a provocative analysis, in which he claims that "the European community is not the true European community," Allott has recently cautioned against abstracting EC integration from the rest of European and world history and against reducing the process of integration to an aggregation of national interests devoid of historical, cultural and ethical depth.[91] Without subscribing to the idealistic tone of the argument or to its conclusion, I have proposed a comparative analytical framework that aims precisely at bringing to the foreground the diversity of the histories, spatialities and temporalities melted into the pot of the European Community. This diversity easily runs the risk of being swept under the carpet of legalistic, as well as realist or neorealist, functionalist or neofunctionalist political analyses.

3. Global Capital's Own Law: *Lex Mercatoria*

Understood as a set of customary principles and rules which are widely and uniformly recognized and applied in international transactions, *lex mercatoria* or *law merchant* is probably the oldest form of transnationalization of the legal field. Its origin can be traced back to the European urban uprisings of the eleventh century and to the growth of commerce that then started. Faced with the inadequacy of the local laws, the merchants—those "*pieds poudreux*" (the dusty feet) who took

their goods from town to town, from fair to fair, from market to market on foot or horseback—created for themselves a legal system that served their interests.[92] Laden with concepts of equity, or *ex aequo et bono*, *lex mercatoria* was a supranational law whose most distinct features were the following: the ease with which it permitted binding contracts; the stress on security of contracts; the speed of adjudication; the variety of mechanisms for establishing, transmitting and receiving credit; the normative value of customs and usages of the commercial world. Medieval *lex mercatoria* underwent profound changes in the modern period, which indeed caused its seemingly irreversible decline. On the one hand, as trade expanded and more and more diverse trading communities emerged, customs changed and became more diversified themselves. The diversity of customs made *lex mercatoria* less predictable, less transparent, and thus vulnerable to the critique of lacking impartiality. On the other hand, as the modern states gained control over their territories, the existence of a deterritorialized law, which did not derive its normative claims from treaties among sovereign states, was viewed as a threat. As a result, merchant courts were often either forbidden or assimilated into the domestic court system, and the transnational business customs were made to comply with national legislations. The expansion of transnational practices and the need to protect them legally led the states to develop a private international law. Since this was a national state law, and could therefore conflict with the private international law of other states, efforts were made to harmonize these bodies of laws through the creation of international uniform laws.

The scope of uniform laws has always remained very limited and unable to account for the tremendous growth, in number, complexity and variety, of transnational contracts and other business transactions, specially after World War II. These relationships, which committed generally larger amounts of money for longer periods than domestic relationships ever did, and engaged partners often separated by great distances and cultural and linguistic differences, had a greater degree of insecurity and required, therefore, a common normative foundation.[93] One solution might have been to choose the governing law from among different national laws. But because so much would depend on it, the choice of law was bound to be a sensitive issue: How to guarantee, for example, an equal footing between the parties? What to do if the chosen national law had been changed overnight to the disadvantage of one of the parties? Given these difficulties, the common foundation had to be sought elsewhere, in a deterritorialized set of normative principles and rules, expressed in such formulas as "general common principles," "principles of equity," "principles of good faith and good will," "principles of international law," "international trade usages," and so on. Because such normative references aimed at circumventing submission to national laws and to the traditional conflict of laws, transnational contracts were deemed to be self-regulatory, subjected only to their own provisions: *contrats sans loi*, *contratti senza legge*, *rechtsordnunglose Verträge*. In fact, a new supranational legal order was emerging. It was the new *lex mercatoria*, which was to expand enormously in the period of disorganized capitalism, by reason of the sheer intensification of transnational transactions and in the wake of a new worldwide regime of accumulation in search of adequate institutional structures.[94] The new *lex mercatoria* is comprised of several elements, including general principles of

law recognized by commercial nations, rules of international organizations, customs and usages, standard form contracts, and reports of arbitral awards. Though this is disputed, *lex mercatoria* may be conceived of as also comprising uniform laws and public international law. Concerning the latter, though public international law governs the relations among nation-states, and not among private parties, *lex mercatoria* shares with it the "general principles of law recognized by civilized nations," such as *pacta sunt servanda*, *rebus sic stantibus*, and the prohibition of undue enrichment. But the relation between *lex mercatoria* and public international law may also be conflictual whenever the first is used to create forms of immunity which operate both vis-à-vis the national law and the public international law.[95] As regards international uniform laws, once they have been adopted by the nation states and become part of the national law, they are not, in themselves, part of *lex mercatoria*. But before that process of adoption, and to the extent that they represent a crystallization of international trade usages, such laws are *lex mercatoria*.[96]

However informal, the new *lex mercatoria* is neither amorphous nor neutral, the customs and usages being not necessarily universal and much less traditional or immemorial. The new *lex mercatoria*, as an emerging transnational legal field, is a globalized localism, constituted by thick cognitive expectations and thin normative allegiances reproduced by the routine repetition of myriads of transnational contractual relations originally framed by transnational corporations and their lawyers, international banks and international organizations dominated by both. Depending on the power relations between the parties and their stakes in the transaction, the new *lex mercatoria* can operate in either a high rigidity mode (the iron cage mode) or in a high flexibility mode (the rubber cage mode): the first mode applies whenever the power differential between partners is high; the second mode, in the opposite case. Even in its rigidity mode, *lex mercatoria* is often ephemeral, an instantaneous customary law, so to speak, as in the case of a new type of contract drafted by a leading TNC and its lawyers, which must be accepted as drafted by the weaker partner, irrespective of the fact that such contract type may not be used again in its entirety. Within the research agenda I am outlining in this chapter, two issues raised by *lex mercatoria* deserve special attention: *lex mercatoria* and the world system, and *lex mercatoria* and legal cultures.

Lex Mercatoria and the World System

It has been claimed that transnational contracts are purely contractual, in that they contain their own rules of recognition and validation and that, as a result, *lex mercatoria* is nonpolitical, needing no reference to noncontractual elements to sustain itself as a normative order. Grounded on a legal formalistic reasoning, this conception unduly abstracts from the hierarchies and unequal exchanges that characterize the world system. A relative balance of power between partners in the transactions is only rarely obtainable. In most cases, the dominant practices at the basis of this global law are the practices of the dominant actors. The most prominent among these do indeed enjoy statelike political prerogatives, immunity privileges, special access to political resources (tax incentives, special rights on infrastructures and so on); and, indeed, they often negotiate directly with the host states the conditions under which the private transactions will be carried out. The political facilitation made possible by the state is a crucial noncontractual dimension of the transnational contracts. Moreover, this dimension can be found in the reports of the World Bank or IMF which, according to the situation, open or close territorities and areas for transnational transactions and *lex mercatoria*. The apparently infinite sea of transnational transactions is precisely mapped out by such reports and the "dos" and the "don'ts" they contain.

Another dimension of the relations between *lex mercatoria* and the world system, involving also the contractual/noncontractual dichotomy but rarely discussed in this context, concerns the international property rules. Since stable property rights are exceedingly difficult to establish across national boundaries, the international extension of capital, which is an original feature of the modern world system, has always been an inherently problematic activity. After the Treaties of Westphalia (1648), and particularly in the mid-nineteenth century, when foreign investments began to increase dramatically, European core countries effectively secured the economic rights of their subjects abroad through a network of treaty provisions that were then imposed on a global scale, from China to Latin America.[97] Their aim was to protect not only the personal safety and tangible property of their nationals but all their assets, including private debts.[98] This interstate legal field, created by the core states and imposed on the semiperipheral and peripheral states, has changed substantially in the last one hundred and fifty years, but has prevailed as a framing, boundary-setting legal and political structure, within which *lex mercatoria* has evolved apparently unencumbered by noncontractual constrains. The use of overt or covert interventionary force and economic sanctions by the core countries in the case of expropriations or debt renunciations in the periphery and semiperiphery has been for a long time an integral part of an "international regime," closely reflecting the hierarchies in the world system.

The articulations of *lex mercatoria* with the world system thus illustrate how the dialectics of deterritorialization and reterritorialization operates in this legal field. The growth of deterritorialized legal relations entailed the reterritorialization of sovereign rights by core states beyond the national boundaries, whenever investors' rights were at stake. This hegemonic reterritorialization often sought to counteract subordinated reterritorialization, whenever peripheral and semiperipheral states claimed the supremacy of sovereign rights over investors' rights, as was the case for the first time in a large scale in the first quarter of the twentieth century, with the Mexican Revolution, the Russian Revolution and the Turkish state-led industrialization. This dialectics goes on today in different forms, and not only at the macrolevel just mentioned, but also at the microlevel. The microlevel, which often goes together with the so-called "micro *lex mercatoria*," comprises a myriad of instances of anticipated failures or inadequacies of *lex mercatoria* which are corrected by a complementary intervention of territorial, national law. One example of this occurs when the legal protection of deterritorialized transnational transactions demands the latter's fictive division into two territorialized national transactions, whereby an internationally legally unprotected relation is nationalized in order to become legally enforceable. Gessner and Schade offer an illustration[99] in the case of cross-border payments through documentary credit. In this case, a transnational legally unprotected contract between

one seller and one buyer is divided into two nationally, legally protected contracts, one between the seller and a national bank and the other between the buyer and another national bank. The international relation thus created between the two banks is itself legally unprotected in terms of a national law, but it is covered by the *lex mercatoria* generated in the stable reproduction of interbanking business relations. This example shows how the transnational legal system may benefit from keeping the national legal system as a reserve system.

Lex Mercatoria and Legal Cultures

This issue deals with the relationship between *lex mercatoria* and the legal families we have identified above. Though more indirectly, it has also to do with the different routes into modernity. The internationalization of capital has always been the motor behind the development of *lex mercatoria*. *Lex mercatoria* is, thus, basically a transnational business law or, more broadly, an economic law. Within the national legal field, economic law has traditionally been one of the laws most permeable to foreign influences and transplants, an area of law in which the ethos of the national legal cultures have always been less determinant. Not by mere coincidence has this area of law been the area of harmonization, uniformization and conventionalization *par excellence*. For this reason, and also because of its deterritorialized character, *lex mercatoria* has often been considered as the expression of a "global legal culture," a kind of "third culture," independent of the various national legal cultures and hovering above them in its specific domain. This conception is flawed on many accounts. To begin with, the very existence of *lex mercatoria* is debatable, the debate being framed, in part at least, by rival presuppositions that can be traced back to the differences among the families of law. While the concept of *lex mercatoria* was developed by civil law scholars, its harshest critics seem to be scholars from a common law background. Draetta, Lake and Nanda have seen in this fact an interesting paradox: civil lawyers, who are used to law being created by legislative authority and in a dramatic way, tend to view the legal nature of *lex mercatoria* with favor; whereas common law lawyers, who are used to law being developed by accretion and practice, have often rejected *lex mercatoria*.[100] Further research on legal cultures and styles is needed to explain this paradox, particularly because the conceptual debate seems to be totally at odds with the *lex mercatoria*-in-action. This law has expanded enormously in the last decades, mainly with the expansion of the transnational activities by TNCs, most of them of Anglo-American origin. Furthermore, the legal drafting of such transactions, in itself a major source of *lex mercatoria*, has been done for the most part by "in-house" lawyers with a common law training or by American corporate law firms.

I thus come to another argument against considering the new *lex mercatoria* as an expression of a global legal culture. If a new regime of global capital accumulation is indeed emerging, its most visible institutional features, aside from *lex mercatoria* itself, are the rise of TNCs and the international organizations that back up their activities, the adaptation of the nation-state regulatory legislation according to the transnational finance capital requirements, the globalization of the market for legal services promoted by the American or American-style corporate law firms, and the rise of international commerce arbitration. At the present

transitional stage, the institutional devices of a predominantly suprastate nature, which will guarantee the stability of the new regime of accumulation, are still to be developed. Of those already in place, one is particularly visible, though it is doubtful whether it is an institution of the new regime or rather an institution of the transition toward the new regime. I am referring to the American law firm. In the terms of the conceptual framework advanced here, the American corporate law firm is one of the most striking global localisms in the current process of globalization of legal phenomena. Marc Galanter[101] and more recently Yves Dezalay[102] have drawn our attention to them. According to the latter, "[t]he Wall Street firm, invented over a century ago in response to the demands of American finance and industry, has become a model for similar developments everywhere, as the local lawyers, in a struggle for survival, feel that they also must adopt the model of the corporate law firm." This type of law firm is at the core of the new international market in consultancy, and its rise to prominence constitutes what Dezalay calls a "big bang"[103] in the legal services, because the type of juridicization it produces is very symbiotic with the economic relations it covers, and leads toward the infusion of high-level competition and market imperatives in the practice of law itself (a new generation of entrepreneurial lawyers).

In light of what I said above on the relations between *lex mercatoria* and the world system, the hegemony of the American corporate law firm is not a case of legal technological diffusion, as assumed by Dezalay. We are not simply before an organizational model and an experience particularly suited for the new conditions of transnational transactions. We are also before services provided to the actors that are shaping those conditions. The power of the model would be much less impressive if it were not backed by the power of the actors who impose it. As Gessner puts it, "[t]he world market dominated by the English language, American capital and common law reasoning is a home-match for American lawyers who in addition are organized much more in the entrepreneurial form needed for worldwide activities."[104] The idea that a global legal culture is in the making is thus to be rejected, particularly if it is conceived as the ideal-typical culture of the big transnational economic actor who "receives the advice of international banks and large law firms which use quasiuniversal business language and which thrash out any differences on the level of interests rather than that of values, world views or social norms."[105] The particularistic character of this "global" legal culture becomes obvious when confronted with another (equally particularistic) global legal culture, also evidently in the making. I mean the international regime of human rights, which operates on an inverse priority of values and worldviews over interests (and which will be discussed at greater length below). Similarly, the character of the *lex mercatoria* as a globalized localism becomes particularly evident when it interacts with legal families with strong religious influences, and in countries whose route into modernity was the colonial gate or the top-down, externally induced modernization.[106]

In this latter respect, China is a telling illustration. Ever since Deng Xiaoping's "open door" policy was adopted in 1978, the integration of China in the world economy has steadily expanded (an average annual growth of the economy of ten percent). The growth of foreign trade and investment and the development of international business transactions in China indicates an ever-greater presence of

lex mercatoria. However, the "universalistic" claims of *lex mercatoria* (meaning, to a great extent, the claims of U.S. corporate firms) to predictable and secure transactions have necessitated a *modus vivendi* with two "particularistic" conditions of "Chinese capitalism" and "Chinese modernization": the precedence of state policy over legality and the role of Confucian culture and *guanxi* relationships. Given the fact that China's traditional and, since 1949, Communist route toward modernity amounts to a top-down, state-led, authoritarian modernization, the state plays, in this case, a key role in the transition from command economy to market economy, to the extent that such a transition may itself be considered an expression of the command economy. Under such conditions, the predictability of commercial transactions and, in general, the certainty of the marketplace must be subordinated to overriding policy concerns of the state. As Jones points out, "[f]oreign lawyers used to a system of binding law in their own jurisdiction are surprised when Chinese partners break contracts or renege on deals whenever Party policy changes. . . . Since the right of interpretation of law remains with the National People's Congress, it is the Party which ultimately determines how and whether law will be enacted."[107] The second particularistic condition has to do with the Confucian base of Chinese culture. The Confucian values of paternalism (subordination of the individual), social cohesion, strong familism, utilitarian discipline, self-confidence and so on, endow the commercial transactions with forms and resources of predictability and security, which are foreign to the universalistic (Western) principles of *lex mercatoria*. This is specially the case of the *guanxi* networks. *Guanxi* is an informal personalized system of connections based on the family, the clan or the friendship networks through which state favors are obtained and social relationships are lubricated with reference to a relational ethics (reciprocity, personal obligation, face and honor).[108] *Guanxi* operates, thus, both as a mobilizing and a stabilizing resource in social relationships in general and in business deals in particular. To the extent that partners in international transactions resort to *guanxi* to obtain or intensify business predictability and security, we may say that *lex mercatoria* is being guanxified. In other words, in China *lex mercatoria* and the old Confucian dimensions of Chinese legal culture interpenetrate.

4. Transnational Third Worlds: The Law of People on the Move

I am arguing in this chapter that the intensification of global interactions in the last three decades cannot be reduced to transnational business transactions carried out by large and powerful world actors. In this period, cross-border interactions in general have expanded enormously for a whole range of reasons, of which only some have directly to do with the increase in international trade. According to some estimates, on an average day more than seven million persons cross national borders by plane, train, bus, car or on foot.[109] People cross borders as tourists, on business or as migrant workers, and as scientists, students, consumers and refugees. These cross-border movements raise a myriad of different sociolegal issues, from international contracts, binational marriages, adoptions of foreign children, legal protection of tourists and cross-border consumer rights, to civil,

political and social rights of legal and illegal foreign migrant workers, refugees and asylum seekers. In spite of this, however, the international community has paid relatively little attention to the movement of people across national borders, specially when compared with the elaborate sets of uniform laws, international conventions and *lex mercatoria* dealing with the movements of goods and services. Since the traditional international private law covers only a very small number of issues, the international movements of people is in many respects a legal no-man's land. As a result, the legal protection of human beings seems to be much more territorialized than the legal protection of goods and services. International movements and interactions of people thus imply a net loss of legal protection. In a world seemingly saturated with an ideology of rights, and undergoing a period of intense globalization, the challenges posed by this "black hole" heavily underscore the sociological and political need to analyze the movements of people across national borders.

This analysis is as important as it is difficult, mainly because the movements of people across national borders encompass such a wide variety of situations that they are irreducible to a single theoretical explanation or policy orientation. As a starting point, and with the objective of identifying and classifying the major forms of movements, I suggest an analytical framework based on a double criterion: the amount of autonomy, and the amount of risk involved in moving across borders. Tourists, for instance, have almost total autonomy over their movements, including the autonomy to decide the amount of risk to take (they may decide to go backpacking alone into the wilderness or abide comfortably by a package organized by a travel agency). Business people may have just a little less autonomy than tourists, particularly if they are employed but have full control over the personal risks involved (safe means of transportation, travel insurance, guaranteed labor rights and contracts). On the contrary, and though the situations may vary widely, migrants tend to move across borders with relatively little autonomy and with a great deal of personal risk. Finally, refugees are, generally speaking, the social group with least autonomy and highest degree of personal risk. International migrants and refugees are, therefore, the two most vulnerable groups of people moving across borders, and those whose legal protection is simultaneously most needed and most difficult to sustain politically. They thus deserve special attention in this section. Though I start by accepting as a given the distinction between international migrants (economically determined migration) and refugees (politically determined migration), I will comment below on the reasons why the distinction has been blurred in the last decades.

International Migration

According to Portes and Böröcz, among the topics of interest to contemporary social science, few are more dynamic than international migration, especially as it has manifested itself in recent years.[110] In their view, rather than being the outcome of economic decisions governed by the law of supply and demand, international labor migration is a very complex social phenomenon, embedded in the political history of the relations between sending and receiving societies and in the networks constructed by the movement and contact of people across space, and whose basic dynamics lie in the labor needs of the world system as a whole. Such

needs, as well as the means of fulfilling them, have changed over time. International migration is hardly a new phenomenon. From the very beginning, the modern world system relied on it, in the form of slavery. As Wallerstein has shown, capitalist development lies in the combination of free and coerced labor: "Free labor is the form of labor control used for skilled work in core countries, whereas coerced labor is used for less skilled work in peripheral ones. The combination thereof is the essence of capitalism."[111] From the sixteenth century on, unfree labor involved coerced labor flows under the slave trade from West Africa to the New World, where the indigenous populations had drastically declined in the aftermath of the conquest (in Mexico the population fell from 11 million in 1519 to 1.5 million in about 1650). With a wholly different context from that of classical slavery, the slave trade was the first major form of international migration in the modern world system.[112] This form of labor flow involved high-risk capital investment, and required the active support of the colonial state.[113] From the nineteenth century on, and until the 1960s, a new major form of international migration emerged, based on migrant recruitment through economic inducements. This was a period of dramatic emigration from Europe. Between 1846 and 1930, over fifty million Europeans emigrated overseas. This migration occurred in the context of active recruitment practices—by the postcolonial states of the Americas, from the United States to Argentina—which were again costly in terms of capital input, but required only passive support of the coercive bodies of the receiving states.[114] From this point of view, this form of international labor flow was at the midpoint between the coerced labor extraction of the slave trade and the self-initiated or spontaneous flows that came to dominate in more recent years. This third major form of international migration had its origins in the expectations raised by the cultural diffusion in the peripheral societies of the patterns of consumption typical of core societies: "The fulfillment of such expectations becomes increasingly difficult under the economies of scarcity of the periphery and growing cross-national ties make it possible for certain groups located there to seek a solution by migration abroad."[115]

The succession of these three forms of international migration represents only a general tendency. Given the historical capacity of capitalism to combine different forms of labor, different forms of international migration may be resorted to at a given point in time, and the combinations among them may vary according to the regions of the world system. The existence of pockets of slavelike labor flows (for example, sex tourism and prostitution rings) is recurrently a matter of international news,[116] while active labor procurement systems continue to exist under different forms.[117] One of such systems, the *Bracero* program—an official agreement between the U.S. and Mexico, established in 1942—though officially brought to a halt in the period from 1965 to 1968, continued in reality under a different form as massive procurement of foreign workers by way of undocumented border crossers, at no risk whatsoever to the employers, and under conditions that facilitated ruthless exploitation.[118] Both in its formal and informal versions, this system had some features in common with the *Gastarbeiter* model that was targeted to the labor reserves of the Mediterranean Basin and adopted by the advanced European countries (especially Germany) throughout the 1960s and early 1970s.[119]

As forms of labor and of labor recruitment change over time, so do forms of settlement. Though the world labor market has always combined temporary migration and settlement with permanent migration and settlement, the end of the period of organized capitalism, in the early 1970s, seems to coincide with the demise of permanent migration and settlement. While only four countries can be said to accept permanent migrants today (such acceptance being defined as confirming rights of citizenship upon entry)—Australia, Canada, New Zealand and the U.S.—virtually all countries are now participating in an international system of temporary migrations.[120] Though temporary migration has absorbed increasingly larger numbers of people in the last two decades, its internal dynamics is now changing, due to several economic, political and cultural factors that together create the context for the discussion of the two topics which, in the field of transnationalization dealt with here, I consider most important within the research agenda of this chapter: the role of the state in the regulation of international migration flows, and the legal protection of international migrants.

State Regulation of Migration Flows. It is commonly agreed that one of the main features of the period of disorganized capitalism is a new international division of labor, in the terms of which industrial capital from the core is moving to the periphery, where cheaper labor is located, establishing factories to produce manufactured goods for export to the worldwide market.[121] This new division of labor involves a new spatial division of labor which, according to some authors, is producing some structural changes in the labor markets of the core countries, to the effect that the demand for massive industrial labor of the sort usually filled by immigrants will be substantially reduced.[122] It is further claimed that, in the future, the international migration flows will grow mainly in the South, among peripheral and semiperipheral countries. Though this is disputed by other authors, for whom the bulk of industrial production continues to be located at the core and to feed the need for continuing international migration, it is evident that in recent years the core states have tightened the controls over entry, building imaginary fortresses or Walls of China around their national boundaries. This raises the issue of the role of the state in transnational flows of labor. A first observation is that the role of the state, no matter how drastically changed in its internal content over time, has always remained crucial in this field. Throughout the history of capitalism, labor flows have gone through time-spaces of intense deterritorialization and time-spaces of intense reterritorialization, but in either case the state has always played a crucial role. The three large forms of labor displacement mentioned above required from the states—from the receiving state but also from the sending state—the performance of important tasks with the purpose either of deterritorializing labor relations (opening up national borders) or reterritorializing them (closing down the national borders) according to the circumstances. Enforcing or relaxing border controls in the interests of capital as a whole has therefore been a major function of the modern state.[123] But this is by no means the whole story. As the most recent migration literature has emphasized, international migration is a complex social and political process that cannot be reduced to the operation of the laws of the market. Portes has drawn our attention to the creation and consolidation of migrant networks across space: "More than individu-

alistic calculations of gain, it is the insertion of people into such networks which helps explain differential proclivities to move and the enduring character of migrant flows."[124] The operation of such networks is partly responsible for the often-limited effectiveness of state efforts to regulate immigration. In West Germany, even though entries of migrant workers from outside the EC were banned in 1973, the number of foreign residents continued to grow due to family reunification. In spite of such limits, state control over national boundaries has been a crucial factor in the direction and intensity of international migration, and its operational logic cannot be reduced to that of world economy.[125] International migration has an irreducible political element, in that it entails not only physical relocation, but a change of jurisdiction and membership. In this respect, the policies of the receiving states are particularly important, because, after all, they determine whether the international movement, and of what kind, may or may not take place. In a world system characterized by widely varying conditions, international borders serve to maintain global inequality. State policies may aim at defending one fraction of capital to the detriment of another, or national capital to the detriment of foreign capital. They may also result from coalitions of capital and labor, particularly in core countries, as when organized labor is able to achieve some market protection by imposing limiting conditions on labor importation.[126] Furthermore, the state prerogative over national boundaries may be activated for reasons that, though related to economic factors, cannot be solely attributed to them. Racism, xenophobia and the social construction of codes of "cultural incompatibility" between foreigners and nationals have a cultural and political leverage of their own, influencing migration policies autonomously.[127]

The state and the national boundaries it controls have thus performed crucial roles in the creation of international migration regimes throughout the history of modern capitalism. Even when the state control is limited either by transnational economic pressures or by transnational social networks of migratory movement and settlement, the state retains the control of the legal status of migrants, a detail that has a decisive impact on migrant life and experience in the host country. This control has become more central lately in light of the convergent impact of two recent trends: on the one hand, the trend of core states to favor, if at all, only temporary migration and only in restrictive terms (available only to those whose skills and expertise are in demand), with the consequent tighter control over borders; on the other hand, the increased pressure to emigrate and the potential for large-scale population movements motivated by the struggle for survival resulting from the immiseration of significant regions of the world system and the growing disparities between the North and the South, hence the potential increase in illegal, clandestine or undocumented migration, and the consequent strengthening of the receiving states as monopoly holders of the legal status of migrants and of migrant life chances and expectations attached to it.

The Legal Rights of Migrants. In general, states do not treat aliens, including legal resident aliens, the same way they treat citizens. They regularly reserve a variety of rights for nationals, and this is generally considered legitimate under international law. Thus, by definition, migrants are second- or third-class citizens, but their legal status varies considerably according to whether they are legal or

illegal migrants. Concerning legal migrants, their legal status may still vary according to whether they are permanent immigrants (expected to settle in the host country) or temporary immigrants (seasonal migrants, "guest workers," "project-tied workers"). The legal status of illegal migrants, on the other hand, is the most precarious; accordingly, they are the most vulnerable class of immigrants, though they are also the fastest-growing class of immigrants.[128] The International Labor Organization (ILO) predicts that in the next two decades there will be twenty-five million migrants in irregular situations throughout the world, not including refugees.[129] For these reasons, and also because they represent the highest social and political tension between national and transnational perspectives, between territorial sovereignty principles and human rights principles, I will focus briefly on the status of illegal migrants. The undocumented migrants are the hardest working and lowest-paid laborers; they are specially vulnerable to arbitrary practices on the part of employers, landlords and merchants; they are afraid to avail themselves of the few rights they may enjoy for fear of exposure to immigration authorities and, above all, for fear of deportation; they are too culturally handicapped (including limited foreign-language-speaking ability) to have minimum access to the system; they are specially victimized by racial, class, ethnic and gender discrimination.[130] Some of their hardships are related to the specific work the undocumented migrants are engaged in. For instance, undocumented domestic workers—one fast-growing group in many European countries and in the U.S.—often lack formal contracts; their working conditions are poorly enforced, due to the dispersed, isolated and private nature of work sites; they are often physically and sexually abused, due to close working quarters.[131]

In light of these multiple vulnerabilities, the extension of substantial human rights protection to undocumented immigrants seems particularly justified and necessary. Nonetheless, protection is as problematic as it is necessary. The problems arise from the fact that illegal immigrants question, in a very direct way, one of the state's prerogatives most closely associated with territorial sovereignty: the state's powers to decide who will enter its territory, to refuse entry, and to expel unwanted aliens. The very existence of illegal immigrants demonstrates that such powers are being eroded and, with them, territorial sovereignty. In theory, the improvement of the legal status of illegal immigrants seems to be obtainable only at the cost of state sovereignty. From the latter's perspective, the sole logical way of dealing with illegal immigration is to prevent its occurrence. In practice, however, state policies vis-à-vis illegal immigration have varied widely, and in some periods they have been characterized by great tolerance toward unauthorized cross-border movements. I have already mentioned that in the U.S. the *Bracero* program continued informally after its official termination, without employers necessarily being punished or workers deported. In France, undocumented immigration, which constituted up to eighty percent of all immigration until the early seventies, was described as "spontaneous migration," and tolerated as such.[132] Today, in the periphery of the world system, irregular migration is a normal, often inconsequential occurrence, out of sheer incapacity on the part of the states to enforce border controls, or mere lack of political will. Only in the last two decades, as a result of economic deterioration and the rise of xenophobic anti-immigration movements, have states, particularly the core states, come to view

illegal immigration as a threat to national sovereignty, indeed, as a legal, social and political problem of significant proportions. Many of these countries have introduced restrictive immigration legislation with the purpose of reasserting control over the borders and eliminating illegal immigration (the U.S., Canada, France, Australia, Japan, Germany, Argentina, Italy and, lastly, some European states in the ambit of the Schengen Agreements).

In spite of these legislative efforts, it is unlikely that illegal migration will diminish at any time soon; many factors and indicators point, rather, to its substantial increase in the coming years. If this is the tendency, the principle of territorial sovereignty will appear increasingly at odds with the dynamics of transnational migration, and the tensions derived therefrom will accentuate. To a significant extent, these tensions are part of a much broader conflict between the core and the periphery of the world system, or between the North and South, and must be analyzed in this context (more on this below). As things stand now, no international consensus has been reached on the possible terms of a compromise between the principles of international human rights applicable to nationals and nonnationals and to legal and illegal aliens, on the one hand, and the principle of territorial sovereignty, on the other; in other words, no international migration regime has come into existence.[133] The latent ideological and political conflict between these mutually inconsistent principles, both of them equally embedded in Western modernity, can be easily traced in the last United Nations Convention for the Protection of the Rights of All Migrant Workers and Members of their Families, drafted in collaboration with the ILO, and adopted by the UN General Assembly of 1990.[134] Under the convention, it is the obligation of states to afford to documented as well as to undocumented workers a range of civil, social and labor rights, which include, among others, rights to due process of law in criminal proceedings, free expression and religious observance, domestic privacy, equality with nationals before the courts, emergency medical care, education for children, respect for cultural identity, rights to enforce employment contracts against employers, to participate in trade unions and to enjoy the protection of wage, hour and health regulations in the workplace. Yet, as Bosniak notes,[135] despite its laudable provisions, the convention's treatment of undocumented immigrants is deeply ambivalent. While contracting states must meet a minimum standard of treatment of irregular migrants, the rights provided to these migrants need not be as extensive as those which must be afforded to legally admitted migrants. The states are thus entitled to discriminate against undocumented migrants in many decisive aspects, from rights to family unity and liberty of movement, to rights to social services, employment and trade union protection. The allowance for this discriminatory treatment is grounded on the convention's overriding commitment to the principle of national sovereignty. Over and over again, the terms of the convention state that the rights granted cannot be construed as an infringement on state power to exclude foreigners from its territory and to shape the composition of its national membership. "The ultimate result," Bosniak concludes, "is a hybrid instrument, at once a ringing declaration of individual rights and a staunch manifesto in support of state territorial sovereignty."[136]

The tension between human rights and territorial sovereignty principles extends far beyond the migration context, and in a sense is constitutive of the modern inter-

state system; but in the case of undocumented migrants it reaches a particularly high level, because the states here have no choice but to assert the prerogative of sovereignty against the recognition of their failure to assert it. Therefore, discrimination against undocumented migrants is a substitute for actual exclusion at the border. Under such circumstances, elimination of discrimination presupposes a radical transformation of the principle of sovereignty as we know it. Short of that, and irrespective of how many transnational migration movements, both regular and irregular, have contributed and will still contribute to world capitalist development, the situation of undocumented immigrants is bound to be structurally shaped by multiple and blatant violations of human rights. The discrimination they suffer is double: on the one hand, their legal entitlements are very low; on the other, their social vulnerability makes the struggle for the enforcement of rights almost impossible and the impunity of violations a normal occurrence. To give just an example: according to the U.S. Immigration Reform and Control Act of 1986, regardless of their legal status, undocumented workers are entitled to the federal minimum wage. If the employer pays them less than that—which occurs very often[137]—they are unlikely to complain about it to the authorities for fear of exposure to punishment or deportation; they are less likely to quit and risk unemployment since they are not eligible for unemployment benefits; and they are also less likely to organize in defense of their rights or to join existing labor unions for the same fear of public exposure. Undocumented migrants are part of a growing, transnational Third World of people, a nonconstituency for nationally-based political processes, moving around in a legal no-man's-land, living life experiences shaped by the dark side of a growing global economy whose inequities are in part guaranteed by the existence of national boundaries and the coercive powers of the states policing them. As an extreme case of subordinate transnationalization—not the most extreme case of distribution which, in many instances, is the case of those who cannot even emigrate—undocumented migrants reveal the innermost contradictions between the exclusionary powers of sovereignty and a cosmopolitan politics of rights called for to protect new transnational vulnerabilities against new transnational impunities.

Refugees and Displaced People

Though internally more diversified, another sector of the growing, transnational Third World of people are the refugees. As in the case of undocumented migrant workers, refugees concern me here insofar as they raise specific new issues in the broad conceptualization of the transnationalization of the legal field I am outlining in this chapter. Such issues have to do, in this case, with two clear-cut distinctions upon which the international refugee regime was built in the postwar period: between voluntary and involuntary international migration, on the one hand, and between economically motivated and politically motivated migration, on the other. I argue here that these two distinctions have collapsed in recent years, thereby producing new inadequacies between the hegemonic principles of territorial sovereignty and the dynamics of transnational movements.

The cumulative world number of postwar refugees has been estimated at around ninety million.[138] Massive refugee flows have marked the period since the end of the seventies—starting with the dramatic situation of the Vietnamese "boat

people" in 1979 to 1981—and have increased dramatically in the last few years. Due to the political transformations in Central and Eastern Europe, applications for asylum in European countries numbered 65,400 in 1983 and 544,500 in 1991.[139] In 1992, there were some seventeen million people seeking refuge across national boundaries. Refugees are not evenly distributed around the world. Particularly since the early eighties, the share of the South has increased, with Asia in the range of forty-five to fifty-five percent, and Africa around thirty percent of the total of refugee flows.[140] In the last decades, massive emergencies have forced hundreds of thousands of people to cross state borders in Jordan, Somalia, Eritrea, Vietnam, Ogaden, Sudan, Liberia, Mozambique, Cambodia, Laos, Iraq, Afghanistan, Sri Lanka, Lebanon, Uganda, Nicaragua, El Salvador and so on. The pressures on neighboring countries have been enormous. Until very recently, there were one million Mozambican refugees in Malawi, whose native population is only seven times larger. In the last half-decade, refugees have become a serious problem in Europe, and they are likely to continue being seen as such in the coming years. The disintegration of the Soviet Union and Yugoslavia has already produced hundreds of thousands of displaced people. The specter of massive flows of people within Europe is already transforming the European interstate system in significant ways. I mean "Soviet-Poles" flowing into Poland, *Volksdeutsche* into Germany, Albanians into Italy, Transylvanian Magyars into Hungary, ex-Yugoslavians into Croatia and elsewhere, Pontic Greeks into Greece and so on.

But who is a refugee? According to the United Nations Convention of 1951 and 1967, a refugee is any person who:

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality or being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[141]

Bearing in mind the reference above to the major refugee flows of our time, the above definition excludes most of the world's displaced populations, who are mainly victims of massive conflicts, human rights abuses, civil wars, external aggression and occupation, foreign domination and so on. Since they have not been personally persecuted, they are not entitled to refugee status, even though the political nature of the causes of their flight offers no doubt. They are considered "displaced persons," and at the most may receive some humanitarian assistance. In the periphery and the semiperiphery of the world system, some regional interstate agreements have taken some first steps to expand the concept of refugee in order to include the "humanitarian refugee,"[142] but the core countries have repeatedly expressed their opposition to such an expansion; in recent years, when confronted with the potential rise of applications for asylum, they have even adopted more restrictive legislation on (or rather, against) refugees and asylum-seekers.[143] The most blatant examples are the Schengen countries in Europe (more on this below).

The last two decades have witnessed other "involuntary" flows of people still more at odds with international and domestic refugees legislation: hundreds of thousands of people fleeing from famine, starvation and natural disasters (droughts, earthquakes, volcano eruptions). In may cases extreme poverty and environmental crises have acted together with civil war or political repression to provoke massive displacements of people, as in Haiti or Eritrea, in Mozambique or Cambodia. These are dramatic situations, apparently ever more recurrent, in which the distinction between economic and political factors have been blurred, if not totally dissolved; situations in which the calamitous deterioration of native survival systems turns the question of the voluntary or involuntary nature of the migration into a macabre exercise. The inadequacy and the inequity of an international system that fails to provide protection for millions of people in the most vulnerable of situations are thereby fully exposed. Notwithstanding the chauvinistic alarms in the core countries, the majority of these subordinate transnational migrations have taken place within the South, and have meant an enormous burden for neighboring countries whose social conditions are often equally grim. Ought not burden-sharing be conceived on a global scale? And will this be possible in an interstate system based on state self-centeredness?

Two types of "involuntary" transnational migration are most likely to grow in the coming years. The first one will be caused by environmental catastrophes, directly or indirectly caused by anthropogenic climate changes and often coupled with overpopulation. Refugees will be environmental refugees, seeking ecological asylum.[144] Once again, most of these flows will take place in the periphery of the world system or, at least, will start from there. More stridently even than others, environmental refugee flows portray the dark side of capitalist world development and global lifestyles. They should, therefore, become the best candidates for the application of a new and more solidary transnational conception of burden sharing. It is, however, very doubtful that that may ever occur. Environmental refugees occupy the outer fringes of a generally precarious system of international protection. They fall outside the competence of the United National High Commissioner for Refugees, and their plight can be alleviated only to a very limited degree by the already-overcommitted resources of the United Nations Disaster Relief Co-ordinator. Furthermore, environmental refugees are most likely to collide with the territorial logic underlying social protection as a matter of right.

The second type of forced transnational migration likely to grow in the coming years is the most paradoxical form of migration because it consists of populations who stay put and "migrate" only because the political conditions in which they used to live "migrate" themselves, so to speak. Over twenty-five million Russians who live outside Russia became minorities overnight when the USSR ceased to exist. In some cases they became even aliens in a quasirefugee situation. The same happened in former Yugoslavia, with even more dramatic consequences. With the rise of ethnic nationalism—against the background of modern nation-state-building based on ethnic supremacy and ethnic suppression—it is not far-fetched to predict new situations of standstill migration in other parts of the world, in Africa, in India, in China and so on. Unlike other forms of refugee situations, the fate of refugees is here determined by the weakness or even by the breakup of territorial sovereignty.

The high vulnerability of refugees derives from a double adverse condition. On the one side, international human rights applicable to them are highly restricted by a highly restrictive definition of refugees that leaves out most of the current and massive situations of forced migration. On the other side, the few rights they are entitled to are grossly violated with almost total impunity. Such rights have evolved both from international human rights law and international humanitarian law, and include the obligation of the states through which refugees and displaced people transit or seek asylum or durable settlement in, to uphold their rights to life, to personal property, to shelter, to food, to basic health care, to practice religion, to nondiscrimination and so on. In reality, however, such rights are rarely respected. For alleged reasons of national security, refugees are often confined to camps and detention centers where, aside from the lack of freedom of movement and access to the outside world, refugees are subjected to the most degrading human conditions. I quote from the 1991 UNHCR Report:

> In several countries, refugees and asylum-seekers were kept in closed camps as a matter of policy. Surrounded by barbed wire and surveyed by police and armed personnel, they were obliged to remain in such camps until either resettled elsewhere or returned to their respective countries of origin. Many have been kept in such camps for more than a decade. Such circumstances have led to severe strain among camp inhabitants and serious outbreaks of violence.[145]

On the other hand, the discrepancy between the refugee politics of core countries (as is well illustrated by the Schengen Agreements) and that of peripheral countries (as in the Organization of African Unity's broad definition of refugees, including those fleeing natural disasters, foreign intervention and civil unrest) is creating a tension which is likely to become another dimension of the North-South conflict. This is due mainly to the stability rent that core countries continue to collect directly or indirectly at the cost of the periphery in an historical continuity that can be traced back to European colonialism. Aside from recent upheavals in Central Europe, some of the largest, most urgent and longest-lasting refugee situations have originated in countries where ethnic and/or religious cleavages overlap with regional inequalities, and where they possibly have a significant transboundary dimension.[146] These situations have predominantly occurred in the South, in most instances as part of the historical process of transition from decolonization to the conflicts of postcolonialism.

Citizenship, International Migration and Cosmopolitanism

I have focused on undocumented migrant workers and refugees because they constitute the two most vulnerable groups of subordinated transnational migration. Needless to say, many situations of often extreme vulnerability (poverty, starvation, repression) do not involve any massive movements of people or, if they do, such movements take place within the confines of national borders and for that reason have not been considered in this section. Migration literature and international relief agencies have coined the concept of "internally displaced persons" to

cover the situations in which the movement of people has kept within a given nation-state.[147] According to UN estimates, at the end of the eighties there were, in Southern Africa, 10.5 million uprooted (including 3.6 million forcibly relocated within the Republic of South Africa), of whom 1.4 million had crossed transnational borders; in Afghanistan, 7 to 8 million uprooted, of whom 5.8 million were abroad; in Palestine, 8.8 million abroad, of whom 2.2 million were under UNWRA jurisdiction; in other Middle Eastern countries, 2.8 to 3.2 million uprooted, of whom 1.3 million were abroad; in sub-Saharan Africa, 2.7 to 2.9 million uprooted, of whom 1.1 million were abroad; in Ethiopia, 1.8 to 2.6 million uprooted, of whom 1.1 million were abroad; in Central America, 1.9 million uprooted, of whom 850,000 were abroad.[148] The vulnerability of internally displaced people lies, among other factors, in that it remains for the most part beyond the purview of international organizations. In this situation, international human rights principles collide with special intensity with the principle of sovereignty. This conflict will be further considered from different perspectives in the context of my analysis of the forms of transnationalization of the legal field in the following sections.

Subordinate transnational migration is most likely to grow in the coming years. Three main factors account for this: the increasing inequality between the North and the South; the growing instability in the interstate system (including civil wars, ethnic infrastate nationalisms, boundary disputes and threat of nuclear holocaust) directly or indirectly related to the renewed struggle for supremacy among core states; the likelihood of a global environmental disaster due to the uncontrolled reproduction of anarchy in investment decision making and anti-ecological consumption habits and lifestyles. In themselves, and via the subordinate transnational movements of people that they will eventually generate, these factors will challenge in fundamental ways the principle of territorial sovereignty, as well as its satellite concepts of national community, citizenship and membership. It is therefore not by coincidence that the nation-states, specially the core states, are today posed to control one of the major effects of such factors, the dramatic increase in the migration potential and the likelihood of massive irregular transnational movements.

In fact, the control over national boundaries as a major prerogative of territorial sovereignty has been growing steadily since the mid-nineteenth century as a central dimension of the consolidation of the nation-states and of the modern interstate system. In Europe, in the second half of the nineteenth century, it was possible to travel from Portugal to Russia without passport or visa. Restrictions on movements of persons across borders were imposed mainly after World War I. From then on, wars and international tensions, disparities of economic development and standards of living, and differences in political and social regimes contributed together to build up restrictions and controls of cross-border movements. The general argument of this chapter—that transnationalization is a complex and even contradictory historical process that occurs both by deterritorializing and reterritorializing social relations—finds here an unequivocal confirmation. While in the previous forms of transnationalization of the legal field (transnational factors causing changes in domestic law; *lex mercatoria*; law of regional integration) the national state seems to have lost ground and become relatively obsolete, in the

case of subordinate transnational movements, the state, particularly the core state, seems more affirmative and self-centered than ever.

The European states are in this respect specially revealing, because they are now in a double process of relinquishing the control over entry and membership in the national territory within the EC (the internal boundaries) and of strengthening it as far as non-EC countries are concerned (the external boundaries).[149] In terms of the Single European Act, the EC countries seem determined to guarantee the free movement of persons within its common borders. In spite of differences about who these persons are, and the political and institutional instruments that will guarantee such freedom in practice, this is a major political development, and signifies a substantial transformation of a central prerogative of modern territorial sovereignty. This transformation is even more compelling within the five EC countries that have signed the Schengen Agreements Concerning the Gradual Abolition of Controls at the Common Borders (1985, 1990). "Schengenland" is constituted by the joint territories of France, West Germany, the Netherlands, Belgium and Luxembourg, to which will be soon added those of Italy, Portugal and Spain, and probably later, Greece and eventually other countries.[150] One person authorized to enter at any external border of this transnational territory can move freely within it up to three months. To guarantee this freedom, an unprecedented system of international security cooperation is set up—police cooperation; court cooperation; the Schengen Information System and so on—in the 142 articles that comprise the 1990 Schengen Agreement, drawn upon for the purpose of "executing" the 1985 Agreement.

The facility with which one will be allowed to move within Schengenland is only matched by the difficulty in entering it. The refugee norms of Schengen, which are very strict, will yield to the equally restrictive refugee legislation defined by the 1990 Dublin Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, as soon as this convention is ratified by the twelve EC countries. This convention, drafted in a moment of panic before the specter of millions of refugees fleeing the disintegration of the Soviet Union,[151] not only sticks to the old, by now totally inadequate, concept of refugee, but also introduces numerous procedural and substantive controls which have led to the enactment, in the individual signing countries, of the most restrictive refugee legislation in their history. Increase in discretionary powers of the agencies in charge of asylum applications; elimination of judicial control over their decisions; granting transport carriers (almost always privately owned, like airlines); the public prerogatives (and obligations, subject to penalty if not fulfilled) of controlling entry on national borders; these are some of the features of this new antirefugee legislation. I am not concerned here with the problems deriving from the noncoincidence between the external borders of Schengenland and those of the EC, since the United Kingdom, Denmark and Ireland are not part of Schengen: in the future, some EC countries will be at the external borders of Schengenland. What I want to emphasize is that the deterritorialization of the internal borders goes together with the reterritorialization of the external borders. The principle of sovereignty is thus negated at the national level by the same process that confirms it with greater efficiency at the suprastate level. This enhanced confirmation and the

democratic deficit that it implies are of consequence not only for asylum-seekers but also for the nationals of this transnational space: the price of free movement will eventually be a greater vulnerability vis-à-vis transnationalized systems of repression and information.[152]

Though probably an extreme case, the European legal and political development epitomizes the ingenuity and resourcefulness of the principle of sovereignty, always ready to transform itself on the condition that it remains operative—and, if possible, with renewed efficiency—against the truly dangerous intruders, those that remain at the external borders. And these are, without exception, those that come from peripheral or semiperipheral regions of the world system, and dare to benefit from the social amenities accumulated in the core, often at the expense of those same regions. The exclusionary virtuosity of the principle of sovereignty is not exercised in a social or political vacuum. The state, as a set of institutions, together with the political, social and cultural elites, are the cement with which the fortress of nationalistic chauvinism and ethnic panic are built. In an illuminating analysis of the widespread ethnic panic in the Netherlands created by the immigration of a group of Tamil refugees from Sri Lanka during the first months of 1985—a potential minority group that up until then had been unknown to the population at large—van Dijk has found that ethnic prejudice is mainly preformulated in the prevailing discourse types of the elite—representatives of the national and local authorities, the judiciary, the police, welfare agencies, education and academic research—and that such discourse is publicly reformulated by the mass media.[153] In the last years, ethnic panic has spread throughout Europe as a kind of symbolic reterritorialization of national communities, which in a perverse way might have fed the contestation of the Maastricht Treaty.

This dialectics of deterritorialization-reterritorialization, which is observable at the macrolevel of policy, legislation and opinion making, can also be observed at the microlevel of sets of individual decisions by different state agencies. The European Court of Justice is one such agency. In my analysis of the transnational law of regional integration, I emphasized the prominent role of the Court in deterritorializing the economic and commercial legislation of EC countries, creating in its stead a new, communitywide, supranational, legal order of its own, grounded on a new constitutional basis derived from the interpretation of the European treaties adopted by the Court. In light of this, it is all the more symptomatic that the Court has been extremely passive, restrictive and low-profile in interpreting the limits of its human rights jurisdiction in cases concerning non-EC nationals. As Weiler aptly notes, "in relation to non-Community nationals the Court has been . . . particularly prudent and has eschewed the boldness which characterizes some of its jurisprudence in other areas."[154] In my analytical framework, in this respect, the Court has been acting in total consonance with the political project of EC member states, deterritorializing the internal borders in order to strengthen the position of Europe as a regional trading bloc in the upcoming struggle for supremacy in the world system, on the one hand, and, on the other, reterritorializing the external borders so as to prevent the strength of the position from being endangered by the disruptive presence of undesired and undeserving guests. The hard economic interest calculations that seem to fuel this dialectics are, however, in a collision course with the political and cultural principles that have been pro-

claimed as the essential ethos of the European project. Furthermore, the needs of electoral politics may at times require feeding on internal xenophobic sentiments, or at least, being ambiguous about them. The contradictory nature of such a course of action is well summarized by Weiler, when he speaks of:

> a delicate path to tread, one which is supportive of the process of European Union but acknowledges the dangers of feeding xenophobia towards non-Europeans and the even deeper danger towards one of the moral assets of European integration—its historical downplaying of nationality as a principal referent in transnational intercourse.[155]

If the EC countries have lately become an extreme example of restrictive refugee policies, the U.S. has been, and not only lately, an extreme example of political bias and discretionary selectivity in the application of refugee legislation formally informed by the principle of equal treatment. In 1965, Congress discarded favoritism by national origins in favor of the same immigration ceiling for every country; equal treatment was further extended in 1980 when, through the Refugee Act, the U.S. redefined refugees as individuals fearing persecution not only from Communist systems, as had been the case before, but from any regime.[156] The Refugee Act established objective criteria for determining refugee admissions which would supposedly depoliticize the refugee policy. In practice, however, the act's provisions have been easily circumvented by an executive branch with too much discretionary authority which has been exercised to fit overarching political objectives. The Haitians' quest for political asylum illustrates best the strong bias in the implementation of U.S. immigration laws. From June 1983 until March 1991, 74.5 percent of refugees from the former Soviet Union were granted asylum, compared to 1.8 percent of Haitians, and the discrimination is even more blatant when Haitians are contrasted with nationals from other American countries, namely with Cubans. As Little puts it, "[i]n many ways, immigration procedures towards Cubans and Haitians that seek entry into the United States represent the extremes of United States' policy. Immigration policy towards Cuba tends to be generous and humanitarian; immigration policy towards Haiti tends to be stringent and inhumane."[157] Soon after Fidel Castro took power in Cuba, the United States enacted the Cuban Refugee Adjustment Act of 1966, enabling almost 800,000 Cubans to enter the U.S. between 1966 and 1980.[158] During the same period, the government refused to admit refugees from Haiti, though they fled from one of the bloodiest and most repressive regimes of the world, the "gangster government" of the Duvaliers. The truth of the matter lay in the fact that Haiti was anti-Communist and the Duvaliers supported the U.S.'s attempts to dislodge Communism in Cuba. For this reason, Haitian refugees were unwelcome. Discrimination against Haitians and in favor of Cubans has been a distinctive feature of the U.S. refugee policy, and is pursued at different levels, for instance, in detention centers. During most of the time, Haitians have been the majority of the detainees in the best well known INS detention facility, Krome North Service Processing Center located in Miami, Florida. In early January, 1993, the Haitians detained here entered a nine-day

hunger strike, following the arrival of fifty-two Cubans who had "commandeered" a Cuban commuter flight from Havana to Varadero, Cuba, diverting it to Miami. They protested against another painful instance of the double standard: all the Cubans were released from the camp within forty-eight hours.[159] Plainly, the Refugee Act of 1980 has failed to eliminate ideological discrimination from immigration policy. Because the President selects the geographical locations and allotment of aliens who may enter, *de facto* discrimination based on geopolitical considerations has simply replaced *de jure* discrimination.[160]

For all their differences, recent immigration and refugee policies of the European countries and the United States illustrate the extent to which the overriding commitment of core states to national interests, defined, in this instance, as territorial prerogatives, may lead to measures against nonnationals and to distinctions among nonnationals which, when viewed from a cosmopolitan human rights perspective, are arbitrary and discriminatory. The likely intensification of subordinate transnational migrations in the coming years, together with the increasing transnationalization of their root causes, are liable to raise the contradictions between their dynamics and the logic of territorial sovereignty to such a high level that current institutional and normative structures will collapse for lack of legitimacy and feasibility, calling for a new understanding and a new political approach. In my view, such a new departure will be built upon the following concerns, whose analytical and normative dimensions constitute the research agenda in the field of the subordinate transnational movement put forward in this chapter.

A New Historical Epistemology of Need and Difference. Whenever transnational migration is forced upon people, there is no justification to distinguish between nationals and nonnationals. In the light of international human rights principles, whenever people cannot choose to stay within their national boundaries except by risking their lives, they become *ipso facto* citizens of any other country. This is the basic premise of a new political and legal cosmopolitanism. It is new to the extent that, rather than based on abstract principles of individualism, universalism and generality, it is historically grounded, culturally specific and politically discriminating.[161] The history of the modern world system is a history of unequal exchanges which are at the roots of the war, starvation, oppression and ecological disaster that force people to migrate. Modern science has managed to separate the knowledge of this history from the history of this knowledge. For this reason, modern historical knowledge is ahistorical. Because this ahistorical knowledge benefits the countries that have benefited from the unequal exchanges, modern science is intrinsically territorial. To that extent, it is as great an obstacle to the development of a new cosmopolitan politics as the nation-state itself. Short of such a new cosmopolitanism, neither the needs nor the differences of transnational migrants can be properly addressed. As things stand now, the needs of migrants have been codified and ranked by criteria of nationality and territoriality that are inherently biased against them, while their differences have been codified and ranked by a hegemonic form of knowledge that cannot understand them except by what they are not. Hegel conceived of modern science as a form of knowledge that progressed by distinctions, divisions and discriminations. He oversaw the fact that, in the real world, rather than calling for a philosophical *Aufhebung*, that form of knowledge became articu-

lated with the modern state, whereupon scientific distinctions became social differences, which in turn engendered subordination. Subordinate transnational movements are movements of knowledges that have been suppressed and marginalized. Transnational Third Worlds of people are also transnational Third Worlds of knowledges, and they feed on each other. Learning from them, learning from the South, is one of the epistemological prerequisites of a cosmopolitan politics.[162] Competition among different knowledges is a prerequisite to the transformation of the history of the modern world system into a tribunal to determine culpability and liability, grant entitlements to compensation, and establish the criteria for burden-sharing. It is also an epistemological prerequisite to distinguish among differences that do not generate legitimate or occult subordination, and differences that do. Without alternative knowledges within the same hermeneutic constellation, it is not possible to sustain multicultural pluralism within the same territorial time-space (more on this in Chapter Eight).

Community, Membership, Transnational Advocacy. Subordinate transnational migration represents a fundamental challenge to the concepts orbiting around the principle of territorial sovereignty, such as national community, citizenship, membership, naturalization. It is today widely recognized that national boundaries are a major political device to maintain inequality across the world system, and that they do so by separating jurisdictions and defining membership. Control of entry and control over range of membership, though separate issues, are thus intimately interconnected. Whenever the state fails to control entry—as when illegal immigrants manage to settle inside the borders—it still can erect a wall against incorporation by virtue of the illegal status stamped on immigrant life experience. Illegal immigrants and asylum-seekers thus doubly challenge the principle of territorial sovereignty, as they raise both the question of entry—to what extent does the denial of entry represent a violation of international human rights?—and the question of membership—to what extent can people already present in the national territory and, eventually, with significant ties to it, be denied full membership without thereby violating international human rights?[163] The second question deserves greater attention, because the social and political impact of decisions on entry is premised upon the quality and the range of membership they give access to.

The plight of illegal immigrants and asylum-seekers is one of the most dramatic consequences of the impoverishment of the principle of community once it has been reduced to the national community, and the latter to the state and civil society as foils of one another. The legal and political overload of such a reduction disqualified at once both local communities and transnational communities. The concepts of citizenship, membership and, mediating between the two, the concept of naturalization, are the core of that overload, and have in recent years become the most contested terrain in a politics of belonging. Walzer has argued that the national community is the most comprehensive level at which human beings have been able to develop democratic forms of political organization and mechanisms for cultural understanding and for a fairer distribution of resources, and that for that reason it is legitimate to protect it as an established and functioning community against massive immigration. According to him:

> the idea of distributive justice presupposes a bounded world, a community, within which distributions take place, a group of people committed to dividing, exchanging and sharing, first of all among themselves. . . . At some level of political organization something like the sovereign state must take shape and claim the authority to make its own admissions policy, to control and sometimes to restrain the flows of immigrants.[164]

This sophisticated defense of liberal political territoriality is a paradigmatic example of how an abstractly constructed and universally applicable principle of balanced relation between inclusion and exclusion may legitimize, under the conditions of the modern interstate system, a politics that in fact excludes the great majority of the world population from the goods that Walzer's national community is capable of delivering. Such national community is restricted to the core countries and, with the emergence of the interior Third World, will be increasingly restricted to a partial community inside them. The relatively high level of incorporation that it achieves within the national borders, protecting one sixth of the world population, is the other side of the extremely high level of exclusion it commands outside those borders, where five-sixths of the world population lives.

Because illegal immigrants and asylum seekers are the most vulnerable social groups contesting national boundaries, they show most clearly the radical reassessment of concepts of citizenship and membership required by a cosmopolitan politics. Conversely, they unveil the most resistant obstacles in building up a transnational coalition that would support and promote such a politics.[165] As Brubaker puts it, "citizenship is at the vital center of the political life of the modern nation-state."[166] The ideal-type of citizenship, intrinsic to the ideal-type of Walzer's national community, is a form of membership characterized by being egalitarian, sacred, national democratic, unique and socially consequential.[167] This is not the place to analyze the "deviations" of real citizenship in relation to this ideal-type, even in core countries. For my argument here, it will suffice to mention that the modern concept of citizenship has always operated in articulation with a broader concept of membership that is also territorially based and intended to cover a whole range of statuses of people who are not full citizens. Legally admitted permanent immigrants are more members than seasonal workers, while illegal immigrants or asylum-seekers are not members at all or, at best, vestigial members. By means of its territorial grounding, the concept of citizenship keeps its integrity only by creating, in sociological terms, second-class, third-class and even fourth-class citizens. Millions of subordinate transnational migrants are generally deprived from getting beyond the first steps of the citizenship ladder. The legal disenfranchising of these people, together with the sociological disenfranchising of millions of nationals confined to the interior Third Worlds, show the discriminatory workings of modern politics of citizenship. The collision with international human rights is evident, and has been managed in different ways by different nation-states. Because such differences are very relevant, the creation of a cosmopolitan coalition—transnational networks of locally, nationally and transnationally embedded social relations of emancipa-

tion—must take them into account. They must be considered within the triple analytical framework I am propounding in this chapter: position in the world system, historical trajectory toward modernity, and prevalent legal culture. The bridge of naturalization between membership and citizenship is narrower and longer in some countries than in others. The fact that Canada entered modernity through the gate of the New Worlds (settlement) and Germany through the European gate explains, in part, the fact that the naturalization rate in Canada is more than twenty times higher than in Germany. The different traditions of nationhood in Portugal or France, on the one hand, and Germany, on the other, are, in part, explained by the fact that, while Portugal and France were colonial powers, Germany was not.[168] In countries whose legal culture is grounded on religion, as in the Middle East, citizenship is sacred, and its sacredness is reproduced by its unbridgeable reach, while in countries whose legal culture has been most pervasively secularized, as in the Nordic countries, short of naturalization, human rights can be granted more easily (for instance, the right to vote in local elections).

These differences must be analytically worked out before cosmopolitan coalitions can be built in this field. The networking of differences must be subjected to certain general orientations. A new theory of citizenship must be developed to account for the growing subordinate transnational movements and the challenges they pose to the international human rights regime.[169] Citizenship must be deterritorialized (less national and more egalitarian), so that the legal diaspora of millions of displaced people may come to an end. Citizenship must be decanonized (less sacred and more democratic), so that the passport and the visa cease to be a legal fetish upon which the life changes and human dignity of so many people depend. Citizenship must be socialistically reconstructed (more socially consequential and less unique), so that dual or even triple citizenship becomes the rule rather than the exception. The objective is to disperse both citizenship and territorial sovereignty, but in such a way that citizenship is thereby reevaluated, while territorial sovereignty is devaluated: precisely the opposite of what is happening today in core countries, as I tried to show above. This general orientation must be institutionally grounded on a new transnational legal field, emerging out of a new balance between international human rights and the domestic legal statuses of persons. The new theory of citizenship is just a first step toward a new cosmopolitan consciousness and politics. It must be combined with a new theory of trust, globally conceived, which will replace the current paradigm of state-centered trust that is fortressed within national boundaries. The new historical epistemology of need and difference called for above will be the foundation of global trust. Since a great deal of forced transnational migration is taking place within the South, the new theory of citizenship, unaccompanied by a new theory of trust, could easily become another trap for the South. On the contrary, the cosmopolitan politics proposes that entry becomes irrelevant for membership. People may enter specific countries, but they are members of all of them, and the guarantee of their human rights must be provided for by all countries according to their resources, that is to say, according to their historical responsibilities in the creation of worldwide inequalities.

5. Ancient Grievances and New Solidarities: The Law of Indigenous Peoples

The legal constellation analyzed in this section has a long, social, if not sociological, tradition in all the societies whose route to modernity has been any of the three non-European routes. In general, it consists in the coexistence, within the same geopolitical territory, of a modern, Westernized, official, state legal order, with a plurality of local, traditional or recently developed, nonofficial, community-based, legal orders—in other words, the conventional situation of legal plurality. Due to its long standing, this legal constellation seems to have very little to do with what I have been calling in this chapter the transnationalization of the legal field. As I have argued in Chapter Three, far from being a sociological residue of premodern times in countries that have not yet completed the process of "modernization," infrastate legal plurality is constitutive of the latter's unequal, uneven and exclusionary character, and for that reason is bound to be recurrently reinvented and reproduced as "modernization" unfolds. This explanation, however, links infrastate legal plurality to capitalist modernity in general, and not specifically to the processes of globalization and transnationalization that I have been discussing in this chapter.

The legal constellations I have in mind here do not cover all the situations of infrastate legal plurality, but only those in which a specific transnational-local linkage can be identified. Without discarding the possibility of other legal constellations falling into this category, I will concentrate in this section on the *collective rights of indigenous peoples*, surely an old issue—at least, as old as European expansion from the fifteenth century onwards—which has, however, in the last two decades, gained a new prominence. I will argue that this new prominence is due to a transnational-local linkage with two vectors, one older than the other, but both dramatically intensified in the last two decades. The first vector has to do with the dialectics of globalized localisms-localized globalisms fueled by the emergence of worldwide sourcing and production systems, the most recent step of the secular trend of the capitalist world economy to incorporate the whole planet, even its most remote regions, in the process of capital accumulation. As a result, in the last two decades many indigenous peoples saw their traditional lifestyles, customary rights and peasant economies threatened by new or more powerful development claims by TNCs or the national state or, in most cases, the two combined. For most of the indigenous peoples, particularly in the Americas, their founding memory is the memory of the violation of their rights throughout modern history and their resistance in very unequal conditions. What are seen (and they themselves see) today as their traditions, customs and economies are indeed the sedimentation of resistances, survival strategies and adaptive responses in the face of mass destruction of their ancestral communal life by modern conquerors and settlers of all denominations. In this sense, the "contacts" of the last two decades are far from unprecedented. They merely represent another and probably more powerful wave of imperial globalization. One of its specific features is the extent to which the national state itself intervenes as a transnational actor. Pressed by the "Washington consensus" on debt, stabilization and structural adjustment, the peripheral and semiperipheral states embark on new "devel-

opment projects," often in joint ventures with TNCs and with the support of international financial institutions, be they extractive, agro-industrial, road construction or hydroelectric projects. Some of these projects are to be carried out on indigenous lands, further destroying their traditional lifestyles and economies, forcing them into new and massive relocations.[170]

What is truly new in the new prominence of the indigenous question is the emergence of a transformative, transnational coalition consisting of indigenous and nonindigenous NGOs, which have been drawing the attention of world public opinion to the violations of indigenous historical rights, and pressing both international organizations and the national states to condemn the violations, stop the destruction and take active measures to effectively right (or begin to right) such massive historical wrongdoing. This is the second vector of the transnationalization of the indigenous peoples' struggles. This transnational effort falls into the process of globalization that I have called cosmopolitanism. Its reading of our time is paradigmatic in nature, its logic is anticapitalist, its politics is self-determination and autonomy, its ideology is emancipation from hegemonic "development models." The legal dimension of this transnational transformative action has some similarities with the one I will describe below as cosmopolitan law. But there is an important difference between the two. While under cosmopolitan law, as we shall see, the struggle is for access to nationally and transnationally established (but only selectively effective) systems of justice and universal individual human rights, in the case under analysis, the struggle is for special collective rights and local autonomous legal regulation within territorially defined areas. In sum, while in the case of cosmopolitan law, the emphasis is on universal rights and on general systems of transnational nation-state law, in this case of transnationalized infrastate law, the emphasis is on the national and transnational recognition of local, community-based plurality of laws. In both cases, the national character of the "nation"-state is questioned, but while in the first case it is questioned for its deficits, that is, for not being sufficiently developed according to its own political and legal claims, in the second case it is questioned for its excesses, that is, for being structurally flawed as a project of political and legal development.

Though exact estimates are impossible in view of the nomadic existence of some indigenous peoples in inaccessible areas, the Secretary-General of the International Labor Organization estimates that "300 million indigenous tribal peoples of widely differing races live in just about every part of the world."[171] While the interstate system is made up of roughly 170 independent states, "educated estimates, based mainly on anthropological and linguistic criteria, would place the number of nations, peoples or ethnic groups at around five to eight thousand, the real figure probably being closer to the latter."[172] In Latin America, it is estimated that there are four hundred indigenous peoples, comprising thirty million individuals, that is, ten percent of the whole Latin American population.[173] Among the best-known indigenous peoples we should include the Native Americans or Amerindians, the Aborigines of Australia, the Inuit (Eskimos) of the Arctic, the New Zealand Maoris, the Scandinavian and Russian Sami (Lapps); though in the South-East Asian and African countries the concept of indigenous peoples is not generally used, we should also mention the "tribal people" in India

(*adivasis*), the Maubere people in East Timor, the mountain people in the Philippines and Thailand, indigenous peoples in Malasia and Sri Lanka and other Asian countries, and isolated ethnic groups in Africa.[174] The best definition of "indigenous peoples" has been formulated by UN Special Rapporteur, Martinez Cobo:

> Indigenous communities, peoples and nations are those which, having an historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in these territories, or parts of them. They form at present non-dominant sectors of society and are determined to perceive, develop and transmit to future generations their ancestral territories and their ethnic identity, as the basis of their continued existence as people, in accordance with their own cultural patterns, social institutions and legal systems.[175]

I shall rely on this definition to deal with the issues raised by indigenous peoples' rights that are most pertinent to outline the specific form of infra-state legal plurality they constitute. More specifically, I will deal with three issues: historical and cultural roots of indigenous rights; self-determination and the ethnocratic state; formation of transnational coalitions.

Historical and Cultural Roots of Indigenous Rights

This issue raises a whole range of questions. The first one is the question of primordial identities in modernity, which, in turn, raises many issues: to start with, the conceptual issue of the relations between "indigenous peoples" and "ethnic minorities." Ethnic groups are generally defined in terms of broadly defined cultural identity (of language, national origin, religion, race, social organization). They are considered minorities either because they are numerically so, or because they are discriminated against, socially excluded, or dominated in the countries they live in (sociological minorities). In at least one of these senses, indigenous peoples are ethnic minorities. They are, generally, both numerical minorities (though not in Bolivia, Guatemala, Peru, Ecuador and in the northern part of Canada) and sociological minorities.[176] According to the Aga Khan's report, indigenous peoples are:

> the most deprived and ill-treated groups in most countries . . . their average income is lower, their health is worse, they are disproportionately the subjects of arrest and imprisonment. Even in the richer countries, indigenous peoples live as second class citizens in conditions which often attract comparison with those existing among the poorest of the Third World.[177]

With this in mind, some authors have argued that the recognition and protection of indigenous peoples' rights could be guaranteed by the same legal instruments developed by international law and many national laws to guarantee the protection of ethnic minorities. To be sure, indigenous peoples are a special case within a larger category: the ethnic minority. Both indigenous peoples and ethnic minori-

ties are primordial social groupings, in Geertz's sense of groups bonded by congruities of blood, religion, speech, custom and other "first principles."[178] They have also shared, for the most part, the same historical fate both as objects of the social sciences and victims of discrimination.

Being part of traditional collectivities (such as church, community, neighborhood, family), these primordial social groups fit Durkheim's concept of mechanical solidarity, which he conceived as a declining form of social solidarity in the process of being replaced by a new one, organic solidarity, based on social differentiation and complexity. After Durkheim, and for many decades, social sciences, as well as liberalism and Marxism, predicted the gradual but inexorable disappearance of "primordial" collective identities. Surveying some of the major social sciences, Stavenhagen rightly concludes that "the paradigms of modern social theory have not included the ethnic factor as relevant to the questions they have asked of reality."[179] For liberalism, primordial identities are premodern residues negatively interfering with the political obligation between individual citizens and the state, the latter viewed as the only legitimate foundation of political association. Throughout the nineteenth century, and in our century until the end of the sixties, this conception fitted the tasks of nation-state-building, whereby the "nation," supposedly monoethnic, made possible the conversion of ethnic domination into nationalism. In Smith's words, "ethnic nationalism has striven to turn the ethnic group into that more abstract and politicized category, the 'nation,' and then to establish the latter as the sole criterion of statehood."[180] For Marxism, primordial identities were subsumed within the analysis of class formation and class struggle, and more often than not, seen as obstacles to be overcome in the "natural" unfolding of either of these social processes. Ethnic identities were more central in the analysis of the "national question," but, except for the remarkable work of the Austro-Marxists,[181] this question received relatively little attention from Marxism.[182]

In the same way that they shared analytical neglect and political suppression in the past, indigenous peoples and ethnic minorities today also share the benefits of a changing constellation of meaning, which surfaces in shifts of symbolic universes, from the melting pot to multiculturalism, from functional and abstract identities to neoprimordial local identities, from class politics to ethnic politics, from modernization to ethnodevelopment, from the quincentennial celebrations of the discoveries to the 1990 Declaration of Quito, proclaimed by the Indigenous Alliance of the Americas on 500 Years of Resistance. Needless to say, these shifts of analytical and political emphasis are not the outcome of unconditionally auspicious social processes. Some of the latter are, indeed, quite reactionary, as shown in the new rise of racism and chauvinistic nationalism, in the dramatic increase of refugee populations, in the proliferation of ethnic conflicts and in the new (and old) forms of ethnocide.

The legal and political claims of indigenous peoples and ethnic minorities, in general, have been at the center of the debate over individual and collective human rights. According to the liberal political paradigm, rights are entitlements held by individuals, and only by individuals. Furthermore, since the "universality" of human rights means both formal legal equality of all citizens, and nondiscrimination (in the sense that no citizen can be excluded from the enjoyment of

human rights) it has been claimed, within this paradigm, that collective human rights are either absurd or superfluous (more on this in the next section). As the argument goes, collective legal protection is the "natural" result of universal individual protection. The fact that specified groups of people (children, workers, women, minorities) have been entitled to specific legal protection does not collide with the liberal principle, since rights pertain, in those cases as in general, to the individuals and not to the collective entities to which individuals belong.[183]

The liberal paradigm has been at the root of the states' aversion to recognizing collective rights of groups other than itself. Collective rights are viewed as threatening the principle of sovereignty and fueling domestic tensions: disruptive, at the internal level, of the political obligation that holds together citizens and the state, and, at the international level, of the normal operation of the interstate system. Against this liberal orthodoxy, an alternative view that has been defended by indigenous peoples and pioneering NGOs since the middle of the nineteenth century has recently been gaining wide acceptance in the international community, particularly in the last two decades. It is based on two premises. First, in spite of the international recognition of universal human rights as a civilizatory process, discrimination against indigenous peoples and ethnic minorities has been practiced and even legally supported over the years. To mention two striking examples: Australia did not grant civil rights to the Aborigines until the late sixties, and in the earlier years of the United Nations, many Latin American states refused to admit that there were minorities in their territories, or that indigenous peoples were minorities in the UN's sense. Second, after a long history of genocide and ethnocide, of imposed policies of social exclusion or integration, the elimination of discrimination cannot be achieved by mere formal equality before the law. As the practice of both the United Nations' and the International Labor Organization's committees and working groups on ethnic minorities, indigenous peoples and racial discrimination clearly shows (whenever the testimonies of minorities are taken seriously), ethnic rights must be constructed and contextualized as rights of peoples and collectivities before they can adequately protect, as human rights, the individuals that belong to such peoples and collectivities. This is the position taken by ethnic minorities whose argument is that universal human rights are not enough, and that without specific provisos obligating the states not only to abstain from interfering with the collective rights of minorities, but also to provide active support for the enjoyment of such rights, minority groups will always be disadvantaged within the wider society. Following this line of argumentation, Stavenhagen justly emphasizes that "the collective rights that ethnic minorities around the world have been demanding have to do with the survival of the ethnic groups as such, the preservation of ethnic cultures, the reproduction of the group as a distinct entity, the cultural identity attached to group life and social organization." And he concludes: "This is much more than expecting non-discrimination and equality before the law. It relates to the use of language, schooling and educational and cultural institutions, including religious institutions; frequently, with self-government and political autonomy."[184]

The struggle for collective rights is part and parcel of a politics of critical legal plurality, and has been understood as such by the nation-states, which tend to see in the recognition of collective rights the creation of internal legal competition, a

challenge to the state monopoly of production and distribution of law. Linked to the right to self-determination, as we shall see below, collective rights are also likely to be viewed as obstructing the exercise of sovereign prerogatives and, ultimately, as undermining the survival of the nation-state itself. For these reasons, and having in mind the privileged position of states in the international system, international organizations have been quite slow and cautious, to say the least, in recognizing the collective rights of ethnic minorities. The only "tangible result" of forty years of labor of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities has been the inclusion of Article 27 in the International Covenant on Civil and Political Rights, which states: "In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion or to use their own language."

For reasons I cannot go into here, minority peoples have been quite disappointed and indeed felt cheated by this formulation.[185] However, as regards indigenous peoples more specifically, new international instruments have been recently produced which considerably strengthen their struggle for collective rights. In this respect, the ILO "Convention 169" (Convention Concerning Indigenous and Tribal Peoples in Independent Countries) and the UN Draft Universal Declaration on Rights of Indigenous Peoples deserve to be mentioned. The latter includes the following rights:

3. The collective right to exist as distinct peoples and to be protected against genocide, as well as the individual rights to life, physical integrity, liberty and security of person.
4. The individual and collective right to maintain and develop their ethnic and cultural characteristics as distinct identity, including the right of peoples and individuals to call themselves by their proper names.
5. The individual and collective right to protection against ethnocide.

In the same vein, the project of Paragraph 21 of the Draft Declaration (as revised by the president-rapporteur of the Working Group on Indigenous Peoples, Erica-Irene Daes) states that indigenous peoples have "the right to participate fully in the political, economic and social life of their state and to have their specific character duly reflected in the legal system and in political institutions, including proper regard to and recognition of indigenous laws and customs."[186]

The claim of collective rights by indigenous peoples and ethnic minorities is gaining strength in the international political agenda, supported by a broad and broadening transnational coalition. It is a claim for the legal recognition, both by national law and by international law, of situations of legal plurality which sociology and anthropology of law have vastly documented as social and political forms of resistance against internal legal colonialism. A full treatment of transnationalized, infrastate, legal plurality would thus require the analysis of collective rights claims by ethnic minorities in general. The reason why I concentrate on the claims of indigenous peoples is because they represent the most far-reaching challenge to the modern equation among nation, state and law, and also because they

illustrate most eloquently and painfully the historical mass destruction, oppression and injustice upon which the routes to and through modernity were built outside Europe (though, of course, ethnocides within Europe, both ancient and modern, should not be forgotten). Moreover, the indigenous peoples' rights are different from the rights of ethnic minorities in two important counts, which together confer a specific profile to the situations of legal plurality they entail. First, because indigenous peoples are historically "original" peoples and nations, their rights have a kind of historical precedence and, for that reason, the collective rights they struggle for are not conceived by them as rights to be granted to them, but rather as rights they had always enjoyed before they were taken away from them by conquerors, settlers, missionaries or merchants coming from afar. Now, this historical precedence cannot be invoked by all ethnic minorities (for instance, by ethnic migrant communities). Second, among all the collective rights of indigenous peoples, the right to land, to their ancestral territory and its resources, is paramount; therefore, legal plurality assumes in this case a distinct, geospatial configuration. On the other hand, the claims of ethnic minorities may or may not include territorial rights, but they always include the right to cultural identity, with a symbolic autonomous territory within the broader mental maps of the culturally alien states in which they happen to be living for longer or shorter periods.

The territoriality of indigenous peoples' rights, combined with the fact that, by far, most indigenous peoples are peasants, has led some authors to believe that the issue of indigenous rights and, particularly, the collective right to be governed by their own customary laws, should be subsumed under the issue of peasants' rights and laws or, indeed, under the more general issue of the rights and laws of the oppressed or subordinate classes, of which Pasargada law, analyzed in Chapter Three, is an example.[187] Even though significant similarities between indigenous legal plurality, peasant legal plurality and even subordinate legal plurality can be identified, what is distinctive about indigenous legal plurality is the specific embeddedness of the legal dimension in broader, deep-seated, cultural, religious, linguistic, familial, ethnic identities, to such an extent that the preservation of autonomous law becomes part and parcel of a politics of survival and resistance against "assimilation" and ethnocide.[188] Indeed, the refusal by the state law and administration of justice to take cognizance of indigenous laws has been the central element of ethnocratic domination throughout the centuries. In an eloquent analysis of the Peruvian criminal justice system, Aguirre has demonstrated how court decisions, more blatantly even than the Penal Code, express the ethnocentric bias of state legal domination: distinguishing, for instance, between "civilized" and "non-civilized" Indians in order to justify a humiliating "special protection," showing an arrogant ignorance of Indian culture, subscribing to an uncritical and only apparently naïve equation between capitalist market and Western civilization, transforming prisons into spaces of Westernization.[189] Such imperial legal ignorance of the indigenous laws and cultures has always stood in a deliberately asymmetric relation with the ignorance of the colonial or postcolonial state laws displayed by the indigenous peoples. The indigenous peoples' ignorance has been made illegal by various means since the early times of the conquest, the *requerimento* being the most striking example. The *requerimento* was a formal document to be read to the indigenous peoples, "informing" them that they were subjects of

the Crown and should, therefore, adopt the Christian faith; this "legal condition" they could not "legitimately" ignore from then on, even if they had understood nothing of what had been read to (against) them.[190] Throughout the centuries, ethnocratic domination dealt with this asymmetric legal ignorance in different ways. If at times it conceived it as part of seawide unbridgeable cultural distance, at other times it viewed it as a transitory phenomenon, to be gradually superseded by cultural integration and assimilation under the supervision of the state. A good example of the latter are the "indigenist policies" of many Latin American states in the thirties and forties, with their characteristic paternalism and assimilationism.[191] Today, under the pressure of indigenous peoples' organization and mobilization, the national states are being forced into a more multicultural, polyethnic position which, in order to be sustained and as the indigenous organizations are well aware of, presupposes the recognition of collective rights and a territorially-based plurality of legal orders.

Self-Determination Versus the Ethnocratic State

The recognition of collective rights and autonomous laws of the indigenous peoples *qua* peoples raises the controversial issue of self-determination. The principle of self-determination of peoples is well established in international law, and was the guiding principle of decolonization, particularly after World War II. It granted the colonized peoples the right to independence, a right, therefore, to be exercised once and for all. The peoples were for the most part territorially defined according to colonial geography, and declared independent on its basis. In an attempt to link the right of self-determination clearly with the colonial situation, it was understood that the peoples to be granted independence were the ones that had been colonized by overseas colonial powers (the "blue water" theory).

Once the colonized peoples became independent states, they considered that, *ipso facto*, there were no further grounds for the application of the principle of self-determination within their borders. For fear of chaotic secessions, the existence of indigenous peoples or ethnic minorities in the newly independent states was denied (and still is, in some cases). As Maivân Lâm puts it:

> Because the attainment of independence remains, for the present, the founding myth of the modern nation-states of the Third World, where the recall of national sacrifice and foreign perfidy respectively ennoble and enrage, counter-calls for independence, so to speak, easily suggest treason or complicity with foreign intervention which, because it continues to reproduce itself in the post-colonial age, if under different forms, sustains the myth, with extremely unfortunate results for indigenous peoples.[192]

In the field of international law, one such result has been the difficulty confronting the indigenous peoples of being recognized as peoples, that is to say, as collective entities with international legal personality and entitled to the exercise of self-determination.[193] In fact, in most documents of international organizations, they are described as persons, populations, groups of individuals. Only in more recent documents have they begun to be considered as peoples, due to the growing pressure of indigenous organizations. This is notably the case of ILO Convention No. 169, which, however, accepts the concept with a major restriction, prompted by the fear that the principle of self-determination attached to it might destroy the territorial integrity or the political unity of the sovereign states. Paragraph 3 of Article 1 states that "the use of the term 'people' in this convention shall not be construed as having any implications as regards the rights which may attach to the term under international law." The perceived need to compromise between the right to self-determination and state sovereignty has led to further specifications as, for instance, the distinction between external self-determination (which would involve secession and independence) and internal self-determination (restricted to the right to autonomy or self-government within the boundaries of the state and under the latter's sovereignty). These issues will be further discussed in the next section.

The fact of the matter is that, in most cases, the self-determination claimed by indigenous peoples has not included secession, statehood, or political sovereignty. Truly, indigenous peoples' organizations feel sometimes victimized by restrictive conceptions of "colonialism" and of "decolonization." They think that, though "external" colonialism ended, "internal" colonialism continued and even thrived within the "independent" states. Moreover, the general term of "decolonization" hides strikingly different situations: while in Africa and Asia independence was granted to the colonized peoples, in the Americas, in almost all the cases, independence was granted to the European colonizers and their descendants, a difference that, as I have suggested above, was decisive in shaping the routes of these regions to modernity. The indigenous peoples' claim to self-determination is focused on the right to the historical land and its resources, as well as to autonomous social organization and cultural identity—all of which can be made compatible with the sovereignty of the state in which they live. Either because they appreciate that to claim otherwise would be unrealistic within the interstate system as we know it, or even detrimental to their ultimate interests, or because statehood is to them a culturally alien concept, the indigenous peoples are basically claiming forms of ethnic equalization (not homogenization), ethnic federalism and ethnodevelopment, in order to secure themselves against always-recurrent dangers of ethnocide and corresponding new ethnographies of terror. Heintze cites a declaration by the Dene which graphically illustrates this:

> The Dene find themselves as part of a country. That country is Canada. But the government of Canada is not the government of the Dene. These governments were not the choice of the Dene, they were imposed upon the Dene. What we the Dene are struggling for is the recognition of the Dene nation by the governments and peoples of the world. And while there are realities we are forced to submit to such as the existence of a country called Canada, we insist on the right to self-determination as a distinct people and the recognition of the Dene Nation.[194]

The struggle of the Miskitos for self-determination within the Nicaraguan state has been one of the most widely publicized indigenous mobilizations of the last

decade, and its outcome is today the object of scholarly and political discussion. The Miskito Indians are an indigenous people living in the Atlantic Coast of Nicaragua. Official records state that they number approximately 54,000, while other sources estimate their number at 120,000. Other, much smaller ethnic groups live in the area, such as the Rama, the Garifuna and the Sumu. In view of the colonial and capitalist development of Nicaragua, there was not much contact between the Atlantic and the Pacific coast until 1979, when the Sandinista Revolution took place. Throughout the twentieth century, the Miskito region was controlled by American TNCs and the Protestant Moravian Church without much interference from the central government (in Somoza's hands since 1933). At first, and in line with their revolutionary ideology, the Sandinistas downplayed the ethnic component of social injustice in the Atlantic coast and saw the Miskitos' conditions, as with the conditions of Nicaraguans in general, as class-based and economically determined. Accordingly, in what was considered some years later a serious mistake,[195] the Sandinistas disregarded the Miskito organizations that already existed, and tried to replace them with Sandinist mass organizations. The confrontation between the government and the Miskitos broke out in 1981. Many Miskitos fled to Honduras and joined the contrarevolutionary movements, while the government decided to forcibly transfer ten thousand Miskitos living on the Honduras-Nicaragua border to new settlements located fifty kilometers south of the border. This "controversial decision" expressed a drastic incongruence between the progressive and liberating ideology of the Sandinistas and the reactionary, colonialist practice of forcible resettlement, justified rather unconvincingly by national security reasons. Confronted with international condemnation, and having also concluded that the Miskitos implicated in the counterrevolution had been manipulated or were simply aiding family members actually involved, in 1984 the Nicaraguan authorities radically changed their policies toward ethnic groups, acknowledging mistakes and actively seeking a reconciliation. A general amnesty for Miskitos imprisoned or in exile was declared, and negotiations on autonomy for the Atlantic coast were held from 1984 until 1986. In September 1987, the Nicaraguan National Assembly ratified the law of autonomy for the Atlantic regions, whereby Nicaragua became the first formal, multiethnic, multicultural nation in Latin America. The main points of the law were the following:[196]

1. The authorities must show unconditioned respect for the ethnic languages and the local culture.
2. The law guarantees local control over and the priority to the use of natural resources like land, forestry, mining and fishing.
3. Development projects must benefit the local population to a "just degree" through agreements made between the regional council and central government in Managua.
4. Local authorities are to be elected directly. Two regional councils in the North and South, respectively, consist of forty-five members for periods of four years. Each regional council elects a leader of the local government.

This law, which formalizes the right of Miskitos to self-determination, has been differently interpreted and evaluated, both within the indigenous communities and in international fora,[197] but it is generally agreed that the law has a potential for regional autonomy that far exceeds what ethnic groups in other parts of the world have achieved.[198] The electoral defeat of the Sandinistas in the 1990 elections, combined with the structural adjustment programs by Chamorro's government, have made the real impact of the autonomy law even more problematic. The political context of the law—the recognition of multiethnicity as a *means* to strengthen national unity around the revolution and Sandinism—has changed radically, and this will definitely reverberate in the substantive, if not the formal, application of the law.

The Miskito case has been described here as a very recent illustration of some of the contradictions of nation-building in multiethnic societies and the difficulties faced by indigenous peoples and ethnic minorities in their struggle for the right to self-determination. Such contradictions and difficulties, far from being specific of the Americas, are to be found under different contexts in many other parts of the world, notably in South Asia.[199] Indeed, South Asia reveals very clearly how the equation between nation and state served to justify ethnocratic rule in newly independent states, such as India, Pakistan and Sri Lanka. Often under apparently antagonistic legitimation principles (Islamic religion or, on the contrary, secularism and equal citizenship), and through a process of cajoling and coercing ethnic minorities, such states sought to convert "what was merely the political-cultural principle subscribed to by the ethnic majority into a universal principle for the nation as a whole."[200] With the case of India in mind, Sheth shows that market and citizenship are not good enough bases for establishing a nation-state in multiethnic societies, and so calls for new political forms, for "new relationships between the state and the society unmediated by the idea of a nation."[201] Considering that the nation-state is a political form that has contributed to too much ethnic conflict and ethnocratic development, Sheth does not hesitate to call for a "civil state" instead. Irrespective of its specific merits, this proposal signals the need for bolder political innovation well beyond the liberal paradigm, if the right of indigenous peoples and ethnic minorities to self-determination is to be fully recognized as the legal prerequisite for an autonomous and genuine political alternative to both integrationist and genocide policies (more on this in Section II.6).

Building Transnational Coalitions

The struggles of indigenous peoples for self-determination and, consequently, for infrastate, culturally autonomous, legal plurality are at the crossroads of such intense and contradictory processes of transnationalization that their conceptualization in this chapter as an instance of transnationalization of the legal field is fully justified. The case of the Huaorani people[202] epitomizes the complex web of transnationalization vectors involved in indigenous peoples' local struggles for land: on the one side, a TNC (Conoco Oil Co.) contracting with the national state with the accord of international financial institutions; on the other, the CONFENIAE (Confederation of Ecuadorian Indian Peoples), a national NGO that is also a member of a transnational NGO, the World Council of Indigenous Peoples, getting the collaboration of a transnational advocacy NGO, the Sierra Club, which, through the Sierra Club Legal Defense Fund, on June 1, 1990, submitted

a petition to the Inter-American Commission on Human Rights of the OAS on behalf of the Huaorani people. Commenting on the Declaration of Quito of July, 1990, which resulted from the largest gathering of indigenous peoples of North, Central and South America in modern times, Maivân Lâm stresses the expanded linkages and the improved organization of the indigenous political struggle in the Americas.[203] With roots in the nineteenth century (the Aborigines Protection Society was founded in 1837), the transnationalization of indigenous peoples' struggles has known an unprecedented impulse in the last two decades. According to Maivân Lâm:

> The ability to fight back, at least in the western hemisphere, owed something to the American and European protest movements of the 60s, in which some indigenous young peoples cut their political teeth, thereby providing indigenous communities with new leaders who, equipped with extensive contacts to the outside world, could facilitate the banding together of indigenous communities into larger political organizations, and simultaneously link these up with strategically placed non-indigenous NGOs.[204]

She then lists some of the transnational NGOs which, in the last decades, have taken up the defense of the indigenous peoples' rights, and integrated them in the progressive global political agenda: the International Working Group for Indigenous Affairs, Cultural Survival, Survival International, World Council of Indigenous Peoples, Comissão Pro-Indio, Consejo Indio de Sud America, Arctic Peoples' Conference, International Indian Treaty Council, Inuit Circumpolar Conference, West Papuan Peoples' Front, Karen National Union, Jumma Network in Europe, Indian Council of Indigenous and Tribal Peoples, Alliance of Taiwan Aborigines, National Federation of Indigenous Peoples of the Philippines, Lumad-Mindanao, Cordillera Peoples Alliance, Ainu Association of Hokkaido, Asia Indigenous Peoples Pact, Naga Peoples Movement for Human Rights, Homeland Mission 1950 for South Moluccas, Hmong People.[205] This incomplete list bears witness to the impressive transnational effort of the last decades to organize and mobilize the collective interests of indigenous peoples throughout the world. Moreover, part of this effort was the product of collaboration between indigenous NGOs and non-indigenous NGOs, such as the International Commission of Jurists, World Peace Council, World Council of Churches, Women's League for Peace and Freedom and the Fourth Bertrand Russell Tribunal. In Latin America, in the last three decades, the role of the Catholic Church in defense of indigenous peoples should also be mentioned. For instance, the Brazilian Conselho Indigenista Missionário, founded in 1971, has been very influential in denouncing ethnocidal policies (including those of missionization) and in facilitating the creation of leadership and organization among the indigenous peoples of Brazil.[206] It goes without saying that the transnationalization of the indigenous peoples' struggles was much helped by the information and mass communication revolution. The instant transmission of information and visual images across the globe has turned each one of us into an eyewitness of racial discrimination and ethnocide, thereby creating the contemporaneity of the noncontemporaneous, a new, layered synchronicity.

Learning From the South of the South[207]

The struggles of indigenous peoples and ethnic minorities in general for the right to self-determination are relevant in more than one account for the analysis of the transnationalization of the legal field undertaken in this chapter. I have described them as an instance of transnationalized, infrastate, legal plurality. Their relevance, however, extends far beyond the issue of transnationalization of the legal field, and I would like to mention here some of its broader dimensions. First, and as I have already indicated, the indigenous peoples' struggles bring to light the darkest side of modernity, the terror, oppression and destruction that was inflicted upon non-European peoples in order to pave the way for Western modernity. More than anything else, they symbolize the structural asymmetry between the European and the non-European routes to and through modernity. Second, they show the extent to which false equivalences among nationhood, ethnicity and statehood gave rise to ethnocratic states, false national states, and, in some cases, doubly false national states, which is what Varese calls the Latin American states in which the indigenous peoples are the majority of the population.[208] Finally, indigenous struggles for legal autonomy illustrate the extent to which conventional comparative law and conventional taxonomies of world legal families have ignored important and deep-rooted legal traditions and legal cultures governing the social life of millions of people throughout the world. Without understanding them as integral parts of legal pluralistic formations, not even the official laws themselves of the states with which they interact will be adequately grasped.

The dark-side relevance of indigenous peoples' struggles coexists with a bright-side relevance, which equally deserves to be mentioned. In the first two chapters, I have argued that, in order to build new emancipatory constellations in a period of paradigmatic transition, it is imperative to learn from the suppressed, marginalized traditions which, in most instances, are the traditions of suppressed or marginalized people. To use the metaphor of hierarchy in the world system, we have to learn from the South. What can we learn from the indigenous peoples who, in a sense, are the South of the South? To answer my question I suggest we consider three perspectives: neolaw, neocommunity and neostate. The prefix *neo* is meant to emphasize that we are not learning from the past "as it really happened," but rather from the past as it is being reinvented or reimagined by those entitled to it, the retrospect of the self-determined future they want to live in and pass on to their children.

Neolaw. The indigenous struggle for legality is a double struggle: it is the struggle for a collective right to create laws and rights. On the one hand, indigenous peoples demand, from both international law and national state law, recognition of their collective rights as peoples, above all the right to self-determination; on the other, according to autonomous indigenous law, the paramount substantive content of such right is self-government. At both levels, indigenous law transcends the legal form of the modern nation-state, and points to new local-transnational legal linkages. For different reasons, both levels of legality are structurally characterized by high rhetoric and low bureaucracy and violence. At both levels, normativity is argumentative and thick, whereas enforcement mechanisms are thin. First-level legality (international legal recognition) depends heavily, both for its

creation and enforcement, on public opinion and on the pressure exerted on governments and international organizations by transnational coalitions of indigenous and nonindigenous NGOs and social movements. Notwithstanding its extreme variation, second-level legality (the laws and customs within self-governed territories) tends to be informal, poor in bureaucratic and violent resources and rich in argumentative resources, bearing some structural similarities with Pasargada law. Both on account of the new local-transnational linkages they point to, and their legal style, centered on rhetoric, indigenous struggles for law enrich our views of the legal landscape, up until now so narrowly focused on the national frame of reference and on the bureaucracy-violence mix.

Neostate. I have already suggested that at the roots of the struggle of indigenous peoples for self-determination lies a radical critique of the nation-state. Such a critique is so radical, indeed, that the self-determination sought for does not contemplate the typical attributes of statehood, such as independence or sovereignty. By denouncing the social exclusion and political suppression brought about in the name of false, abstract equivalences between nation, state and law, the indigenous struggles open the ideological space for a radical revision of the vertical political obligation that underlies the liberal state, and call for new conceptions of sovereignty (dispersed, shared, polyphonic sovereignty). Far from being prestatist or premodern, the claim for collective rights and self-government points to postliberal or even postmodern state forms and political obligations, new noncorporatistic intermediations between citizens and state, and more equitable allocations of sameness and difference. In Tambiah's apt formulation, "the time of becoming the same is also the time of claiming to be different."[209] In the same line of reasoning, Varese also considers that "unity does not imply uniqueness. This is the civilizing requirement par excellence, recognizing multiplicity as the framework of knowledge and of existence and the interaction of the differences as the only appropriate environment for the construction of civilization."[210]

Neocommunity. The indigenous peoples' claim to self-determination comprises the claims to self-government and local autonomy, and control over land and its resources, that is to say, claims to sustainable community life. Underlying these claims, there is the idea of an horizontal political obligation analogous to that which, in Part One, I considered to be characteristic of the principle of the community. Together with the principle of the state and the principle of the market, the principle of the community, we recall, constitutes the pillar of regulation of the sociocultural project of modernity. It may seem absurd that the peoples most thoroughly victimized by modernity be converted, at the end of the twentieth century, into the guardians of one of the founding principles of modernity, indeed, the principle most neglected by the capitalist trajectory of modernity in the last two hundred years. It may also be argued that the community that the indigenous peoples struggled for is premodern or preRousseauian, since the political obligation upon which it is founded is ancestral and pregiven, and not the result of a social contract. Moreover, in a world of expanding deterritorialized social relations, an indigenous community seems anachronistic, with its hyperterritorial drive, its privileged anchorage in historical land and natural resources.

I would like to counterargue that, far from being a premodern relic, the community for which indigenous peoples are struggling is indeed a neocommunity, a complex constellation of social and political meaning, in which premodern, modern and postmodern elements are tightly intertwined. In point of fact, the past that grounds such a community is a contemporary noncontemporaneity, a social construction designed to transform a past of oppression into a future of dignity, for that purpose using skillfully and innovatively the discursive and political resources of modernity and postmodernity. Just think of the wide variety of forms of organization and mobilization emerging everywhere, from grassroots movements to transnational NGOs, from local rallies to the Quito Declaration, from the use of mass media to participation in UN and ILO commissions and working groups. Most importantly, the neocommunitarian character of the indigenous quest for community lies in the fact that it links the local with the transnational community, thus providing an illuminating synthesis of the dialectics of reterritorialization-deterritorialization, which, as I showed above, underlies the current processes of globalization. Such a dialectics is clearly seen to be at work in the way the territorial dimension of the indigenous community is symbolically constructed. To be sure, the territory is historical and physical, but the transnational coalition organized in its defense makes it intelligible both to the coalition itself and to public opinion in general, by transforming it into a symbolic or even mythic territory. Thus transformed, the hyperreal territory is integrated into a symbolic universe, where it easily relates to such mental territories of romantic modernity as the promised land, the lost paradise or the frontier, which are likely to capture the imagination and motivation of highly heterogeneous transnational coalitions and world public opinions. Thereby, a common ground is created, an imagined community, in which the territories of history cohere with the territories of the mind. Rather than an absurdity, it is probably mere cunning of historical reason if, as it withers away, modernity gets its last grain of truth or future precisely from those peoples whose truth and future it has savagely suppressed.

6. Cosmopolitanism and Human Rights

In the last two sections I dealt with oppressed social groups whose oppression is closely linked to processes of economic, social and political transnationalization. In the case of undocumented immigrants, refugees and asylum-seekers, vulnerability is expressed in the subordinate and forced character of their movements across national borders. They are made vulnerable both by the national and transnational factors that cause their moving, and by the effects of such moving in a world system structured by territorial sovereign states. In the case of indigenous peoples, the transnationalization of their oppression and suffering started very early, with the European expansion, and the genocide and colonial domination that came with it. Today, it is reenacted in new forms in the escalating competition among core countries for the control of and access to raw materials, combined with the pressure in many a peripheral and semiperipheral country to respond to the transnational imperatives of foreign debt and structural adjustment by further encroaching upon the ancestral territories and traditional livelihoods of indigenous peoples. In both cases, the prerogatives of territorial

sovereignty constitute a powerful obstacle to the development of a cosmopolitan legal field that might provide for the effective protection of these transnational Third Worlds of people. The creation of a transnational progressive coalition—more visible at present in the case of the indigenous peoples than in the case of international migrants and refugees—is required in order to overcome such obstacles.

In the current section, I broaden the scope of the inquiry to encompass subordinate classes and groups throughout the world. I mean victims of multiple forms of discrimination, privileged targets of massive violations of human rights, second- and third-class citizens or even pariahs, workers and peasants, women, ethnic and religious minorities, millions of undernourished and brutalized children, internally displaced people, gays and lesbians, sociological untouchables of all kinds. This is a very large social field, in which the social processes accounting for the forms of oppression, exploitation and domination are of the most diverse kind, some transnational, others local, some predominantly economic, others predominantly cultural, some centuries old, others very recent. Far from pretending to describe them all in detail, I am only concerned here with the emergence in the postwar period, and particularly in the last three decades, of a cosmopolitan legal culture that grew out of a transnational understanding of human suffering and the transnational constellation of progressive (legal, political, humanitarian) social actions devised to minimize it; it has gradually evolved into an international human rights regime supported by transnational coalitions of local, national and transnational nongovernmental organizations, which have been growing dramatically, in number, range and effectiveness in recent years.

The globalization of capitalist production; the enhanced competition of core countries and trading blocs for economic supremacy, and the increased inequalities between North and South associated with it; the hegemonic doctrines of national security, and the wars by proxy they have led to—all these factors have added, in the last two decades, new transnational dimensions to human suffering and social oppression; but they have also created the potential for the transnationalization of resistance. In a few instances, the link between the transnationalization of oppression and the transnationalization of resistance is very direct, as when workers working for the same TNC in different countries act together to formulate their grievances and organize their struggles. Or when environmental groups of different countries (for instance U.S. and Mexico) unite to fight against the same cross-border source of pollution (NAFTA's industrialization style). In most cases, however, the impact of specific transnational practices is less direct and networking of resistance much more difficult. Similar phenomena—be they massive violations of human rights, repression of workers' organizations, racial, ethnic and sexual discrimination, famine and starvation, destruction of the environment, civil or cross-border warfare—occur in different parts of the world system as a result of different combinations of local, national and transnational factors. Irreversible destruction of the environment may result from the transnationally induced and intensified integration of one region in the world economy (for example, the Amazon); attacks on workers' rights and organizations may be justified in the name of a hegemonic transnational ideology such as neoliberalism; civil or cross-border warfare may result from the confrontation between rival nationalisms exacerbated

by interference of a globally or regionally hegemonic state; massive violation of human rights may take place as part of a "temporary" trade-off (basic needs, equality, freedom trade-offs) with the development goals of economic growth and world competitiveness set by political elites. But in all these cases and in myriad similar ones, transnational factors operate in complementary or confrontational articulation with national and local factors. Social causation is thereby made opaque and controversial; the rivalry among subordinate classes or groups in different countries, however oppressed by basically the same general conditions, is provoked and exacerbated, and the transnationalization of resistance and emancipation becomes very difficult, if not impossible. In addition to this, the monopoly held by nation-states, as the only international political subjects, and the national basis of the "old" social movements (labor unions and political parties) should caution us against triumphalist predictions of cosmopolitan politics and cosmopolitan legal fields resulting from the global intensification of transnational practices, specifically from the new cross-border dimensions of human suffering and social oppression. The emergence of an international human rights regime in the last three decades is nonetheless remarkable, a regime based on the United Nations but with wide regional differences (Europe and Asia as two extremes), a regime, moreover, that has been contributing to the erosion of the monopoly of the states as international political subjects, challenging it through the growing strength of transnational advocacy NGOs and transnational networks of local and national NGOs devoted to the promotion of human rights on a world scale.

In this section, the international human rights regime will be critically analyzed and evaluated in light of the cosmopolitan legal culture I am envisaging, that is to say, as part of an emancipatory politics measuring up to the unprecedented challenges, risks and opportunities inhering in an increasingly globalized and interdependent but also increasingly unjust and eco-predatory world society. Bearing in mind the research agenda put forward in this chapter, I will concentrate on three major topics which, though deeply interconnected, must be dealt with separately. With reference to the three-layered comparative approach presented above, I will analyze: national sovereignty versus international human rights advocacy; universalism versus particularism in human rights conceptions; human rights and social development. Given the extreme complexity of each one of these topics, I will be highly restrictive as to the issues I select for analysis. At the end, I will present a few cosmopolitan policy orientations as they emerge from the analysis.

International Human Rights and National Sovereignty

The international human rights regime is built around three major documents and sets of standards: the Universal Declaration of Human Rights adopted on December 10, 1948; the International Covenant on Economic, Social and Cultural Rights opened for signature on December 19, 1966, entered into force on January 3, 1976; the International Covenant on Civil and Political Rights, opened for signature on December 19, 1966, entered into force on March 23, 1976. Together they comprise what Donnelly calls "the global human rights regime,"[211] a system of rules and implementation procedures centered on the United Nations, and whose main organs are the UN Commission on Human Rights and the Human Rights Committee. If we were to accept Chase-Dunn's[212] position that the capi-

talist world economy is integrated by political-military power and market interdependence, rather than by normative consensus, it might be difficult to explain the emergence in the postwar period of an international human rights regime, based on an international consensus on substantive norms with high moral voltage. It is true that, for almost a century, between the consolidation of the liberal states and World War II, human rights were largely viewed as the exclusive domain of the state, and that this situation could only change under the impulse of an exceedingly dramatic and atrocious violation of human rights, the Nazi horror, before which the democratic states had proved impotent.[213] Furthermore, in spite of strong moral and emotional demands for a new international interdependence in the area of human rights practices—turned into an extremely sensitive domain, with national violations becoming an undeniable international concern—the new global human rights regime started out as a rather weak regime in enforcement terms, and so it remains today. Strong declarations and promotional activities have not translated themselves into strong implementation and enforcement practices. In other words, implementation and enforcement of international human rights were designed as largely a matter of national state action. The undisputed supremacy of the principle of national sovereignty saved the states from the threats and embarrassment that might derive from too effective an international scrutiny over human rights practices. Implicit here was the idea that an effective promotion of human rights would be at odds with the proper functioning of the states system.[214] The obligation to safeguard human rights was not in itself a collective obligation, let alone the institutional machinery to guarantee its fulfillment. In both regards, the collective vision was rather weak; it did not go beyond "a politically weak moral interdependence," as Donnelly puts it, and implied no significant limitation on national sovereignty. "The result is a regime with extensive, coherent and widely accepted norms, but extremely limited international decision-making powers—that is, a strong promotional regime."[215]

This global human rights regime allows for internal differentiation across the interstate system. Three or four regional subregimes are usually identified and ranked as follows, by decreasing order of strength: the European, the Inter-American, the African and the Asian and Middle Eastern (lack of) regime.[216] A brief comment on each one of them: what distinguishes the *European regime*—established by the members of the Council of Europe in 1950—is not so much the substantive human rights normativity, but the very strong monitoring powers of the European Commission of Human Rights and the binding decision-making powers of the European Court of Human Rights. Complaints by individuals, groups of individuals, nongovernmental organizations or states alleging violations of human rights are reviewed by the European Commission, an independent body of experts. Whenever a friendly settlement cannot be reached, the case is referred to the European Court for binding enforcement action, which is completely accepted in practice by the participant states. The complex legal and political relationships between this European regime, which comprises twenty-six European states (as of July, 1993), and another, narrower European regime constituted by the European Community legal order and comprising twelve European states, do not concern me here.[217] Nor am I concerned with the relationships between either regime and the strong human rights component of the Conference on Security and Cooperation in Europe established by the Helsinki Final Act, signed on August 1, 1975 by representatives of thirty-five states, comprising thirty-two European states, plus the Soviet Union, the United States and Canada.[218] At this point I just want to emphasize two issues which, without questioning the overall strength of the European human rights regime when analyzed in comparative terms, nonetheless show some of its weaknesses, which are indeed bound to expand in the coming years. The first one, already touched upon in the section on refugees and non-Community immigrants, refers to the massive violations of human rights that may be in store for non-Community citizens, as the internal borders are eliminated and the external borders strengthened. Another dimension of this issue is the failure of the EC to define and comply with human rights criteria in decisions on foreign aid, international trade and restrictions on the international activities of European-based multinational corporations. The second issue relates to the net decline of human rights guarantees for European citizens as a side effect of the strengthening of the EC and specifically of the "1992" program, the internal market of the four forms of free circulation and what will follow from them. As Clapham suggests:

> the drive towards "1992" and the changes which will continue way beyond "1992" mean that people in the Community will be subjected to new controls, new technology, new transnational actors, new forms of work, and continuing racial and sexual discrimination. Without new rights and remedies, some individuals and groups could find the negative effects of integration outweighing the positive opportunities which it claims to offer.[219]

To the extent that it does not include the economic, social and cultural rights listed in the European Covenants, the *Inter-American regime* is substantively narrower than the European one. Similarly to the European regime, its main organs are the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights. In practice, however, the two institutions have been operating very differently from their European counterparts. The commission has no real enforcement powers and its activity (and inactivity) has been all along subordinated to the geopolitical interests of the dominant power in the regime, the United States. On the other hand, though it may issue legally binding judgments, until 1992 the court had handed down decisions on only two cases (one dealing with a disappearance in Honduras, the other dealing with military violence against two journalists in Peru).[220] More importantly, this regime suffers from a striking moral weakness, the fact that the hegemonic power, the United States, dominates the regime without being a party to the convention that has created it (the American Convention on Human Rights of 1969). In a tremendous show of hegemonic arrogance, the United States refuses to ratify the International Human Rights Covenants and other human rights treaties. Even more shocking is the fact that the United States holds other countries to international human rights standards and procedures that it refuses to allow to be applied to itself. A simple illustration: while the state department prepares an annual report on the human rights practices of most countries, the U.S. refuses to submit reports on its own practices to international monitoring bodies.[221]

As to the *African regime*, the African Charter on Human and Peoples' Rights was adopted by the Organization of African Unity in Nairobi in June, 1981. In terms of substantive normativity, this charter contains two major innovations: as the title of the charter itself indicates, to individual human rights it adds collective rights, as well as the right to development; it also introduces the concept of duty of individuals vis-à-vis the family, the community and the state. But the provisions that establish the African Commission on Human and Peoples' Rights are exceedingly vague, conferring on it no enforcement powers of any sort and only very modest investigatory powers, and there is no regional human rights court. Even as a declaratory regime, the African regime is rather weak, ridden by heated ideological confrontations.[222] For instance, the African Charter is often contrasted, in scholarly and political debates, with the Universal Declaration of the Rights of Peoples (known as the Algiers Declaration) adopted by a group of jurists, political scientists, sociologists, representatives of trade unions and political parties of various countries, as well as members of several liberation movements, at a meeting held in Algiers on July 4, 1976. While the African Charter has been praised by some for establishing a new and higher standard for human rights politics, the peoples' rights, others have condemned it for its authoritarianism and opportunism.[223] For Issa Shivji, "The Charter bears the birthmarks of essentially a neocolonialist statist disposition," while, on the contrary, the Algiers Declaration is truly revolutionary, people-centered, anti-imperialistic and inspired by a global reflection on the real conditions in which people are actually living.[224]

If outside Europe the international human rights regimes are recognizably weak, in *Asia* and *The Middle East* no regime exists at all. Though in both regions the human rights debate is widening and deepening, there are, among other reasons, important cultural barriers to the establishment of a human rights regime. Human rights are often viewed as an exotic, foreign, Western conception whose worldwide circulation is nothing but a manifestation of the overall cultural imperialism of the West (more on this below).

International regimes refer to international normative consensuses among nation-states and, as such, they raise two interrelated questions: the extent to which the normative consensus collapses whenever the overriding imperatives of national sovereignty are considered to be better served by the violation of human rights; and the extent to which the inherent statism of implementation and enforcement mechanisms stays in the way of the emergence of new international legal subjects with a more cosmopolitan orientation and a transnational advocacy of greater efficiency. The record of violations of human rights across the world system in the postwar period is a cruel comment on the human rights dominant discourse and a flat denial of the practical validity of international declarations on normative consensus. The optimist predictions in the last ten years of a brighter future for human rights, in the wake of democratic transition in many countries ruled by dictatorial regimes, peace negotiations among nations, political factions or ethnic groups involved in civil and cross-border wars for many years, and, finally, the collapse of the Communist bloc, may prove to be displaced and utterly wrong themselves. Comparisons among regions of the world system are not very enlightening, and may be even misleading, as we lack accepted transregional criteria to assess differences and construct rankings.[225] Suffice it to acknowledge the

disheartening fact that violations of human rights have been occurring everywhere. Just a brief overview.

Violations of human rights have been occurring in *Europe*, the region of the strongest international regime. Parmentier mentions the direct and indirect violations of human rights by the European states as reported both in the 1992 Amnesty International Report and in the 1992 Annual Report on Respect for Human Rights in the European Community.[226] According to these reports, the most salient type of direct (active) violations of civil and political rights are related to the treatment of citizens by police or paramilitary forces, political killings in Turkey and Northern Ireland, application of discriminatory legislation against linguistic and religious minorities, homosexuals and women, as well as promulgation of restrictive legislation against immigrants and asylum-seekers. Among indirect or passive violations of human rights there are justice delays, impunity, and failure to guarantee economic and social rights. Parmentier goes on to analyze two case studies involving massive violations of human rights in Europe: the emergency legislation in Northern Ireland, on the one hand, and the alarming growth of poverty as proof of widespread violation of economic and social rights with obvious repercussions in the exercise of civil and political rights, on the other.[227] Many other striking case studies of massive violations of human rights could be developed out of current nationalist retribution, ethnic domination, separatism and balkanization in former Soviet Union and Yugoslavia.

In the *Americas*, the last three decades were particularly tragic in terms of massive and often grotesque violations of human rights. Actually, in spite of the democratic transitions of the last decade, the perspectives for the near future are equally gloomy, in view of the general impoverishment of the region and the shocking growth of social inequality. In Latin and Central America, fragile political democracies (in some instances, no more than semidemocracies) have managed to put a halt to or at least reduce the brutality of politically motivated violations of some of the most fundamental human rights, such as the right to life and physical integrity. I have particularly in mind the torture inflicted on thousands and thousands of Brazilians, Chileans and Argentinians, the disappearance of more than ten thousand Argentinians, numberless extrajudicial executions in Guatemala, Haiti, El Salvador, Uruguay and so on.[228] But since these countries are now faced with the imminent failure to fulfill the most basic human needs of the large majority of the population (the right to food, shelter and health care), what happens is that different social and political processes again contribute, Sisyphus-like, to turning the people's right to life and physical integrity into an unfulfilled promise. The violence of parastate organizations in Colombia, the elimination of hundreds of opposition leaders in Mexico, mass killings of street children in Brazil, the violent "structural adjustment" in Venezuela and Peru, are some other dark sides of human rights practices in the subcontinent. Though North Americans like to believe that violations of human rights take place only to the South of them or, as Donnelly puts it, "in places that must be reached by crossing large bodies of saltwater,"[229] the truth of the matter is that police brutality, racial and sexual discrimination, homelessness, mass poverty and violence in the inner cities, health care crisis, obstruction to workers' unionization, arbitrary treatment of prisoners, asylum-seekers and undocumented immigrants, also constitute viola-

tions of human rights, even though they rarely find their way into international human rights reports.

In *Africa*, where, very early on, the Europeans set in motion massive violations of human rights through colonialism, slave trade, forced labor and apartheid, the historical and contemporary record of human rights violations is atrocious. Many examples contribute to the tragic portrait of the fate of human rights in Africa: the legal system of apartheid, up until very recently in force in South Africa; millions of undernourished and starving people; more internally and internationally displaced people than in any other continent, fleeing from hunger, drought, civil wars and ethnic persecutions; ethnic slaughters of the Acholi and Langi in Uganda, of Igbo Biafrans in Nigeria, of ethnic Somalis in Kenya, of Eritreans in Ethiopia, of Ewe in Ghana; ethnic and, in the last decade, also religious conflicts in Sudan, where the civilian populations of the South are regularly bombed by the government, the death toll from war or starvation exceeding half a million since 1988; the denial of self-determination to the Casamanceans; the bloody dictatorships of Idi Amin, Bokassa and Mobutu; the ethnic bloodshed in Rwanda; the civil wars in Angola and Mozambique, originally instigated by the superpowers and until recently fueled by South Africa.[230]

In the *Middle East*, the Palestinians and the Kurds have been the collective victims of the cruelest violations of human rights in the region.[231] In *Asia*, both ethnic and religious intolerance and/or dictatorial regimes have been at the roots of massive violations of human rights in India (starting with the Hindu caste system), Pakistan, Malaysia, Indonesia (with salience for the genocide of the Maubere people in East Timor), Sri Lanka (the persecution of the Tamil), Iran, Afghanistan, Bangladesh, the political repression in China, North and South Korea, Singapore, Burma, Thailand, the mass killings by the Pol Pot and so on.[232] It remains to be said that, in all these regions, there are other structural and more resilient violations of human rights, such as children's rights and, particularly in the Islamic regions, women's rights.

Even if one sticks to a conventional conception of human rights, as I did in the preceding survey, the global panorama of human rights practices is very sinister, and gives little room for optimism. In most instances, violation of human rights has its origin, directly or indirectly, actively or passively, in state actions or omissions that are justified as prerogatives of sovereignty, and in the name of state-defined national interests and national security objectives. Given the fact that, in the current interstate system, implementation and enforcement of international norms is largely left to the initiative and political will of the individual nation-states, the existence of international human rights regimes has proved disarmingly impotent to prevent or punish major violations of human rights. It could, however, be imagined that, in conjunction with the international community and international organizations, the hegemonic democratic states of the global or regional human rights regimes might feel compelled to play a decisive role in forcing or inducing the compliance with human rights norms by externally weaker states. But in reality, even if sometimes proclaimed in abstract, such a role has been performed in a most disappointing way, precisely because its performance has been subjected to the same overriding commitment to national sovereignty which we have found to be responsible for so much violation of human rights.

The truth is that hegemonic states have subordinated the international human rights advocacy to their geopolitical interests and objectives, defined in narrow national terms, with the result that recurrent and oftentimes shocking double standards continue to underline the moral weakness of official commitments to human rights. This is true of Europe, the United States and Japan, but particularly blatant in the case of the United States.

During the Cold War, the United States repeatedly denounced violations of civil and political rights in the Soviet bloc countries, while condoning or even encouraging violations of the same rights in "friendly countries"[233] (among the most grotesque cases: Duvalier in Haiti, Pinochet in Chile, Mobutu in Zaire, Marcos in the Philippines, Park in South Korea, the Shah in Iran, Stroessner in Paraguay, Somoza in Nicaragua). Even when, after 1975, the U.S. Congress linked foreign aid to human rights, the same overriding strategic interests continued to produce, to this day, otherwise unjustified double standards in Israel, Kenya, Egypt, Indonesia and so on. This duplicity reverberates in many policy areas, as witness the case of refugee policy and the different treatment given to asylum-seekers from Haiti or from Cuba. The same reasons preside over swift changes in policy vis-à-vis certain leaders or countries where no corresponding changes in human rights practices have occurred: just think of Saddam Hussein and Khomeini, or China and Syria. The United States has encouraged international violations of human rights, and then covered them up with outstanding geopolitical reasons aired worldwide by a friendly mass communication system.

Writing in 1981 about the manipulation of the human rights agenda in the United States in conjunction with the mass media, Richard Falk spoke of a "politics of invisibility" and of a "politics of supervisibility." As examples of the politics of invisibility, he spoke of the total blackout by the media on news about the tragic decimation of the East Timorese people (taking more than half a million lives) and the plight of the hundred million or so "untouchables" in India "who suffer a daily existence, by and large, that is quite as humiliating as that endured by black South Africans."[234] As examples of the politics of supervisibility, Falk mentioned the relish with which postrevolutionary abuses of human rights in Iran and Vietnam were reported in the U.S. And he concludes: "The poles of invisibility and supervisibility correlate closely with the American foreign policy imperatives of supporting certain repressive regimes and discouraging recourse to revolutionary politics. Human rights violations—keeping them hidden or magnifying their occurrence—became, then, part of the battle for the hearts and minds of Americans (and others)."[235] Actually, the same could largely be said of the European Community countries, the most poignant example being the silence that kept the genocide of the Maubere people in East Timor hidden from the Europeans throughout the decade, thereby facilitating the ongoing smooth and thriving international trade with Indonesia. Writing at the end of the seventies, Chomsky and Herman were even more radical in their critical assessment of the United States' international human rights record. According to them, the massive U.S. intervention in Latin America and Asia in the previous twenty-five years had been confined "almost exclusively to overthrowing reformers, democrats and radicals," rarely "destabilizing" right-wing military regimes, no matter how corrupt or terroristic they might have been. Their scathing conclusion was that "for most

of the sample countries, U.S.-controlled aid has been positively related to investment climate and inversely related to the maintenance of a democratic order and human rights."[236]

According to Donnelly, most of the structural factors that accounted for unimpeded or even promoted violations of international human rights during the Cold War continue in the post-Cold War period, and for that reason the impediments to establishing effective international human rights policies remain essentially unchanged.[237] Among such impediments there looms large a state-centered, sovereignty-based conception of international order, and the consequent absence of transnational enforcement capabilities. As the international regime depends largely on voluntary patterns of compliance, considerations of self-interest as perceived by the nation-states will continue to be the key factor. Enhanced competition for markets and for production niches in the current global restructuring of capital accumulation is likely to fragment the conceptions of national self-interest even further, and augment the political aggressiveness that defends them against competing states. The formation and consolidation of regional trading blocs, and mounting global competition among them, are likely to justify new trade-offs between commercial advantages and human rights issues, not only within the periphery but also within the core countries of each of the blocs. Under such circumstances, the continuation of a statist logic in the field of human rights will represent a growing impediment to an efficient and morally decent international human rights policy. This impediment will be mostly linked, from now on, to a double process. On the one hand, further colonization of conceptions of national interest and security by the imperatives of the globalization of the economy according to the market-friendly development model will enhance the vulnerability of those human rights issues that might collide with such imperatives; therefore, national states will be expedient in invoking and strengthening the prerogatives of political sovereignty to justify human rights violations (which, indeed, both mirror and occult the weakening of economic sovereignty). On the other hand, the globalization of the economy is engendering global economic actors with tremendous economic and political clout. Because of their private character, these economic actors can commit massive violations of human rights with total impunity in different parts of the world, taking advantage of market-friendly expanded freedoms of movement and action in and out of the regional trading blocs. Because such actors are at the core of the loss in economic national sovereignty, their actions, no matter how offensive to human rights, are unlikely to collide with consideration of national interest or security that might otherwise prompt the corrective or punitive intervention of the state.

Once prisoner of a transnational capitalist order which, as a principle of social regulation, reorganizes in terms of global regulation what it disorganizes in terms of national deregulation, the statist logic must be transcended, if social emancipation is to be reinvented so as to measure up to the new authoritarianism of transnationally organized social regulation. To the extent that human rights belong to emancipatory agendas—though the fact that they have often been appropriated by regulatory agendas must not be neglected—they themselves must be reinvented. To transcend the statist logic is, however, not enough. Above all, it is necessary to determine the direction of such transcendence and the political and

analytical tools it calls for. In the following I will be engaged in such a task. My major concerns are the question of the problematic universality of human rights and the structural obstacles that the unequal exchanges in the world system pose to a radical emancipatory politics of human rights.

Universalism Versus Cosmopolitanism?

Concrete violations of human rights or objections to human rights discourse are often justified by nation-states on grounds of national interest, national security and noninterference, as well as cultural specificity and development trade-offs. The first three grounds fall under the principle of sovereignty, already dealt with in the previous section. In the following sections I will concentrate on the last two grounds, the first one having a predominantly political-cultural profile, the other a predominantly political-economic profile.

One of the most heated human rights debates is whether human rights are a universal or rather a Western concept and, concomitantly, whether they are universally valid or not. Though closely related, these two questions are nonetheless autonomous. The first one deals with the historical and cultural origins of the concept of human rights, the second one with their validity claims at a given point in history. The genesis of a moral claim may condition its validity, but it certainly does not determine it. The Western origin of human rights may be made congruent with their universality if, hypothetically, at a given point in history they are universally accepted as ideal standards of political and moral life. The two questions are, however, interrelated, because the mobilizing energy that can be generated to make the acceptance of human rights concrete and effective depends, in part, upon the cultural identification with the presuppositions that ground human rights as a moral claim. From a sociological and political perspective, the elucidation of this linkage is by far more important than the abstract discussion of either the question of cultural anchorage or of philosophical validity. For this reason I will only review this discussion to the extent that it illuminates the sociological and political perspectives that concern me here.

Are human rights universal, a cultural invariant, that is to say, part of a global culture? I would suggest that the only transcultural fact is that all cultures are relative. Cultural relativity also means cultural diversity and incompleteness. From the (relative) point of view of a given culture, diversity is both experienced and denied as hierarchical differentiation, whereas incompleteness is both experienced and denied as a specific aspiration to completeness. Cultural relativity means, therefore, that all cultures tend to define as universal the values that they consider ultimate. What is highest is also most widespread. Thus, the specific question about the conditions of universality in a given culture is itself not universal. The question about the universality of human rights is a Western cultural question. Hence, human rights are universal only when they are viewed from a Western standpoint. The extent to which this standpoint can be shared, rejected, appropriated or modified by other cultures depends on the cross-cultural dialogues made possible by the concrete political and sociological power relations among the different countries involved. Because the question of universality is the answer to an aspiration of completeness, and because each culture "situates" such an aspiration around ultimate values and universal validity, different aspirations to

different ultimate values in different cultures will lead to isomorphic concerns which, given the adequate hermeneutical procedures, may become mutually intelligible and mutually translatable. At best it is even possible to achieve a mixture and interpenetration of concerns and concepts. The more equal power relations among cultures are, the more probable it is that such *mestizaje* might occur. A balanced cross-cultural *mestizaje* of concerns and concepts is the multicultural correspondent of single-culture universality (more on this below).

We may then conclude that, once posed, the question of universality betrays the universality of what it questions, no matter what the answer may be. Other strategies to establish the universality of human rights have, however, been designed. For instance, human rights can be conceived as a cultural invariant whose universality derives from the universe of their application. Even so are they conceived by authors for whom human rights are universal because they are held by all human beings as human beings.[238] This line of thought begs the question by dislocating its object. Since human beings do not hold human rights because they are beings—most beings do not hold rights—but because they are human, the universality of human nature becomes the unanswered question that makes possible the fictive answer to the question of the universality of human rights. There is no culturally invariant concept of human nature. Another possible way of establishing the universality of human rights might be through the concept of global culture, but I already expressed my reservations against this concept in this chapter, and so I will not pursue this line here.

The concept of human rights lies on a well-known set of presuppositions, all of which are distinctly Western,[239] namely: there is a universal human nature that can be known by rational means; human nature is essentially different from and higher than the rest of reality; the individual has an absolute and irreducible dignity that must be defended against society or the state; the autonomy of the individual requires that society be organized in a nonhierarchical way, as a sum of free individuals. Since all these presuppositions are clearly Western and liberal, and easily distinguishable from other conceptions of human dignity in other cultures, one might ask why the question of the universality of human rights has become so hotly debated, why, in other words, the sociological universality of this question has outgrown its philosophical universality. In my judgment, the answer must be sought in the historical trajectory of Western modernity after it merged with world capitalist development from the nineteenth century onwards. I argued in Part One that the paradigm of modernity in Europe evolved from the sixteenth century onwards with wide-ranging revolutionary, regulatory and emancipatory claims, which were to be tailored to the needs of capitalist development only in the nineteenth century; I also noted that the consolidation of the liberal state played a decisive role in this political process. The asymmetry between the Western passage into modernity and all the others (the New Worlds, the colonial gate and the externally induced modernization) lies in the fact that all the others took place under the aegis of Western capitalism, and were similarly molded by the economic, cultural and political imperatives of the West. The regulatory and emancipatory claims of modernity, already tailored to fit capitalism in the West, were further retailored to fit Western capitalism as a global endeavor, that is to say, as imperialism. Like any other dimension of Western modernity, human rights were "universalized" by successive processes of tailoring and retailoring. Within the analytical framework I am adopting in this chapter, I would suggest that human rights have been universalized as a globalized Western localism. If we look at the history of human rights in the postwar period, it is not difficult to conclude that human rights policies, by and large, have been at the service of the economic and geopolitical interests of the hegemonic capitalist states. In the previous section, I showed how the generous and seductive discourse on human rights has allowed for unspeakable violations, and how such violations have been evaluated and dealt with according to revolting double standards. But the Western mark in the dominant human rights discourse could be traced in many other instances: in the Universal Declaration of 1948, which was drafted without the participation of the majority of the peoples of the world; in the exclusive recognition of individual rights, with the exception of the collective right to self-determination which, however, was only applied to the peoples subjected to European colonialism and organized in colonial states; in the priority given to civil and political rights over economic, social and cultural rights; and in the recognition of the right to property as the first and, for many years, the sole economic right.

But this is not the whole history. Throughout the world, millions of people and thousands of nongovernmental organizations have been struggling for human rights, often at great risk, in defense of oppressed social classes and groups that in many instances have been victimized by authoritarian capitalistic states. The political agendas of such struggles are usually either explicitly or implicitly anticapitalist. A counterhegemonic human rights discourse and practice has been developing, non-Western conceptions of human rights have been proposed, cross-cultural dialogues on human rights have been organized. Furthermore, Western modernity has unfolded into two highly divergent conceptions and practices of human rights—the liberal and the Marxist—and both of them, far from being monolithic, have given rise to very distinct human rights policies socially sustained by very different classes and social groups.[240] In sum, alongside the dominant discourse and practice of human rights conceived as a globalized Western localism, a counterhegemonic discourse and practice of human rights conceived as a cosmopolitan politics has been developing. The central task of emancipatory politics of our time, in this domain, consists in transforming the conceptualization and practice of human rights from a globalized localism into a cosmopolitan project.

What are the conditions for such a transformation? First of all, it is imperative to transcend the debate on universalism and cultural relativism. The debate is an inherently false debate, whose polar concepts are both and equally detrimental to an emancipatory conception of human rights. All cultures are relative, but cultural relativism, as a philosophical posture, is wrong. All cultures aspire genuinely to ultimate, universal concerns and values, but cultural universalism, as a philosophical posture, is wrong. Against universalism, we must propose cross-cultural dialogues on isomorphic concerns. Against relativism, we must develop cross-cultural procedural criteria to distinguish progressive politics from regressive politics, empowerment from disempowerment, emancipation from regulation. Neither universalism nor relativism must be argued for, but rather cosmopolitanism, that is to say, the globalization of moral and political concerns with and

struggles against social oppression and human suffering. To the extent that the debate sparked by human rights might evolve into a competitive dialogue among different cultures on principles of human dignity and social emancipation, it is imperative that such competition induce cross-cultural dialogues and transnational coalitions to race to the top rather than to the bottom (What are the absolute minimum standards? The most basic human rights? The lowest common denominators?). The often voiced cautionary comment against overloading human rights politics with new, more advanced rights or with different and broader conceptions of human rights,[241] is a latter-day manifestation of the reduction of the emancipatory claims of modernity to the low degree of emancipation made possible or tolerated by world capitalism.

Taking into account the incompleteness of each culture, a cross-cultural, *mestiza* conception of human rights is called for, implying that all cultures are problematic vis-à-vis human rights. In one way or another, to a lesser or greater extent, all cultures suffer from some fundamental weakness vis-à-vis a cosmopolitan politics of human rights. The cross-cultural dialogue is premised upon the reciprocal recognition of such weaknesses, its overall *telos* being their elimination. How is such a dialogue to be built? Some of its sociological and political conditions will be briefly mentioned below. At this juncture, I am concerned with some of its epistemological conditions. The new new rhetoric put forward in Chapter One is called to task here. Discursive tolerance, readiness to incorporate alternative knowledges, preference for suppressed and marginalized knowledges, as well as for the hermeneutical circles, of victims and oppressed peoples, are some of the epistemological features of the dialogic rhetoric that are crucial to entertain, and indeed to build the will to entertain, a cross-cultural dialogue. But this is only a starting point. In the case of a cross-cultural dialogue, the exchange is not only between different knowledges, but also between different cultures, that is to say, between different and, in a strong sense, incommensurable universes of meaning. Strong *topoi* within a given culture become highly vulnerable and problematic whenever used as premises of argumentation in a different culture. The best that can happen to them is to be moved "down" from premises of argumentation into arguments, but they can also be excluded from the argumentation altogether. To understand a given culture from another culture's *topoi* may thus prove to be very difficult, if not at all impossible. I shall therefore propose a *diatopical hermeneutics*.[242]

Diatopical hermeneutics is based on the idea that the *topoi* of an individual culture, no matter how strong they may be, are as incomplete as the culture itself. Such incompleteness is not visible from inside the culture itself, since aspiration to the universal induces taking *pars pro toto*. Incompleteness in a given culture must be assessed from another culture's *topoi*. More than as an inadequate answer to a given problem, cultural incompleteness manifests itself as an inadequate formulation of the problem itself. The objective of diatopical hermeneutics is, therefore, not to achieve completeness—which is admittedly an unachievable goal—but, on the contrary, to raise the consciousness of reciprocal incompleteness to its maximum possible by engaging in the dialogue, as it were, with one foot in one culture and the other in another. Herein its *diatopical* character. To give an example: a diatopical hermeneutics can be conducted between the *topos* of human rights in Western culture and the *topos* of *dharma* in Hindu culture. According to Panikkar, *dharma*:

> is that which maintains, gives cohesion and thus strength to any given thing, to reality, and ultimately to the three worlds (*triloka*). Justice keeps human relations together; morality keeps oneself in harmony; law is the binding principle for human relations; religion is what maintains the universe in existence; destiny is that which links us with our future; truth is the internal cohesion of a thing. . . . Now a world in which the notion of *Dharma* is central and nearly all-pervasive is not concerned with finding the "right" of one individual against another or of the individual vis-à-vis society but rather with assaying the *dharmic* (right, true, consistent) or *adharmic* character of a thing or an action within the entire theantropocosmic complex of reality.[243]

Seen from the *topos* of *dharma*, human rights are incomplete, in that they fail to establish the link between the part (the individual) and the whole (reality), or, even more strongly, in that they focus on what is merely derivative, on rights, rather than on the primordial imperative, the duty of individuals to find their place in the order of the entire society, and of the entire cosmos. Seen from the *topos* of human rights, *dharma* is also incomplete, due to its strong undialectical bias in favor of harmony, thereby eventually occulting injustices and totally neglecting the value of conflict as a way toward a richer harmony. Moreover, *dharma* is unconcerned with the principles of democratic order, with freedom and autonomy, and it neglects the fact that, without primordial rights, the individual is too fragile an entity to avoid being run over by whatever transcends him or her.

At another conceptual level, the same diatopical hermeneutics can be attempted between the *topos* of the individual and the *topos* of *umma* in Islamic culture. The passages in the Qur'an in which the word *umma* occurs are so varied that its meaning cannot be rigidly defined. This much, however, seems to be certain: it always refers to ethnical, linguistic or religious bodies of people who are the objects of the divine plan of salvation. As the prophetic activity of Muhammad progressed, the religious foundations of *umma* became increasingly apparent, and consequently the *umma* of the Arabs was transformed into an *umma* of the Muslims. Seen from the *topos* of *umma*, the incompleteness of the individual lies in the fact that, on his basis alone, it is impossible to ground the collective linkages and solidarities without which no society can survive, and much less flourish. Conversely, from the *topos* of the individual, *umma*, like *dharma*, overemphasizes duties to the detriment of rights and, for that reason, is bound to condone otherwise abhorrent inequalities, such as the inequality between men and women and between Muslims and non-Muslims. As unveiled by this diatopical hermeneutics, the fundamental weakness of Western culture consists in dichotomizing too strictly between the individual and society, thus becoming vulnerable to possessive individualism, narcissism, alienation and anomie. On the other hand, the fundamental weakness of Hindu and Islamic culture consists in that they both fail to recognize that human suffering has an irreducible individual

dimension, which can only be adequately addressed in a society not hierarchically organized. Since they are based on very different ontologies, the weaknesses of these two cultures manifest themselves differently, for instance, in the Hindu caste system in one case, and in the Islamic inequality between men and women and between Muslims and non-Muslims, in the other.

The recognition of reciprocal incompleteness and weaknesses is a *conditio sine qua non* of a cross-cultural dialogue. Diatopical hermeneutics builds both on local identification of incompleteness and weakness and on its translocal intelligibility. But why should cultures be interested in cross-cultural dialogue? Diatopical hermeneutics does not occur in a social void; rather, as a specific kind of new new rhetoric, it shares with the latter a political bias in favor of emancipation. This will be further explained as I touch upon the other conditions for the transformation of human rights from a globalized localism into a cosmopolitan project.

Cultural Embeddedness and Cosmopolitanism

It may be contended that in a world in which ever more cultural processes are being globalized, diatopical hermeneutics rings like an anachronistic epistemology. My counterargument is twofold. First of all, I have already said that much of what presents itself as global culture is, in reality, a globalized localism, a cultural process whereby a hegemonic local culture cannibalizes and digests other subordinated cultures. The new wave of "law and modernization" throughout the peripheral and semiperipheral world, as the integration of these regions in the world capitalist economy widens and deepens, is a good manifestation of this phenomenon. The resistance of the different legal cultures varies, but, aside from other political factors, it is likely to be higher in areas that touch upon ideals of morality and good conduct, human dignity and good life, as is the case of human rights. In this and similar legal areas, the cannibalization of the local cultures may lead to a whole range of "deviant" results, such as: the opportunistic adoption of human rights policies to please foreign hegemonic powers or international agencies; extremely low and highly selective patterns of human rights enforcement; cultural distance and social apathy before violations of human rights, and the consequent difficulty in organizing social struggles and building coalitions to fight such violations and to bring about the punishment of violators.

In the area of human rights and dignity, the mobilization of social support for the emancipatory claims they potentially contain is only achievable if such claims have been appropriated in the local cultural context.[244] Appropriation, in this sense, cannot be obtained through cultural cannibalization. It requires cross-cultural dialogue and diatopical hermeneutics. A fascinating example of this in the field of human rights is offered by Abdullahi Ahmed An-na'im. There is a long-standing debate on the relationships between Islamism and human rights and the possibility of an Islamic conception of human rights.[245] This debate covers a wide range of positions, and its impact reaches far beyond the wide Islamic world.[246] Running the risk of excessive simplication, two extreme positions can be identified in this debate.[247] One, absolutist or fundamentalist, is held by those for whom the religious legal system of Islam, the Shari'a, must be fully applied as the law of the Islamic state. According to this position, there are irreconcilable inconsistencies between the Shari'a and the international human rights, but the Shari'a must prevail. For instance, regarding the status of non-Muslims, the Shari'a dictates the creation of a state for Muslims as the sole citizens, non-Muslims having no political rights; peace between Muslims and non-Muslims is always problematic, and confrontation may be unavoidable. Concerning women, there is no question of equality; the Shari'a commands the segregation of women and, according to some more strict interpretations, even excludes them from public life altogether. At the other extreme, there are the secularists or the modernists, who believe that Muslims should organize themselves in secular states. Islam is a religious and spiritual movement, not a political one and, as such, modern Muslim societies are free to organize their government in whatever manner they deem fit and appropriate to the circumstances. The acceptance of international human rights is a matter of political decision unencumbered by religious considerations. Just one example, among many: a Tunisian law of 1956 prohibited polygamy altogether on the grounds that it was no longer acceptable and that the Qur'anic requirement of justice among co-wives was impossible for any man, except the Prophet, to achieve in practice.

An-na'im criticizes both extreme positions in the many different versions they have assumed in the history of Islam. Against secularism, he argues:

> Unless one is advocating the abandonment of Islam itself, Shari'a will continue to be extremely important in shaping the attitudes and behavior of Muslims even if it is not the public law of the land. So long as the Muslim population continues to associate its religious beliefs with the historical Shari'a at the psychological and private levels, Shari'a will have a strong impact on the nature and policies of the state.[248]

Real secularism, An-na'im further opines, is unlikely to receive broad and lasting support in the Muslim world and, in view of recent developments, is indeed increasingly on the defensive and actually receding.[249] On the other hand, against the absolutists he holds that the adoption of the Shari'a as the law of the state in countries such as Iran, Pakistan and Sudan has created more problems than it has solved. The Shari'a has been proposed as a miraculous cure for all the ills of Muslim societies, but it is in fact a manipulation of the sentiments of the masses to protect vested interests and justify highly unjust societies. Furthermore, the implementation of historical Shari'a in areas of conflict with universal standards of human rights implies that Muslims cannot exercise their right to self-determination without violating the rights of others.

The *via per mezzo* proposed by An-na'im aims at establishing a cross-cultural foundation for human rights, identifying the areas of conflict between Shari'a and "universal standards of human rights," and seeking a reconciliation and positive relationship between the two systems.[250] This is a difficult task, because each religious and cultural tradition has its own internal frame of reference and derives the validity of its precepts and norms from its own sources. In order to overcome the hostility thereby developing among cultures, it is imperative to find one common cross-cultural principle, shared by all the major cultural traditions, which, if construed in an enlightened manner, may be capable of sustaining universal standards

of human rights. An-na'im sees such a golden rule in the principle of reciprocity, according to which "universal human rights are those which a cultural tradition would claim for its own members and must therefore concede to members of other traditions if it is to expect reciprocal treatment from the others."[251] For example, the problem with historical Shari'a is that it excludes women and non-Muslims from the application of this principle. Thus, a reform or reconstruction of Shari'a is needed, which must satisfy two conditions if it is to be effective in changing Muslim attitudes and policies: first, constructing the other person in such a way as to encompass all human beings, regardless of gender, religion, race or language, must be valid and credible from the Islamic point of view also; second, other cultural and religious traditions must undertake a similar process of enlightened construction.[252]

The method proposed for such "Islamic reformation" is based on an evolutionary approach to Islamic sources that looks into the specific historical context within which Shari'a was created out of the original sources of Islam by the founding jurists of the eighth and ninth centuries. In the light of such a context, a restricted construction of the other was probably justified. But this is no longer so. On the contrary, in the present different context there is, within Islam, full justification for a more enlightened view. Following the teachings of *Ustadh* Mahmoud, An-na'im shows that a close examination of the content of the Qur'an and Sunna reveals two levels or stages of the message of Islam, one of the earlier Mecca period and the other of the subsequent Medina stage. The earlier message of Mecca is the eternal and fundamental message of Islam, and it emphasizes the inherent dignity of all human beings, regardless of gender, religious belief or race. Under the historical conditions of the seventh century (the Medina stage) this message was considered too advanced, was suspended, and its implementation postponed until appropriate circumstances would emerge in the future. The time and context, says An-na'im, are now ripe for it.

Far be it for me to evaluate the specific validity of this proposal within Islamic culture. What I find remarkable about it is the attempt to transform the Western conception of human rights into a cross-cultural one that vindicates Islamic legitimacy rather than relinquishing it. In abstract and from the outside, it is difficult to judge whether a religious or a secularist approach is more likely to succeed in an Islamic-based cross-cultural dialogue on human rights. However, bearing in mind that Western human rights are the expression of a profound, albeit incomplete, process of secularization which is not comparable to anything in Islamic culture, I would be inclined to suggest that, in the Muslim context, the mobilizing energy needed for a cosmopolitan project of human rights will be more easily generated within a religious framework. If so, An-na'im's approach is very promising. But its relevance is more general, in that it is a true *exemplar* of diatopical hermeneutics, albeit conducted with unequal consistency. In my view, An-na'im accepts the idea of universal human rights too readily and acritically. Besides, although he conditions the success of his cross-cultural project to a symmetrical reconstruction of rights on the part of the other cultures with which Islam entertains dialogue, in actual fact he does not go very far in relation to the Western conception of human rights. Furthermore, even though he subscribes to an evolutionary approach and is quite attentive to the historical context of Islamic traditions, An-na'im becomes surprisingly ahistorical and naïvely universalist as far as the Universal Declaration goes. But he should not be heavily charged on this account. Diatopical hermeneutics is not a task for a single person writing within a single culture. It requires not only a different kind of knowledge, but also a different process of knowledge creation. It requires a production of knowledge that must be collective, interactive, intersubjective and networked.

Cultural Imperialism and the Possibility of Counterhegemony

An idealistic conception of cross-cultural dialogue will easily forget that such a dialogue is only made possible by the temporary simultaneity of two different contemporaneities. The partners in the dialogue are contemporaneous; but so are each of them and the historical tradition of their respective cultures that brings them *now* together into dialogue. The latter form of contemporaneity tends to subvert or obstruct the former, whenever to be contemporaneous with one's past implies the denial of the other as being entitled to be contemporaneous with a past of his/her own. This is most likely the case when the different cultures involved in the dialogue share a past of interlocked unequal exchanges. What are the possibilities for a cross-cultural dialogue when one of the cultures *in presence* has itself been molded by massive and long-lasting violations of human rights perpetrated in the name of the other culture? When cultures share such a past, the present they share at the moment of starting the dialogue is at best a *quid pro quo* and at worst a fraud. The cultural dilemma is the following: since in the past the dominant culture rendered unpronounceable some of the aspirations of the subordinate culture to human dignity, is it now possible to pronounce them in the cross-cultural dialogue without thereby further justifying and even reinforcing their unpronounceability?

Cultural imperialism and epistemicide are part of the historical trajectory of Western modernity. After centuries of unequal cultural exchanges, is equal treatment of cultures fair? Is it necessary to render some aspirations of Western culture unpronounceable in order to make room for the pronounceability of other aspirations of other cultures? Paradoxically—and contrary to hegemonic discourse—it is precisely in the field of human rights that Western culture must learn from the South, if the false universality that it attributed to human rights in the imperial context is to be converted into the new universality of cosmopolitanism in a cross-cultural dialogue.

Learning from the South is only a starting point, and it may actually be a false starting point if it is not borne in mind that the North has been actively unlearning the South all along. As Said has frequently pointed out, the imperial context brutalizes both the victim and the victimizer, and induces in the dominant as well as in the dominated culture "not just assent and loyalty but an unusually rarified sense of the sources from which the culture really springs and in what complicating circumstances its monuments derive."[253] Monuments have, indeed, messy origins. Viewing the pyramids, Ali Shariati observed once:

> I felt so much hatred toward the great monuments of civilization which throughout history were praised upon the bones of my predecessors! My predecessors also built the great wall of China. Those who could not carry the loads were crushed under the heavy stones

> and put into the walls with the stones. This was how all the great monuments of civilization were constructed—at the expense of the flesh and blood of my predecessors.[254]

In my view, the same could be said about human rights as one of the greatest monuments of Western civilization. The clean, clear-cut, ahistorical formulations to which they have lent themselves hide their messy origins, ranging from the genocides of European expansion, to the Thermidor and the Holocaust. But this rarification of cultures occurs in the subordinate cultures as well, as Said has shown:

> Young Arabs and Muslims today are taught to venerate the classics of their religion and thought, not to be critical, not to view what they read of, say, Abbasid or *nahda* literature as alloyed with all kinds of political contests. Only very occasionally does a critic and a poet like Adonis, the brilliant contemporary Syrian writer, come along and say openly that readings of *turath* in the Arab world today enforce a rigid authoritarianism and literalism which have the effect of killing the spirit and obliterating criticism.[255]

To recognize the reciprocal impoverishment of victim and victimizer alike, however asymmetrical, is the most basic condition for a cross-cultural dialogue.[256] Only the knowledge of history permits us to act independently of history. Scrutiny into the relationships between victim and victimizer cautions us against too strict distinctions among cultures, a caution that is particularly relevant in the case of the dominant culture. According to Pieterse, Western culture is neither what it seems, nor what Westerners tend to think it is: "What is held to be European culture or civilization is genealogically not necessarily or strictly European."[257] It is a cultural synthesis of many elements and currents, many of them non-European. Bernal has recently undertaken a deconstruction of the concepts of "classical civilization" to show its non-European foundations, the contributions of Egypt and Africa, Semitic and Phoenecian civilizations, Mesopotamia and Persia, India and China, regarding language, art, knowledge, religion and material culture. He also shows how these Afro-Asiatic roots of Ancient Greece were denied by nineteenth-century European racism and anti-Semitism.[258]

In line with this inquiry, the messy origins of human rights, as a monument of Western culture, can be seen not only in the imperial and domestic domination they once justified, but also in their original composite character as cultural artifacts. The presuppositions of human rights, which were indicated above in their clear-cut, Enlightenment, rational formulations, echo vibrations of other cultures and their historical roots reach far beyond Europe. The cross-cultural dialogue must start from the assumption that cultures have always been cross-cultural; but also with the understanding that exchanges and interpenetrations have always been very unequal and inherently hostile to the cosmopolitan dialogue that is here being argued for. Ultimately, the question is whether it is possible to construct a postimperial conception of human rights. Put differently, the question is whether the vocabulary or the script of human rights is so crowded with hegemonic meanings as to exclude the possibility of counterhegemonic meanings. Although I am fully aware of the almost insurmountable barriers, I give a positive answer to my basic question. In the following I try to specify the conditions under which the possibility of counterhegemony can be actualized.

Human Rights as an Emancipatory Script

The history of human rights is complex and contradictory. Its imperial dimension, decisive as it may be, is not exclusive. In the European context, human rights were at the core of the emancipatory developments of modern law analyzed in Chapter Two, from the reception of Roman law, to rationalist natural law and the theories of the social contract. Conceptually, therefore, human rights symbolize the highest emancipatory consciousness of modern law and politics, and are inherently utopian. They were culturally constructed at a moment in which law was at the core of the conversation of humankind, and they reinforced and expanded that position by being themselves at the core of the emancipatory dimension of modern law. However, the fact that their historical deployment in political practice is tainted with blood illustrates cogently the dialectics of regulation and emancipation in the paradigm of modernity. Any cursory analysis of human rights across generations will show beyond any doubt that they were put at the service of the regulatory needs of the state. But they were also the framework for the progressive politics of the popular classes, whose struggles in fact contributed greatly toward all the major advances in human rights politics. Being an inherently contested terrain, human rights were not monolithically conceived; on the contrary, within the European context there were many different conceptions fighting for hegemony, namely the liberal and the socialist, the reformist and the revolutionary conceptions.

The consolidation of the liberal state from the mid-nineteenth century onwards brought a renewed cogency to the idea of human rights, in that they were conceived then as a weapon against the state, to keep it under democratic control and prevent the authoritarian hubris. This dimension of human rights struggles has since prevailed. The gradual incorporation of human rights policies within state action was part of a broader political process of social incorporation. Such a process was, however, highly ambivalent because, due to the conversion of modern law into a monopoly of the state, the rights against the state were granted by the state itself. When the so-called second generation of human rights (economic and social rights) entered the political agenda, since the implementation of such rights depended on the positive action of the state, the ambivalence of the process became even more apparent. The oppositional strength of human rights struggles was thus tailored to fit the boundaries and capabilities of state action. But, at any given moment, the performance of regulatory functions by human rights policies was but the crystallization of a conflict with the oppositional, progressive struggles of the popular classes struggling for the effective enforcement of existing rights, expansion of the reciprocity range of existing rights (as in the laws of suffrage) and, finally and foremost, promulgation of new rights. The emancipatory energy of human rights struggles has always lain in the ever-incomplete list of granted rights and, consequently, in the legitimacy of the claim to new rights. The open-endedness of human rights struggles has also kept their utopian character alive. For more than a century this utopia was a luxury of the core countries. Vast colonial populations—including populations subjected to internal colonialism,

like African-Americans in the South of the U.S. and Native Americans throughout the continent—were left out of the principle of reciprocity, at first because they were not considered full human beings, and later on because they were not considered civilized (*assimilados*). Thus, granting labor rights in Europe did not collide with the institution of forced labor in Africa until the forties.

The quest for a counterhegemonic politics of human rights amounts to asking if and how it is possible to recuperate the emancipatory potential and the utopian character of human rights.[259] After such a prolonged and violent period of imperial domination, can human rights still adequately represent human suffering across the world? Are they still part of the conversation of humankind? Is it possible to speak and act progressively in the name of human rights? My answer is a qualified "yes." Yes, it is possible, but the conditions are stringent. It is my contention that, once cross-culturally reconstructed, human rights are one of the most powerful factors in bringing about the unthinking of modern law and politics, thereby generating the emancipatory energies necessary to face the challenges of the new times ahead. Human rights are the privileged ground upon which the uncoupling of law from the state and the recoupling of law with polity and revolution must be pursued on a global scale. Why should human rights be elected as the language and code of the emancipatory conversation of humankind on a global scale, rather than any other principle of human dignity found in any of the major world cultures? The answer epitomizes the dilemmatic situation we are in.

The cosmopolitan politics I have been calling for cannot but occur in an imperial context, though hopefully carrying with itself the transition toward a postimperial context. To a certain extent it will therefore be, of necessity, a product of the empire. One of the main political features of the empire has been to organize the world system in a system of sovereign states, the so-called interstate system; the same modern state form has been accordingly ascribed to the most diverse nations and cultures. In a more or less restricted or fraudulent manner, human rights discourse was incorporated into the constitutional law of virtually all the nation-states across the globe. Parallel to this development, an international regime of human rights gradually emerged in the postwar period, and was subscribed to by most members of the interstate system.

A postimperial cosmopolitan politics must start from what exists. What exists is, on the one hand, the nation-state as the still prevalent political form vis-à-vis which human rights politics seems to be the most adequate one to trim off the excesses of authoritarian rule; on the other hand, an interstate system that has adopted human rights as a kind of international code of moral conduct. The contradictions in the regulatory functions of human rights must therefore be taken as the starting point for an emancipatory politics. Because they are experienced worldwide, albeit very differently, such contradictions bear the seeds of translocal intelligibility and the formation of cosmopolitan transnational coalitions. In their conventional conception, human rights are falsely universal because they obliterate the inequalities in the world system, the double standards, and the differential cultural embeddedness. It is up to cosmopolitan politics to transform such false universality into the new universality of cosmopolitanism. Human rights are a political Esperanto, which cosmopolitan politics must transform into a network of mutually intelligible native languages. The conditions for such a transformation are the following: transnational subjectivities; cross-cultural reconstruction; the world system as a single human rights field.

Transnational Subjectivities. The nation-states will remain, in the foreseeable future, a major focus of human rights struggles, both as violators and as promoters-guarantors of human rights. However, in light of recent changes in the principle of sovereignty, whose erosion is highly selective and tends to be hostile mainly to the interests of the popular classes, it is imperative to challenge the nation-states and the monopoly of international legal subjectivity in order to make room for more and more powerful transnational advocacy by human rights non-governmental organizations. Related both to increasing inequalities in the world system and to the activities of TNCs, the most serious violations of human rights have nowadays a distinctive transnational dimension. To that extent, violations of human rights are what I call a localized globalism, that is to say, the locally specific and organized impact of transnational capital operations.

To counteract this, the states, when they are not themselves the violators of human rights, are relatively impotent, as Falk has stressed: "Most states, even when allowedly concerned about human rights, often lack capability and credibility, having too much to hide themselves and generally subordinating and eroding the credibility of their human rights concerns by according priority to geopolitics."[260] By the same token, Falk insists, the state is too small to constitute a protective enterprise against localized globalism, "in the sense that it cannot extend its authority far or effectively enough to control the flow of entropic forces in the world or to fashion suitable regimes for handling global scale problems."[261] If this is the case, then it is imperative to strengthen the transnational advocacy of promotion and protection of human rights. In the postwar period, advocacy of human rights has been the most prominent field of the activities of transnational NGOs, first in Europe and the U.S., and then, in the seventies and eighties, in Latin America and Asia, with Africa lagging behind.[262] The progressive roles they have been playing, both nationally and transnationally, have been widely recognized, and indeed the emergence of a cosmopolitan consciousness on human rights must be largely credited to them. Their brave denunciation of massive and gross violations of human rights under Latin American dictatorships in the seventies and early eighties is particularly admirable, in view of the intimidations, reprisals and all kinds of abuses inflicted on their members.

Much of the efficacy of NGOs in the future will depend on their capacity to network grievances and struggles across the globe. The obstacles are gigantic, however. To begin with, and in line with what I have already said on transnational agency in general above (Section I), human rights NGOs are very heterogeneous politically and socially. While some operate securely in core democratic countries, others operate at great risk in peripheral authoritarian countries.[263] While some are deeply embedded in grassroots movements, others are external missions or services provided by committed experts or intellectuals. While some are crisis-oriented, focusing on violations and disregarding the analysis of the underlying causes of repression, others focus instead on the understanding of structural causes and seek wide range institutional transformation. While some subscribe to a liberal, individualistic conception of human rights, others promote a socialist

conception of human rights. In sum, there are profound positional, organizational and ideological differences among human rights NGOs. "An NGO established in the western world only to deal with the problem of political prisoners," says Shepherd, "operates within the individualist paradigm and performs a limited service. It is not comparable to an NGO that, in a Third World state, supplies support to a liberation movement. One seeks amelioration while the other is aimed at revolutionary change."[264] Within the Third World itself, the diversity is also enormous. In Africa, Shivji criticizes African NGOs for not addressing the issue of imperialism, for collaborating with nondemocratic states and for distancing themselves from the grassroots movements: "African NGOs that are set up, it would seem, are institutional mechanisms by which to obtain foreign funds: they are what might be called FFUNGOS (foreign funded NGOs) rather than grass-roots organizations of the intellectuals and the people to struggle for rights."[265] In Latin America,[266] but also in Asia[267] and elsewhere, the profound differences among NGOs are particularly striking in the field of legal services. Some of them focus exclusively on individual legal conflicts purported to be apolitical, and accept uncritically the laws and the judicial institutions within which they operate. Others, on the contrary, perform alternative legal services, grounded on nonliberal assumptions, that is to say, they conceive law as politics, prioritize public interest or social action litigation, promote forms of collective citizenship, fight for legal and institutional transformation, and, in general, organize the legal services as part of broader social and political emancipatory movements.

As will become clear below, the cosmopolitan politics of human rights I am proposing here is part of much broader political transformations called for in the period of paradigmatic transition we are now entering. In such a context, the demands on transnational subjectivities and coalitions are very high, and run along the following lines. First, the cross-cultural reconstruction of human rights I am arguing for is premised upon the centrality of the link between local embeddedness and grassroots relevance and organization, on the one hand, and translocal intelligibility and transnational vibration, on the other. Second, in the paradigmatic transition, social and political activism must be grounded on a deep archeological understanding of Western modernity and its imperial expansion throughout the world. The unmapping of dominant institutional and normative practices and discourses thus produced will open the utopian legal field upon which new, paradigmatic human rights can be reinvented, adequate to the emancipatory traversing of the paradigmatic transition. Finally, the new legal status of local, national and transnational cosmopolitan coalitions must be inscribed both in domestic and international law. The dispersal and multiplication of citizenship in different social fields is premised upon the emergence of new subjectivities besides the monolithic liberal individual and state. Herein lies the ideal of a new polity and civil society. The critique I have levelled against civil society as the symmetrical counterpart of the nation-state opens the space for a new conception of civil society, a global civil society thought of as the transnational networking of cosmopolitan social practices.

Cross-Cultural Reconstruction. In the transition from imperial to postimperial conditions, the cross-cultural reconstruction of human rights must involve some

measure of *mestizaje* or creollization. What An-na'im has attempted for Islamic culture vis-à-vis Western culture must be also attempted for Western culture vis-à-vis all the other major world cultures.

The general profile of such *mestizaje* must be provided by the following orientations. First, the peculiarity of Western experience must be fully recognized and historically contextualized. For instance, the idea of generations of human rights has some plausibility as a reading of the historical experience of some core European countries, but makes no sense whatsoever elsewhere, not even in Southern Europe. Second, the possessive individualism that bedevils the Western conception of human rights must be fully recognized, and the incompleteness and bias of such a conception must be addressed and transcended through the acceptance of collective rights. In this context, the right to self-determination must be given a new prominence (more on this below). Third, the precedence given to the individual to the detriment of the community, and to rights to the detriment of duties in the Western conception of human rights, has destroyed the capacity for compassion and fellow feeling, and has blocked the development of a principle of responsibility capable of adequately accounting for massive human starvation and suffering and ecological depradation on a global scale. Neither is humankind a mere sum of free and autonomous individuals nor is human nature totally separable from nature as a whole. Nature is the second nature of society; to apply to nature the liberal symmetry between rights and duties is an invitation to ecocide. Even if we grant that it has no rights, nature is entitled to our duty to secure its sustainability (which is also our sustainability as a global community). Fourth, cross-cultural reconstruction must be fully aware of the asymmetries among the different historical routes into modernity and of all the different legal cultures existing in the world. The different routes into modernity that different regions and countries took explain, for instance, why the issue of universalism/particularism of human rights is so important in Africa and Asia, but not in Latin America. They also explain, in part at least, why core countries with specific, non-Western, legal cultures, which have undergone top-down, externally induced modernization, like Japan, tend to adopt blatant opportunistic policies vis-à-vis human rights with no major political costs. They will, finally, help to explain why postcolonial states in Africa have ended up destroying communal forms of life and environment sustainability, without providing the modern alternatives that were available, in part at least, to the European states.

My quest for a cross-cultural reconstruction of human rights is grounded on the idea that the lack of cultural legitimacy is one of the major causes of violations of human rights. As it stands now, the global human rights regime is overly embedded in Western culture, and appears as relatively foreign or exotic to other cultures. In order to become more acceptable to other cultures, it may have to be rewritten.[268] This is, as I am well aware, a highly controversial position. Many authors think that the question of a cross-cultural conception of human rights is a nonproblem. Like Donnelly, whose position I have already cited,[269] Howard also maintains that human rights principles are very recent and have been specifically designed to deal with the advent of the nation-state and to curb its power.[270] Since the nation-state is today the central actor on the contemporary political stage, human rights principles are applicable around the globe wherever the

nation-state has entrenched itself. From a very different perspective, the Marxist conception of human rights tends to minimize the interest of cross-cultural reconstruction since, according to it, the most massive and serious violations of human rights have been directly related to the impositions of capitalist development, most recently the international debt crisis and structural adjustment.[271]

In my analytical framework, all these structural factors are of the utmost importance in understanding the map of human rights violations across recent history and across the globe. It seems to me, however, that cultural factors are equally decisive, at least from the perspective of a social action that aims at understanding social apathy or indifference, indignation or revolt, vis-à-vis violations of human rights, as a first step to promote vigorous social mobilization against such violations. Culture is, after all, where structure and agency meet. Lindholm is right when he asserts "that cultural determinants shape and constrain people's understanding and value commitments, and in particular their reasons for action and inaction, even when structural explanations apply and people are trapped by unintended consequences and impersonal social forces." According to him, therefore, "[t]he study of the cultural legitimacy of human rights is one major concern, because human rights violations and compliance spring from human action informed by cultural determinants."[272] Lindholm's approach to cross-cultural reconstruction of human rights is nonetheless problematic. It consists in reinterpreting the Universal Declaration of 1948 as evolving from specific, global, societal circumstances and as embodying a situated geopolitical moral rationality which does not depend on any particular theology or metaphysics, and which, for that reason, can be cross-culturally appropriated. Specifically in relation to the classical Western tradition (natural rights theory), he maintains, the "'official' United Nations foundation of the internationally acknowledged system of human rights is a more complex, more realistic, and more 'open-ended' scheme of justification."[273] In my judgment, cultural disembeddedness is not a prudent strategy for a cross-cultural dialogue where, on the contrary, the specificity of the different cultures must be fully acknowledged. With the best of intentions, Lindholm may end up presenting as the profile of a global human rights culture what, in reality, is nothing more than a rarified version of Western culture.

As a final note on the regulative principles of cross-cultural reconstruction of human rights, let us be reminded that diatopical hermeneutics is an exercise in cultural tolerance. In order to maximize its efficacy, it must privilege, in each individual culture, the versions that are in themselves most tolerant, more open-ended, and promote wider ranges of reciprocity. That cultures are not monolithic entities, and allow for much internal differentiation and confrontation, cannot be sufficiently emphasized. Openness toward other cultures is often to be found in nonhegemonic, marginal, oppositional, transgressive versions which, because they are more distant from the cultural core, evolve at the borders, that twilight zone where cultures mix and give rise to intercultural symbolic universes. Since within Western culture the liberal conception of human rights—itself not monolithic—has been hegemonic by far, it may not be the ideal starting point for a cross-cultural dialogue. Precedence should perhaps be given to nonhegemonic conceptions instead. For instance, given its critique of property rights and its notion of the inherently restricted range of reciprocity of

all the other rights in capitalist societies, the Marxist version of human rights may offer a partial contribution to the cross-cultural dialogue, particularly as regards the cultural politics of rights in peripheral countries or regions of the world system facing the cruel reality of mass starvation and economic immiseration. On the other hand, communitarian, personalist and feminist conceptions of human rights may contribute even more decisively toward a new understanding of collective or group rights. In this respect, transnational advocacy of indigenous peoples and ethnic minorities rights, and the conceptions of self-determination and cultural identity that have evolved therefrom, may also be of importance. Radical social democratic conceptions of human rights also provide a rich framework for the legal and political linkages between individuals and the different communities they are members of, particularly at a moment in which the state provision of trust seems to be declining. The ecological conceptions of human rights (specifically the eco-socialist conceptions) furnish the intellectual parameters for the incorporation of nature in a politics of rights *and* duties. Finally, in connection with the politics of duties, participatory democracy conceptions of human rights should be assigned the important task of showing that duties vis-à-vis communities or nature must be assumed democratically, lest they become subterfuges for old or new tyrannies.

The World System as a Single Human Rights Field. As I have already indicated, states continue to be both the major violators and guarantors of human rights, and so they will also continue to be a major focus of human rights struggles. However, the conditions underlying both violations and guarantees of human rights seem to be increasingly beyond the reach of the nation-state. The interstate system has for a long time occulted the workings of the world system. Recent transformations in the world system, some of which I have been analyzing in this chapter, have made such occultation increasingly unconvincing. A new approach to human rights is thus needed to confront the new globally organized violations, no matter how locally they are felt, and to explore possible new opportunities to mount global struggles against them. This topic deserves special attention and, for that reason, I deal with it separately in the following.

Human Rights, Development and Paradigmatic Transition

If lack of cultural legitimacy is today one of the major causes of human rights violations in the world, the other consists of the unequal exchanges that constitute the capitalist world economy and world system. People are not poor, they are impoverished; they do not starve, they are starved; they are not marginal, they are marginalized; they are not victims, they are victimized. With its exclusive reliance on capitalist accumulation, market relations and property rights, the world capitalist economy is structurally unjust, in the sense that its normal operation breeds social injustice both internally and internationally. The interstate system and the nation-states have here played a decisive double role, both in guaranteeing the smooth unfolding of the normal operation of capitalist economy, and in correcting some of its grossest excesses. I have been arguing in this chapter that, in light of worldwide changes in capitalist accumulation in the last two decades, the first role of the state has become a political imperative of the highest priority (the rise of business's wel-

fare state), while the second role has been eroding (the crisis of people's welfare state). In consequence, as the last legal form of apartheid fades away in South Africa, a new global social apartheid is emerging between rich countries and poor countries, and, within the national societies, between the rich and the poor. This situation, however novel in some of its features, has been known for a long time in the peripheral and semiperipheral countries. The postwar period, which early on became also the postcolonial period, witnessed the simultaneous emergence of an expanded interstate system, comprising countries and sovereign states of very unequal development, and a global regime of human rights, a moral and legal yardstick for political processes across the interstate system.

The economic, social, political and cultural conditions for the effective enforcement of this new normative consensus were not stipulated (they were left to the states), nor was the extent to which the favorable conditions in some countries related to the unfavorable conditions in others ever questioned at all. Therefore, the universality of human rights was superimposed not only on different cultures connected and disconnected by a long past of unequal exchanges (cultural imperialism), but also on different states and societies tied together by unequal relations of imperialism, neocolonialism, and geopolitics (Cold War, areas of influence, patron-client relationships). Under these circumstances, it should come as no surprise that the question of the articulation between human rights and development issues would sooner or later be raised. Indeed, for the last thirty years, throughout the periphery and semiperiphery of the world system, this question has been raised in two contradictory ways: development, or rather, lack of development, as an excuse for the violation of human rights; and development as a human right of its own. The first vector was particularly popular in the 1960s and 1970s in Latin American countries under military dictatorship, and is now being raised in some Asian countries, particularly in China. The second has been informing the African debate on human rights with particular cogency. A brief reference to each of these vectors is in order at this juncture.

Trade-off between Development and Human Rights. The idea that, in order to achieve rapid development, it is necessary to accept short-run and even medium-run sacrifices of human rights lurked behind the conventional theories on "law and development" and "law and modernization" of the 1960s and the 1970s, and to such an extent that it might be considered to have been the reigning orthodoxy of the times, at least in Latin America. The democratic transitions of the eighties challenged this idea, but probably less radically than might have appeared. In fact, the critique was mainly focused on civil and political rights, leaving aside economic and social rights, which were considered merely as programmatic principles to become enforceable rights only inasmuch as economic and social development allowed for them. In recent years, incorporated in the conventional wisdom of the new wave of "law and development" theories, the idea of the trade-off between development and human rights has assumed a new prominence in the Asian context (China, Malaysia, Indonesia, Thailand, and also India and Bangladesh).

According to Donnelly, the idea of a trade-off between development and human rights has been advocated in three main forms: the needs trade-off; the equality trade-off, and the liberty trade-off.[274] The needs trade-off implies that,

rather than devoting scarce resources to social programs that satisfy basic human needs, relatively high levels of absolute poverty must be accepted in order to maximize investment. According to the equality trade-off, inequality of income distribution is a necessary condition for a rapid transition from a traditional economy (both with low income and low income inequality) to a modern economy. In terms of the liberty trade-off, the exercise of civil and political freedoms may create social unrest, exacerbate labor activism, obstruct necessary but unpopular sacrifices, all of which are susceptible of disrupting the development plan, and must for that reason be temporarily suspended. Underlying all these trade-offs is the idea that the Western model of human rights is a luxury which developing countries cannot afford, at least for a while.

Supported by abundant scholarship produced mainly in the sixties and seventies, the idea of trade-offs has been expounded by many peripheral and semiperipheral states, but it has also found some of its most dedicated supporters among TNCs. Given the new prominence of TNCs, and the growing impact of their operations on human rights, a brief reference to their conception of the trade-offs is justified. It is today widely recognized that the activities of TNCs often result in direct or indirect violations of civil, political, economic and social rights.[275] To the extent that their (export-oriented) policies contribute to increasing unemployment, food and nutrition shortages, high levels of unmanageable urbanization and the siphoning off of natural resources to generate foreign exchange, TNCs may be said to violate human rights indirectly in the "host countries." But, in many instances, they violate the human rights directly, with the connivance of the host states:

> by pursuing policies which violate freedom of association (opposition to unionization), which perpetuate racial discrimination (support for apartheid) and which may result in genocide (support for policies which result in destruction of aboriginal peoples), by engaging in activities harmful to the health and welfare of individuals (marketing toxic drugs) and by interfering with the civil and political freedom of individuals (subsidization of repressive regimes and support for the overthrow of regimes perceived as antimultinational).[276]

When forced to respond to public criticism against some of these forms of active violation of human rights, and whenever incapable of negating violations that are far too obvious, TNCs argue in their own defense that the activities under scrutiny: (1) create employment opportunities and integrate disadvantaged groups in the economy; (2) help to develop a technological elite that can act as a force for social change; (3) introduce liberal ideas of equal opportunity and market efficiency that will generate social welfare in the future; (4) integrate the host country in world politics and put pressure on the government to act as a responsible member of the international community; (5) increase the leverage of the democratic parent country of the multinational corporation upon the host government.[277] As can be easily observed, all these lines of defense echo the idea of trade-off in one way or another.

Donnelly has presented a forceful critique of the idea of trade-offs. To his way of thinking, trade-offs are almost always unnecessary and often positively harmful to

both development and human rights.[278] Comparing the development experiences of Brazil ("the tragedy of 'success'") and South Korea ("a more successful success story"), he concludes for the superiority of the "redistribution first" over the "growth first" strategy. In his view, the latter strategy, which has lain at the heart of conventional wisdom, implies major sacrifices for literally hundreds of millions of people: "We should be particularly wary of tradeoff arguments in environments of despotism and oligarchy, for under such conditions 'tradeoffs' tend to involve people *being* sacrificed, rather than *making* sacrifices. . . . The standard arguments for economic tradeoffs require magnified sacrifices from those least able to sacrifice."[279] After reviewing the debate on trade-offs, Nanda also concludes that "[a]lthough the debate on human rights-economic development tradeoffs is likely to continue, it seems fair to observe that the proponents of economic growth at the cost of civil and political liberties have failed to prove the soundness of their position."[280]

In recent years, this conventional wisdom dating from the sixties has been reconventionalized by the market-friendly economic development model put forward by international agencies like the World Bank and the IMF in the context of structural adjustment and foreign debt crisis, but with a twist in relation to the original formulation: the "growth first" strategy must be made compatible with democratic rule (the so-called "political conditionality"). This means basically that gross violations of economic and social rights are to be tolerated as a trade-off for a certain measure of compliance with civil and political rights. Such is the compromise built into the neoliberal creed in its newest version. Two interrelated ideas guarantee its global reach: on the one hand, peripheral and semiperipheral countries must adopt the principle of the generations of human rights (civil and political rights first, economic and social rights later) followed by core countries since the mid-nineteenth century; on the other, core countries are suffering from an overload of economic and social rights derived from the fact that the levels that were reached in the last two or three decades were the product of an irreproducible conjuncture. Neither in the core nor certainly in the periphery or semiperiphery will the conditions ever again materialize that made that kind of social welfare boom possible.

The fraudulent character of this "wisdom" resides in the fact that it postpones the economic and social rights for a future which, given the insurmountable barriers in its way, will never happen (actually, to the extent that it may have already happened, it must soon be stopped). It also willfully disregards one of the most solid tenets of human rights practices in the postwar period: that human rights are indivisible, and that economic and social rights are conditions for the enjoyment of civil and political rights, and vice versa. Alternatively, it may be argued that such a tenet is not in the least disregarded by the neoliberal "Washington consensus," herein lying the explanation for the latter's adoption of a rather minimalist concept of democracy (low-intensity democracy): a regime is democratic if it upholds some kind of formal elections and tolerates no shockingly visible violations of civil and political rights. Under the aegis of such a diminished conception of democracy, civil and political rights will be drawn down the drain along with economic and social rights.

The Right to Development. The current reconventionalization of the conventional wisdom on trade-offs between development and human rights, and the growing inequality and social injustice in the world system confer a new urgency to the issue of the right to development. The right to development is considered a specifically African contribution to international human rights discourse.[281] Proposed for the first time in 1972 by Keba M'Baye, it found a formal recognition in the African Charter of Human and Peoples' Rights, and was adopted in the Declaration on the Right to Development of the UN General Assembly (resolution 41/128 of December 4, 1986).[282] M'Baye starts from a comprehensive concept of development, in light of which the condition of underdevelopment in itself constitutes a violation of human rights, and, as a collective condition, undermines the universalism of human rights. Without condoning the use of the imperative of development as an excuse for the violation of human rights, M'Baye sees an antinomy between underdevelopment and human rights in the fact that developing countries are not in a position to guarantee compliance with economic and social rights.[283] Such an antinomy is not insurmountable, however, and the right to development is precisely the link connecting and reconciling development and human rights. The right to development is simultaneously an individual and a collective right. It is, as M'Baye says, "the prerogative of all human beings, and of all human beings collectively to have an equal right to the enjoyment, in a just and equitable proportion, of the goods and services produced by the community to which they belong."[284] It includes both civil and political rights, on the one hand, and economic and social rights, on the other. Its foundation is international and national solidarity; its justification, the safeguard of peace.[285]

In the last two decades the debate on the linkages between development and human rights have been developing both in the United Nations and its agencies (UNCTAD, ILO, UNESCO and so on) and in several nongovernmental organizations (International Commission of Jurists, Brandt Commission and so on). The International Commission of Jurists has proposed the most encompassing conception of the right to development as follows:

Article 1

1. The right to development is a right of individuals, groups, peoples and states to participate in and benefit from a process of development aimed at realizing the full potentialities of each person in harmony with the community.
2. The right to development recognizes that the human person is the subject as well as the object of development, its main participant as well as its beneficiary.

Article 2

All human rights, economic, social and cultural as well as civil and political are interdependent and inseparable elements of the right to development.

Article 3

The right to development applies to all levels, community, local, national, regional and global.

It should come as no surprise that a right to development of such a scope would be an easy target of criticism within the hegemonic discourse on human

rights. Donnelly criticizes it as "entirely pointless," confusing rights with moral claims, and indicating no specified right-holders or duty-bearers.[286] According to Howard, on the other hand, the "right to development touted by African elites as a prerequisite to the more traditional human rights, may well be merely a cover for denial of those basic civil and political liberties which will allow the dispossessed masses to act in their own interests."[287]

But the right to development has also been criticized from the left. For Shivji, the question is whether the right to development does serve the interests of people in Africa. In his view, this right has very weak conceptual foundations, because it can either be expanded so as to include everything or, more often, narrowed down to economic development alone.[288] Furthermore, the right to development is state-centered, since, in all the declarations that have adopted it, development appears both as a primary right and as a primary responsibility of the states. Finally, Shivji adds, "underlying the right to development is a conception which sees development/democracy as a gift/charity from above rather than the results of struggles from below."[289] Inspired by the Algiers Declaration of 1976 (Universal Declaration on the Rights of People), Shivji proposes, in its stead, as one of the central rights in the present African conjuncture, the right to self-determination which, according to him, expresses the principal contradiction between imperialism and the people on the international plane.[290] With partially similar concerns, but basically inspired by liberation theology, Shepherd proposes self-reliance as the basic human right, a kind of a right to rights focused on the needs of the people, on redistribution before growth, and on political participation.[291]

Human Rights in the Paradigmatic Transition. If the world system is indeed entering a period of paradigmatic transition, as I have been arguing all along, then a new politics of rights is needed, a fresh approach to the task of empowering the popular classes and coalitions in their struggles for emancipatory solutions to the final crisis of modernity. A new architecture of rights, based on a new foundation and with a new justification, is called for. Since it is not my purpose in this chapter to go beyond proposing a new research agenda, I will limit myself to some exploratory remarks and general guiding principles. The new architecture of rights must go to the roots of modernity, not in order to recapitulate above-the-roots, for that is fairly well known, but to inquire into below-the-roots, turn the roots upside down, so to speak, and plant there the construction site. This inquiry and building plan is a genealogy, in that it looks for the hidden transcript of the origins, inclusions as well as exclusions, legitimate as well as bastard ancestors; it is also a geology, because it is interested in sedimentation layers, gaps and fault lines (that cause social and personal earthquakes); it is finally an archeology as well, in that it is interested in knowing what was once legitimate, proper and just, and then discarded as anachronistic, suppressed as deviant or hidden as shameful.

While for centuries modernity was taken to be universal from an assumedly Western point of view, from the nineteenth century onwards, it was reconceptualized as universal from a supposedly universal point of view. From then on, a totalizing relationship between victimizers and victims evolved which, however unequal in its effects, brutalized both of them, forcing them both to share a common culture of domination in their acceptance of rarified and impoverished versions of their own respective cultures. Modern social sciences are the most sophisticated epistemology of such rarification and impoverishment.

In the paradigmatic transition, a politics of rights is basically a politics of rights to roots and rights to options. This means that all human rights are potentially both individual and collective. It is up to the individuals to decide democratically whether they want to exercise their rights as collective (rights to roots) or as individual (rights to options) rights. There is no collectivity in relation to which the individual has no right to opt out. The most central right in the paradigmatic transition is the *right to knowledge*. While at the subparadigmatic level there is never a one-to-one relationship between knowledge and practice, paradigmatic practices presuppose a paradigmatic knowledge. The plea for a postmodern knowledge presented in Chapter One is the prefiguration of a right to knowledge, which is of necessity a right to an alternative knowledge. In light of the epistemological analysis conducted in that chapter, this right is to be exercised as a right to an edifying knowledge, knowledge-as-emancipation, a knowledge that proceeds from colonialism to solidarity, rather than from chaos to order. Such a knowledge is the epistemological precondition to break the vicious circle of a reciprocal manufacturing of victims and victimizers. When from this perspective we analyze the institutional and organizational knowledge that underlies the practices of state governments and international agencies, we can easily observe how their exclusive emphasis on order renders unthinkable the passage from colonialism to solidarity. Since no distinction is made between the two categories, victims and victimizers are nonexistent as such. Thus kept in their respective structural locations, at best, the hardships of the victims may be attenuated by occasional marginal concessions.

The second central right in the paradigmatic transition is the *right to bring historical capitalism to trial in a world tribunal.* Represented by core capitalist actors (states and TNCs), capitalism must be made accountable for its quota of responsibility for massive violations of human rights, occurring in the form of mass immiseration, cultural impoverishment and ecological destruction. In the paradigmatic transition and as postmodern knowledge gains credibility, the history of world capitalism and Western modernity will gradually evolve from a factual statement into a moral statement. Precisely because it is an edifying knowledge, postmodern knowledge induces epistemological competition with modern knowledge, forcing it to unveil the normative transcript hidden in its positivistic factual discourse. Competition among knowledges, and hence among the transnational coalitions supporting them, will be about retrospective alternative readings of the past.

The main assumption of this type of reading is that whatever happened in history did not just happen; it also prevented other pasts (and thus other presents) from happening. Lacunae in the present are therefore seen to have their source in suppressed pasts. By the same token, no confrontation between facts and nonfacts can be adjudicated factually: the debate over facts and nonfacts becomes a debate over rights and wrongs. That tribunal and the trial, though modern forms in themselves, will be put to a postmodern use. As a world tribunal, the institutional setting will be a transnational time-space of its own, operating through a legal form based on rhetoric. The identification of the parties, no less than the object of

the dispute, will be established by legal argumentation under the overarching *topos* of the principle of responsibility, the idea of *Sorge*, presented in Part One. Rather than looking for well-identified parties in narrowly defined individual disputes over short-range responsibilities for well-delimited courses of action and consequences, this postmodern trial will conceive of the world system as a single collective dispute, leaving nobody out, either as a victim or as a victimizer. Since most parties will be both victims and victimizers, the relative weight of each partial identity will be at the core of legal argumentation. The adjudication of responsibility will be determined in light of long-range, intergenerational courses of action occurring both in society and in nature. There will be no judges, the decisions, always provisional and reversible, will be the result of rhetorical capital accumulation either around the arguments of emancipatory coalitions, predominantly those of victims and their allies, or the arguments of regulatory coalitions, predominantly those of victimizers and their allies. The verdict will be unenforceable, except by collective action, and will constitute an ongoing, never-ending project. In setting up such a tribunal, modern law has an opportunity to reinvent its roots and to recuperate its emancipatory potential in the process of unthinking and undoing itself.

The third central right in the paradigmatic transition is the *right to a solidarity-oriented transformation of the right to property*. Though conceived as an individual right in the Western conception of human rights, this right is one of the most central collective rights that has been violated by the North in its victimization of the South and destruction of nature. With great forethought, Rousseau saw, in the right to property conceived as an individual right, the seeds of war and all human suffering, and the destruction of community and nature; the problem rested, as Rousseau clearly saw, in the dialectics between individual holding and collective consequences. This dialectics has reached a climax in recent decades, with the rise of the TNCs to world economic prominence. Though constituted by large collectivities of stockholders and managers, with resources exceeding those of many nation-states and operating worldwide, TNCs are nevertheless considered right-holder individuals, and are dealt with as such by both domestic and international law. However extreme, this example illustrates very well the exclusion of the principle of the community as one of the pillars of modern regulation from the nineteenth century onwards, with the ensuing recognition of only two forms of property, state property and individual property, a dualist conception of property that is shared both by liberalism and Marxism. In the period of paradigmatic transition, it is up to the cosmopolitan politics of human rights to recuperate the principle of the community and the forms of property legitimated by it. Between the state and the market, a third social domain must be reinvented: a collective but not state-centered, private but not profit-oriented, new, social domain in which the right to a solidarity-oriented transformation of property rights will be socially and politically anchored.

The fourth central human right in a paradigmatic transition is the *right to grant rights to entities incapable of bearing duties, namely nature and future generations*. The Western conception of rights is based on a symmetry between right-holders and duty-bearers, in whose terms only those susceptible of being duty- bearers are entitled to be right-holders. This symmetry narrowed down the scope of the principle of reciprocity as to leave out children, nature and future generations. Once left out of the reciprocity circle, they could easily be excluded from both economic calculations (cost-benefit analysis) and political calculations (the electoral cycle) as well. The tragic result of these arbitrary exclusions is today too obvious to be swept under the rug of cynicism. The sustainability of life and environment—whether as mere survival or improvement—has become undeniably problematic. If it is not already too late, restoring it requires no less than upsetting the symmetry of rights and duties. The broad principle of responsibility mentioned above provides the normative orientation for the enlarged scope of reciprocity within which rights held by nonbearers of duties will be recognized as paramount.

The fifth central human right in the paradigmatic transition is the *right to democratic self-determination*. With a long tradition both in liberal and Marxist versions of Western modernity, this right legitimated all the democratic revolutions of the eighteenth and nineteenth centuries, as well as the independence of Latin American colonies, and was proclaimed almost at the same time, as the right of nations to self-determination, by both Woodrow Wilson and Lenin.[292] In the postwar period, it presided over the process of decolonization, and, as I have shown above, it is now being invoked by indigenous peoples in their struggle for social, political and cultural identity. Though the strength of this tradition is undoubtedly a progressive historical fact, it may also become a serious barrier to the radical reconceptualization of the right to democratic self-determination called for in the paradigmatic transition. A brief note on the conventional international understanding of this right is therefore in order. There is nowadays a consensus that the self-determination of peoples can be either "external" or "internal." According to Cassesse,

> "External" self-determination refers to the ability of a people or a minority to choose freely in the field of international relations, opting for independence or union with other states. "Internal" self-determination usually means that a people in a sovereign state can elect and keep the government of its choice or that an ethnic, racial, religious or other minority within a sovereign state has the right not to be oppressed by central government.[293]

Reviewing, at the end of the 1970s, the trajectory of the right to self-determination during the previous forty years, Cassesse notes that the moderate and relatively ambiguous formulation of this right in the United Nations Charter was soon superseded by the strength of the anticolonialist movement (the Bandung Conference was held in 1955) and the predominance of the socialist doctrine of self-determination over that of the Western world.[294] While expanding the concept of self-determination to mean liberation from colonialism, racist domination (South Africa and Southern Rhodesia) and foreign occupation (Arab territories occupied by Israel), socialist countries, together with Arab and African countries, restricted its use to external self-determination: for sovereign independent states, self-determination was tantamount to the right to nonintervention. On the contrary, Western countries maintained that self-determination should also be understood as internal self-determination, that is to say, as the right of

peoples against sovereign states that massively violate human rights—meaning the totalitarian regimes of the Communist bloc. Normative developments in the United Nations system, particularly after the International Covenants of 1966, have persuaded Cassesse that the UN has been one-sidedly concentrated on "external" to the detriment of "internal" self-determination.[295]

In my analysis of the indigenous peoples' struggles above, I tried to lay bare the almost insurmountable barriers raised by the principle of sovereignty against the recognition of "internal" self-determination. Although the priority given to "external" self-determination might have been justified during the anticolonialist process, it has since lost all justification. As Cassesse puts it, "new forms of oppression are developing and spreading (neo-colonialism, hegemonical oppression, domination by multinational corporations and transnational repressive organizations) and minorities are awakening from secular oppression to a more vital sense of freedom and independence."[296] The continued priority given to "external" self-determination has thus been the other side of the international supremacy of the principle of sovereignty. Hence the special significance, in the European context, of the Helsinki Declaration of 1975, which firmly established the principle of internal self-determination: "All peoples always have the right, in full freedom, to determine when and as they wish, their internal and external political status, without external interference and to pursue as they wish their political, economic, social and cultural development."[297] Today, in the wake of the collapse of the Communist bloc, this formulation has a renewed significance. For many years, cases of external self-determination in Europe seemed to be confined to colonial British rule in Northern Ireland and Gibraltar, divided Germany, and the occupation of Cyprus; whereas the internal self-determination issue concerned basically, from the Western point of view, the Communist bloc. Today, however, the explosive cauldron of ethnic nationalism in the former Soviet Union and Yugoslavia shows how internal and external self-determination have both become part of European politics.

In a broader international context, a special reference must be made to a non-governmental document which has gained worldwide moral authority, and in which the right to self-determination of peoples receives the fullest recognition. I am referring to the Algiers Declaration of the Rights of Peoples of 1976, and specifically to its Articles 5, 6 and 7.

Article 5
Every people has an imprescriptible and unalienable right to self-determination. It shall determine its political status freely and without foreign interference.

Article 6
Every people has the right to break free from any colonial or foreign domination, whether direct or indirect, and from any racist regime.

Article 7
Every people has the right to have a democratic government representing all the citizens without distinction as to race, sex, belief or color, and capable of ensuring effective respect for the human rights and fundamental freedoms of all.

The merit of these provisions is twofold. On the one hand, they focus on the collective rights of peoples both to internal and external self-determination, thus relativizing the prerogative of national sovereignty and even the state's right to nonintervention:[298] in the terms of Article 30, "the re-establishment of fundamental rights of peoples, when they are seriously disregarded is a duty incumbent upon all members of the international community." On the other hand, the link between collective and individual human rights is established by an emphasis on democratic forms of government (Article 7). In view of the erosion of some modern nationally-based safety nets (the "pathologies" of democratic representation, the crisis of the welfare state) and the emergence of new forms of transnational political domination (by nonpolitical, private, global, economic actors), which together question both external and internal self-determination and, in fact, blur the distinction between them altogether, the Algiers Declaration provides, in my judgment, an adequate foundation for a broader and deeper conception of the right to self-determination, as required by the paradigmatic transition.

Shivji has recently proposed the right of people to self-determination as one of the central rights in the African context, a collective right "embodying the principal contradiction between imperialism and its compradorial allies vis-à-vis people on the one hand, and oppressor vis-à-vis oppressed nations, on the other."[299] According to him, the right-holders of this right are dominated/exploited people and oppressed nations, nationalities, national groups and minorities, and the duty-bearers are states, oppressor nations and nationalities and imperialist countries. Although basically in agreement with Shivji, I would like to stress that, in my conception, the right to self-determination can be exercised both as a collective and as an individual right: at the core of any collective right is the right to opt out of the collectivity. Furthermore, unlike Shivji, I put an equal emphasis on the political outcome of self-determination and on the participatory democratic processes towards self-determination. Peoples are political entities and not idealized abstractions, they do not speak with one voice, and when they do speak, it is imperative to establish participatory democracy as the criterion for the legitimacy of the positions voiced.

The sixth central human right in the paradigmatic transition is the *right to organize and participate in the creation of rights*. The paradigmatic transition characterizes itself by relatively unmapped and totally uninsurable risks of oppression, human suffering and destruction, as well as by new, unsuspected possibilities and opportunities for emancipatory politics. Herein lies the characteristic deficit of determinism in the paradigmatic transition I alluded to above. The risks feed on the atomization, depoliticization and apartheidization of people deriving from the downward spiraling of old forms of organization (the vicious circle between declining mobilizing energies and increasingly pointless organizations). Far from being an "organic" process, such spiraling down is actively provoked by repressive measures and ideological manipulation. For instance, in the core countries, particularly in the U.S. (but also in Europe and Japan), the right of workers to organize in labor unions has been undermined by union-bashing, while their interests have been ideologically miniaturized as "special interests" and, as such, equated with any other special interests (for instance, those of the National Rifle Association). On the other hand, the opportunities for emancipatory politics

depend, according to the circumstances, either on the invention of new forms of organization specifically targeted to meet the new risks, or on the defense of old forms of organization, which are then reinvented to measure up to the new challenges, new agenda and new potential coalitions.

The right to organize is in a sense a primordial right, without which none of the other rights can be minimally achievable. The specific breadth and depth of the basic human rights of the paradigmatic transition listed above must be matched by a correspondingly broad and deep right to organize. It amounts to the right to organize all possible solidarities against all existing colonialisms.[300] In one of its dimensions, the right to organize is a metaright, a right to create rights. Paradoxically, the expansion of the circle of reciprocity can only be genuinely accomplished by those that have been kept outside it. To be sure, the analysis of the struggles of indigenous peoples to conquer the right to create their own rights, which I offered above, can be expanded to cover other social forms of exclusion. In much the same way, Falk argues for the relevance of exclusion/inclusion to evaluate the normative adequacy of human rights as a protective framework at a given time and place: "Those *excluded* from rights-creating processes are only likely to be taken into account, if at all, in a partial and paternalistic manner."[301]

The right to organize and the right to create rights are thus two inseparable dimensions of the same right. According to the vulnerabilities of specific social groups, the repression of human rights is targeted against either the creation of rights or the organization to defend or to create rights. The specific vulnerabilities of the growing interior Third World (the poor, the permanently unemployed, the homeless, the undocumented migrant workers, the asylum-seekers, the prisoners and so on), as well as the social fragility of workers, women, ethnic minorities, children, gays and lesbians, clearly show the extent to which a paradigmatic politics of rights is deeply interlocked with the politics of participatory democracy, and calls for the theoretical reconstruction of democratic theory (more on this in Part Three). Inadequate representation or even exclusion from membership, lack of meaningful political participation, repression of organization and demobilization are different dimensions of the same deficit of democracy that foster the violations of human rights and guarantee their impunity.

Given the wide-ranging destructuring that goes together with the paradigmatic transition, more violations and more impunity are to be expected. To counteract them and make room for the emancipatory opportunities likewise opened, I have proposed a cosmopolitan politics of rights. The rights I have proposed are not enforceable under the current political and legal system. Indeed, to the extent that they are adopted by cosmopolitan coalitions and their advocacy is transposed to the concrete political domain, these rights will have a profound destabilizing impact on current political and legal systems. In fact, they fit the category of "destabilization rights" in Unger's conception of rights, except that, for Unger, the scope of such rights is more narrowly defined, and the extent to which they can be exercised as collective rights is not clear.[302] As conceived here, destabilization is not the privilege of abstract citizens, but rather the responsibility of cosmopolitan coalitions of exploited and dominated social classes and groups in their struggles for paradigmatic rights. As mentioned above, such coalitions are to be guided by a form of knowledge (a right of its own that they have to conquer) that progresses from colonialism to solidarity. By rejecting the hegemonic form of knowledge (knowledge-as-regulation progressing from chaos to order) their actions involve, by necessity, a movement from order to chaos. Destabilization is thus the political counterpart of epistemological chaos.

7. The Global Commons: *Jus Humanitatis*

Of all forms of transnational legality, *jus humanitatis* is the one that pushes the idea of globalization further, for it takes the globe itself as the object of its regulation. Since neither the capitalist nor the interstate system allows for a genuine globalization of social practices, *jus humanitatis* is potentially the privileged field of the struggles between capitalist forms of globalization (globalized localisms and localized globalisms), on the one hand, and forms of globalization pointing towards the emergent paradigm (cosmopolitanism and common heritage of humankind), on the other. We might assume, then, that the advances and setbacks of *jus humanitatis* are a good gauge of the advances and setbacks of the paradigmatic transition. Since it covers a very wide field of analysis, and we are just now beginning to enter the paradigmatic transition, the contours of *jus humanitatis* are as yet but all too vague. I will restrict myself here to describing briefly its present profile, identifying at the same time some obstacles to its development, and stressing its paradigmatic potential.

As I conceive of it here, *jus humanitatis* expresses the aspiration to a form of governance of natural or cultural resources which, given their extreme importance for the sustainability and quality of life on earth, must be considered as globally owned and managed in the interest of humankind as a whole, both present and future. In this sense, *jus humanitatis* clashes with two fundamental principles of the dominant paradigm: property, upon which the capitalist world system is based; and sovereignty, upon which the interstate system is based. Little wonder, then, that its application has been so little so far. Nevertheless, its prolegomena are already quite visible in the doctrine of the *common heritage of humankind* that has been adopted by international law for the last few decades. Though the doctrine has its own limitations, it is grounded on principles which, were they to be fully developed, would bring about the bankruptcy of the dominant paradigm, and hence of international law itself as it is conceived today. As we can see, therefore, the doctrine of the common heritage of humankind has many virtualities for the development of the emergent paradigm. I use the concept, similarly to my use of the concept of cosmopolitanism, as a form of juridical globalization that transcends the limits of capitalist globalization. As a matter of fact, there is a deep complicity between cosmopolitanism and the common heritage of humankind: while cosmopolitanism signifies the struggle of oppressed social groups for a decent life under the new conditions of globalization of social practices promoted by the capitalist world system, the common heritage of humankind signifies the idea that such a struggle will be fully successful only in terms of a new pattern of development and sociability that will necessarily include a new social contract with the earth, nature and the future generations.

The concept of the common heritage of humankind was formulated for the first time in 1967 by Malta's Ambassador to the United Nations, Arvid Pardo, in

relation to UN negotiations on the international regulation of the oceans and the deep seabed. Pardo's purpose was:

> to provide a solid basis for future worldwide cooperation . . . through the acceptance by the international community of a new principle of international law . . . that the seabed and ocean floor and their subsoil have a special status as a common heritage of mankind and as such should be reserved exclusively for peaceful purposes and administered by an international authority for the benefit of all peoples.[303]

Since then, the concept of the common heritage of humankind has been applied not only to the ocean floor but also to other "common areas" such as the moon, outer space and Antarctica (even if, concerning Antarctica, several countries have made territorial claims). The idea behind this concept is that these natural entities belong to humankind in its entirety and that all people are, therefore, entitled to have a say and a share in the management and allocation of their resources. Five elements are usually associated with the concept of the common heritage of humankind: nonappropriation; management by all peoples; international sharing of the benefits obtained from the exploitation of natural resources; peaceful use, including freedom of scientific research for the benefit of all peoples; conservation for future generations.[304]

Although it was formulated by international lawyers, the concept of the common heritage of humankind transcends by far the field of traditional international law. International law deals traditionally with international relations among nation-states, which are supposed to be the main beneficiaries of the regulation agreed upon. Such relations are based chiefly on reciprocity, that is, granting advantages to another state or states in return for equivalent advantages for oneself.[305] The concept of the common heritage of humankind is different from traditional international law on two accounts: as far as the common heritage of humankind is concerned, there is no question of reciprocity; and the interests to be safeguarded are the interests of humankind as a whole, rather than the interests of states. To be sure, as Kiss points out, since the nineteenth century, states have been signing conventions containing no implication of reciprocity (prohibition of slave trade, freedom of navigation, regulation of labor conditions and so on), and whose concern is to safeguard "a benefit for all mankind which can be obtained only by international cooperation and the acceptance of obligations by all governments, even if they receive no immediate return."[306] But the concept of the common heritage of humankind reaches much further, inasmuch as both its object and subject of regulation transcend the states. Humankind emerges, indeed, as the subject of international law, entitled to its own heritage and the autonomous prerogative to manage the spaces and resources included in the global commons.[307]

The Law of the Sea Convention, signed in Montego Bay on December 10, 1982, contains, in its Part XI, the most developed formulation of the concept of the common heritage of humankind to date.[308] The Law of the Sea Convention asserts that the seabed, the ocean floor and its subsoil beyond the limits of national jurisdiction are the common heritage of humankind, the implication

being that all rights on the resources in question are vested in humankind as a whole. No state shall claim or exercise sovereignty or sovereignty rights over any part of the area or its resources; no state or natural or juridical person shall appropriate any part of it. Activities in the area shall be carried out for the benefit of humankind as a whole, regardless of the geographical location of the states; but the interests and needs of developing countries must be taken into particular consideration. Marine scientific research in the area, as well as any other activity, will be carried out exclusively for peaceful purposes. All the activities in the area are to be organized, carried out and controlled by an international authority with three main organs: an assembly, a council and a secretariat. The role of this international authority is to grant the right to explore and exploit the resources of the area, but the fundamental principle is that all benefits must be shared by the international community, with a bias in favor of developing countries.

As far as traditional international law is concerned, the Law of the Sea Convention is truly a "marine revolution." It should therefore not be surprising that it clashes with the interests of some states, particularly those that have the technological capacity and financial means to engage in the exploration of the ocean floors—the core countries. As might be expected, the reservations of core countries, particularly the United States, about the convention concern both the control of the authority to grant rights of exploration and exploitation of seabed minerals, and the principle of equal sharing of profits and other benefits from seabed mining. Benefit- and profit-sharing are especially problematic for core countries, in that they must take "into particular consideration the interests and needs of developing states and peoples who have not attained full independence or other self-governing states"[309] (Chapter 3.C.2). The United States has read into this recommendation echoes of the "New International Economic Order" (NIEO) that "Third World countries" brought to the forefront in the United Nations in the seventies. The position of the United States on this issue is quite clear in a statement of the White House Office of Policy Information, dated April 15, 1983: the Law of the Sea Treaty would:

> transfer control of the ocean's minerals to an international authority dominated by Third World states, which are largely hostile to free market approaches and to the interests of the industrialized nations of the free world. . . . The LOS treaty is viewed by the [developing countries] as a significant step toward . . . the establishment of a NIEO, . . . a scheme for restructuring the international economy along the socialist lines of the world's centrally managed economies and for redistributing the world's wealth.[310]

Curiously enough, in the early eighties the demands for an NIEO had already quieted down. What was really at stake was, rather, the opposition of mining companies, as well as the free enterprise and deregulation orientation of the Reagan Administration. According to the latter, the International Seabed Authority made deep seabed mining too burdensome and unrealistic, as well as unjust, insofar as it allowed benefits to be shared by peoples who had not contributed to obtaining them. The issue was not one of principle, but of interests already deeply

rooted at the time that the convention was signed. The truth is that, though the commercial feasibility of deep seabed mining was then still highly problematic, the technology to undertake it was available, and long-term profit seemed promising enough. The principal known deep seabed resources at issue are manganese nodules that lie in great quantities at depths of twelve to twenty thousand feet. The nodules vary greatly in size and composition, but many of them contain rich amounts of minerals like manganese, nickel, copper and cobalt. When the convention was signed, four major ocean mining consortia were in operation; their estimated expenditure was 300 million dollars, and they were headquartered in the United States and involved corporations from such countries as, besides the United States itself, Italy, the United Kingdom, Japan, Belgium, former West Germany, Canada and the Netherlands.[311] Even though the Convention was originally signed by 159 states, it took twelve years to be ratified by sixty states, the number of ratifications needed to bring the Convention into force. The implementation of the Convention started in November 1994. Most probably, due to the pressure of the industrialized countries to correct some of its "imperfections,"[312] the Convention will be implemented with an annex agreement, which in fact will neutralize or subvert some of the most innovative features of the common heritage of humankind regime.

Another area in which the common heritage of humankind regime has been consecrated is the outer space. I have in mind the Moon Treaty of 1979, which entered into force on June 11, 1984.[313] In its Article XI, the Moon Treaty states unequivocally that the moon and its natural resources are a common heritage of humankind. Article VI is particularly explicit about the practical implications of such a statement. In its terms, "the exploration of the moon shall be the province of all mankind and shall be carried out for the benefit and in the interest of all countries, irrespective of their degree of economic and scientific development." Unlike the Outer Space Treaty of 1967, the Moon Treaty explicitly adopts the principle of the common heritage of humankind, though not to the same extent as the Law of the Sea Convention; but like the latter, it, too, denounces obvious clashes with the interests of core countries. Neither the United States nor the former Soviet Union, China, Japan and the United Kingdom are signatories or parties, with the result that none of the major "space powers" is legally obliged by the treaty. Again, one of their main reasons for not participating in the international regime is economic.

As an example, let us consider studies undertaken by the United States on the use of the deuterium (D) and helium-3 (He^3) fuel cycle as the major source of energy in the twenty-first century. Now, while there are no large identifiable sources of He^3 on earth to be obtained economically, the Apollo mission of 1970 revealed that there is a large source of He^3 on the surface of the moon. Recent NASA studies, in fact, indicate that it could be as large as one million metric tons (which is equivalent in energy content to ten times all the economically recoverable coal, oil and natural gas on earth). Furthermore, it seems that He^3 can be extracted and transported to earth with existing technology at an "attractive economic profit." Such studies show that the He^3 is worth at least a billion dollars per ton, and as such would be competitive with oil at seven dollars per barrel. A study on legal regimes for the mining of He^3 from the moon, conducted by the

Wisconsin Center for Space Automation and Robotics,[314] states clearly that "[t]his is the first time in history that we have looked to the moon as a possible solution to our future energy problems and to alleviate pollution here on earth." The question that this study proposes to give an answer to is, accordingly, "[u]nder what legal regime could such a major undertaking be accomplished and what should the U.S. be doing now to insure that if we choose to pursue this energy form in the 21st century, we will be able to do so without severely disrupting international order?" Besides helium-3, other key resources such as magnesium, aluminum, iron and silicon seem to be available on the moon. In addition, the moon has potential as a base from which further space exploration might take place.[315]

As we can see, it is not difficult to understand why the common heritage of humankind regime, once applied to the moon, clashes with the interests of the leading space powers. As might be expected, opposition is particularly strong concerning international management and benefit-sharing. The latter is particularly relevant for peripheral and semiperipheral societies with no exploration or extractive capacities, and whose fear is that the use of enormous and still untapped resources may become in the future the most powerful source of hierarchy and domination in the world system. According to Blaser, the U.S. Senate failed to ratify the treaty, due in part to an intensive lobbying campaign by the space industry. A United Technologies advertisement captured beautifully the fears of the Americans who were against the Moon Treaty: it expressed opposition to "socializing the moon," giving in to the Third World majority in the United Nations, and creating an "OPEC-like monopoly."[316] Ultimately, the aim of such strong opposition was to prevent the application to the moon of the regime already established for the deep seabed. According to its critics, this regime fostered inefficient production and reduced the real income of most Third World countries. Using the standard trick of the "trickling-down" benefits, they suggested that even Third World states would benefit from unregulated access to ocean and space resources.

The lunar future envisaged by the leading space powers seems to be geared more to the condominium principle (two or more states govern and share control over a particular area) than to the principle of the common heritage of humankind. The advocates of condominium proposals claim that they are based on merit, but it is not hard to see that, as Blaser explains, such proposals "will promote a tipping effect whereby the 'meritorious' will acquire an ever greater advantage, and Third World representatives will be less and less able to participate."[317] From the point of view of the common heritage of humankind regime, the eighties were a somber decade, particularly as concerns the U.S. outer space policy. It was a decade of militarization and commercialization of outer space. In 1982, U.S. military expenditures in space exceeded spending for civilian purposes for the first time, and by the end of the decade, military spending was more than double civilian spending. In the process, the peaceful use of outer space has been reinterpreted to include nonaggressive military uses. On the other hand, while military spending has not increased significantly lately, the commercialization of space programs continues to be strongly emphasized.[318]

The huge inequalities thus created between countries with and without space capability are also obvious in a related field: the field of telecommunications. An

interpretation of the Outer Space Treaty on the basis of the common heritage of humankind underlies the plan adopted in 1988 by the World Administrative Radio Conference on the Use of Geostationary Orbit to provide "equitable and guaranteed access by all countries of the world to the Geostationary-Satellite Orbit (GSO) and the space services utilizing this orbit." Nevertheless, the "information gap" between the North and the South, which was at the origin of proposals regarding a New World Information and Communication Order, has increasingly widened, and the tendency is believed to continue as the Integrated Services Digital Network (SDN) and information satellites become implemented.

The information gap resulting from technological development in the field of telecommunications is not just a gap between the North and the South, but, within each country, between the state and the citizens, and between dominant and subordinated classes. Information has become a crucial question of human rights. Though formulated at the state level, this question has a global reach, thereby taking humankind in its entirety as the recipient of human rights. Suffice it to mention remote sensing satellites. It is today acknowledged that reconnaissance satellites have the capability of photographing, with distinguishable quality, the faces of individuals on the ground. There is, therefore, nothing far-fetched about imagining situations in which remote sensing will violate the right to privacy. The development of space technology and the emergence of spatial capital will undoubtedly engender new risks for the global commons and new inequalities and power structures in the world system.[319]

Besides the seabed and outer space, the other common space in relation to which the application of the common heritage of humankind regime has been considered is the Antarctic region. Ever since exploration was started in the Antarctic region, its territorial status has been a source of potential conflict. While some countries take Antarctica to be *terra nullius*—that is to say, land belonging to no one, and thus capable of appropriation by the traditional methods of territorial acquisition (discovery, exploration, effective occupation, or geographic continuity or contiguity)—others have asserted that the continent is the common heritage of humankind. Amongst the former, some have actually made territorial claims (Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom), while others consider themselves to be potential claimants. This is the case of the United States and the former Soviet Union, which agree that Antarctica is *terra nullius*, though without recognizing the specific territorial claims of the above mentioned countries, rather reserving the right to make claims of their own.

In 1959 the Antarctic Treaty was signed to take effect on June 23, 1961 upon ratification by the twelve participating states.[320] Since then, the number of participant states increased to twenty-six. By its very elitist nature—that is, reserved to participant states, the so-called "Antarctic aristocracy"—the Antarctic Treaty does not consecrate the common heritage of humankind principle. It is focused on three major issues: Antarctica (defined as the area south of 60 degrees south geographic latitude) is to be a zone of peace; while not restricting the types of peaceful activities that may be conducted in Antarctica, the treaty emphasizes the importance of scientific research; the treaty does not attempt a final resolution of territorial claims, but puts the issue on hold. We might say that the Antarctic

regime tries to reconcile the condominium with the common heritage of humankind principle.[321] That much it accomplishes by excluding from the Antarctic "club" the great majority of peripheral countries.

The regime of the common heritage of humankind is thus evolving unevenly and slowly, and the times ahead may not be very promising. "The negotiating histories of the Moon, Antarctica, and Law of the Sea Treaties," White points out, "reveal the principle of the 'common heritage of humankind' in three distinct phases of implementation." White then proceeds to identify the phases of uneven implementation of the common heritage of humankind:

> It is firmly entrenched in the developing law of the sea, where it covers both the International Seabed Area and its resources, and provides for an international regime to implement the principle. It is articulated in limited form in the Moon Treaty, where it will apply to celestial bodies but not to resources extracted from them, when exploitation becomes feasible. It has not yet been formally extended to Antarctica, though certain elements—international management and sharing of benefits—have long been part of the relevant agreements.[322]

Besides the common spaces and resources that are directly integrated in the global commons, other spaces and resources, both natural and cultural, quite often under national jurisdiction and even objects of private property, have been increasingly regarded as susceptible of being regulated by the principle of the common heritage of humankind, broadly conceived. I mean monuments, groups of buildings, natural features, geological and physiological formations, and natural sites or precisely delineated areas of outstanding universal value from the point of view of history, art, science, natural beauty or conservation. Such objects are protected by the UNESCO Convention for the Protection of World's Cultural and Natural Heritage, dated 1972. "According to the Convention," writes Kiss, "the contracting parties recognize that their duty is to ensure the identification, protection, conservation, presentation and transmission to the future generations of that heritage and that such a heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to cooperate."[323] Finally, the International Ocean Institute, during its twentieth *Pacem in Maribus* Conference (Malta, November 1 to 5, 1992) studied the possibility of extending the common heritage of humankind or its elements to five sectors of global concern: energy, food, the outer space, atmosphere and science and technology. The purpose is to turn the common heritage of humankind into the congregating concept for the quest for a new sustainable world order, which was the focus of all the debates at the United Nations Conference on Environment and Development held in Rio de Janeiro in June 1992.

The expanded application of the principle of the common heritage of humankind shows the potential of this concept in the paradigmatic transition. Against capitalist expansionism, it proposes the idea of sustainable development; against private property and national appropriation, the idea of shared resource management, rational use and transmission to the future generations; against

nation-state sovereignty, the idea of trust, management by the international community or under its control on behalf of humankind as a whole; against the *hubris* of the pursuit of power that so often leads to war, the idea of peaceful use; against the political economy of the modern world system, the idea of equitable redistribution of the world's wealth, including resources still untapped. In sum, the principle of the common heritage of humankind points forward to *jus humanitatis*, a law of and for humanity as a whole, the law of a decent human condition in a nondualistic, but rather, mutualistic, interaction with nature. Given its paradigmatic potentialities, it is hardly surprising that the principle of the common heritage of humankind has so little application in our time, and that all attempts to extend it to areas susceptible of affecting significantly hegemonic capitalist and state-centered prerogatives are met with fierce opposition, and end up failing altogether.

The new *jus humanitatis* breaks with the basic premises both of nation-state law and traditional international law in many different ways. To begin with, it creates a new spatiality. Beyond local, national and international, it creates global legal spatiality. For this reason, we could characterize it as a fourth-dimension law. This social perception of globality may be facilitated by the so-called "overview effect" produced by space exploration. In the space age, humankind has had the haunting experience of viewing the earth in its entirety for the first time. Indeed, from the perspective of outer space, we are enabled to see the arbitrary borders that separate nations, and we become keenly aware of a single delicate ecological system. The same kind of "overview effect" may underlie some of the theoretical and epistemological reflections that I analyzed in Chapter One as prefiguring a new epistemological paradigm. Such is particularly the case of the Gaia hypothesis formulated by Lovelock. The Gaia hypothesis is the conception of an all-encompassing natural system, or, as Lovelock himself puts it, "a complex entity involving the earth's biosphere, atmosphere, oceans and soils; the total constituting a feedback or cybernetic system which seeks an optimal physical and chemical environment for life on this planet."[324] Informed by such an overview effect, *jus humanitatis* departs from the individualistic microethics of liberal tradition, and takes humankind as a whole as a recipient of human rights. Moreover, while adopting a noncapitalist conception of property, *jus humanitatis* breaks with the conventional reciprocity between rights and duties. The seabed, outer space and Antarctica have rights of their own that do not depend on any private or international property rights over them. A global duty to respect their rights is the only way of sharing the right to the common heritage of humankind that they constitute.

Jus humanitatis is transtemporal; it is grounded on the idea of intergenerational responsibility. The unilateral rights of the global commons are proclaimed in the name of the continued sustainability of life on earth. The basic principle of *jus humanitatis* is the principle of sustainability, rather than the principle of expansionism. As I argued in Part One, *Sorge* is grounded on an expanded principle of responsibility. For this reason, trust, which, together with accumulation and hegemony, is a major strategy of the modern state (see Chapter Two above), has to be exercised on behalf of humankind in a non-state-centered framework. The transtemporal character of *jus humanitatis* is reinforced by another overview effect, perhaps more problematic but certainly equally important—the overview effect of tradition. The idea of transmitting the world's cultural and natural heritage to future generations is central to *jus humanitatis*. This transmission presupposes a simultaneous view over two or more different yet closely related temporalities. Such is the simultaneity of tradition. Tradition is constituted of two elements: the act of transmitting (*tradere*) and its content (*traditum* or *tradendum*). By virtue of these two elements, all tradition is creative, dynamic and, in a sense, also invented, but by no means totally arbitrary, rather, based on a certain continuity and stability (the heritage). Hence, *jus humanitatis* implies both creativity and heritage.

Thus conceived, *jus humanitatis* is utopian without apology. Analyzed in light of the three regulatory principles that underlie modern law, *jus humanitatis* represents the reemergence of the principle of the community in a new mold. This is a highly conflictual process. As we saw above, the principle of the market has prevailed in the restrictive interpretation of the common heritage of humankind, as witness the extension of the entitlement to mine the moon to private entities, and the commercialization of the outer space in general. By the same token, the principle of the state has prevailed regarding the formulation of territorial claims, the role of the states in the negotiations leading to the treaties, the militarization of the outer space and the regulation of its commercial use. In all instances, the role of the U.S. has been quite instrumental. Curiously enough, however, this highly conflictual arena is being disputed in the language and rhetoric of the principle of community, as is intimated by the use of such phrases as "global commons," "global village," "common heritage," "world community" and so on. True enough, neither the principle of the market nor the principle of the state can provide adequate semantics and rhetoric. Indeed, both the language of the market and the language of the state are in the antipodes of *jus humanitatis*.[325] The fact that the principle of the community, one of the unfinished representations of modernity, provides the language of a law that points clearly to the paradigmatic transition, is significant in itself. To be sure, it may conceal a manipulative rhetoric through which the principle of the state and the principle of the market try to survive in a field whose language they do not master. But this very concealment is relevant for what it, in turn, reveals about the linguistic bankruptcy of the hegemonic principles of modern regulation, which find themselves unable to name such crucial topics as humanity, human condition, global sustainability and transmission to future generations. The task of emancipatory coalitions is precisely to denounce such concealment, and to highlight its subversive hidden transcript.

CONCLUSION: FROM LEGAL DIASPORA TO LEGAL ECUMENE?

From its inception, the modern interstate system was designed as a system of national legal ecumene coexisting in an international legal diaspora. From the Westphalia Treaty onwards, and specially after the mid-nineteenth century, the principle of sovereignty, combined with the principle of the state monopoly of law and legitimate violence, guaranteed the ecumenical diffusion of law within national societies, as the first step in a political transformation that would, in the end, replace the administration of people by the administration of things, as envis-

aged by Saint Simon. By the same token, and in line with the same principles, international "society," the sum of interstate relationships, was established as a legal diaspora in which small islands of negotiated and agreed-upon legality would exist in a sea of lawlessness. The modern coexistence of internal legal ecumene and international legal diaspora is at the core of the dilemmatic oscillation of international law between apology and utopia. If, as stated by modern doctrine, international law is based on the consent of states, and defended as "real law" because it is rooted in what states actually do, then it can be said to be apologetic, in that it provides a semblance of justification and legitimation for what states choose to do. If, on the contrary, it is believed to contain rules that are independent of state consent, and different from what states actually do, then international law is not observed and not real; rather, it is utopian.[326]

I have argued in this chapter that the globalization of capital in recent decades and, in general, the dramatic expansion and intensification of transnational practices and interactions are changing the modern dyad of legal ecumene and legal diaspora. Hypothetically, the changes could be occurring in two opposite directions: the diasporization of national legal ecumenes, on the one hand, and the ecumenization of the international legal diaspora, on the other. But it could be hypothesized that both changes are occurring simultaneously. The deregulatory policies of the seventies and eighties, together with the crisis of the welfare state in core countries, could be conceived of as contributing to the diasporization of national legal fields, occurring simultaneously with the ecumenization of the international legal field resulting from the emergence and development of multiple forms of legal transnationalization. In this chapter, however, I chose to concentrate on the second type of changes, in an attempt to answer the question of whether and to what extent the expansion of the transnational legal field is transforming the international legal diaspora into a legal ecumene. In the context of the interstate system and its ruling principles, such a transformation would necessarily involve profound changes, both as concerns the prerogative of state sovereignty and the prerogative of state monopoly over production and distribution of law; for this reason, these two prerogatives constituted the main focus of the inquiry undertaken in this chapter. It was not my purpose to provide definitive answers to the questions raised; I was, rather, intent on mapping out an ambitious research agenda, reaching over a wide horizon of political and legal landscapes wherein those questions could be adequately framed, shaped and located. At this stage, a few conclusions, however provisional they may be, can perhaps be drawn.

The first conclusion is that the use of law as a privileged social indicator of forms of sociability, proposed for the first time by Durkheim, has been proved equally fruitful for the analysis of transnational sociability. The diversity, complexity, complementarity and conflictuality of transnational interactions were vividly mirrored in the different transnational legal fields analyzed in this chapter: transnational pressures on the nation-states, and the consequent transformation and heterogeneization of internal legal fields; sovereignty pooling in processes of regional integration, and the creation of a supranational legal field exemplified by the European Community; a new worldwide regime of accumulation in the making, characterized by a dramatic expansion of international business transactions and regulated, in part, by the boom of the new *lex mercatoria*; growing subordinate transnational migrations, and their legal and political confrontations with the prerogatives of sovereignty illustrated by undocumented migrant workers and asylum-seekers; the increasingly problematic relations between nations as peoples and nations as states, as highlighted in the indigenous peoples' legal struggles for self-determination and the local-transnational linkages through which they are established and strengthened; the problematic universalization of human rights, and the issues raised by a cosmopolitan politics of rights geared to maximize the emancipatory potentials generated by the paradigmatic transition; the growing and irreversible risks facing sustainable life on earth (survival and flourishing), the political and legal indivisibility of the common heritage of humankind, and *jus humanitatis*.

The second conclusion is that this extremely rich and complex process of transnationalization is inherently contradictory, and animated by dialectical tensions between deterritorialization and reterritorialization of social relations, globalization and localization, harmonization and differentiation, boundary maintaining and boundary transcending, capitalist and anticapitalist logics and social coalitions, imagination of options and imagination of roots, social regulation and social emancipation. I tried to reconstruct these multiple tensions analytically by identifying the four major forms of transnationalization in which they are played out and defined according to the specific dominant organizing principles underlying them: globalized localism; localized globalism; cosmopolitanism; common heritage of humankind. The two first forms are directly organized by world capitalism in its search for a new global regime of accumulation. In view of the unevenness and hierarchies of the world system, the same organizing principle generates two different forms: on the one hand, the globalization of local practices that usually originate at the core of the world system and are then expanded, exported and disseminated to the periphery and semiperiphery (globalized localism); on the other, the specific impact of such practices upon local preexisting conditions in different parts of the world system, usually peripheral or semiperipheral (localized globalism). As social fields of transnational interaction, these forms are inhabited by the dialectical tensions mentioned above: they mirror the interests of world capitalism as their organizing principle, even if in a nonlinear, contradictory way. The two other forms of transnationalization are organized by broadly conceived oppositional principles, confronting the hegemonic logic and hierarchies of the world system in the name of dominated, exploited or oppressed social groups and interests, as well as degraded, exploited or destroyed natural resources whose preservation/conservation is a prerequisite of life sustainability on earth. Two forms are distinguished by the range of reciprocity, which is broader in terms of the common heritage of humankind (the globe as the only legitimate totality) than in terms of cosmopolitanism (the oppressed, subordinated social groups and victims of human rights violations in general). Because they both confront the dominant capitalist logic of the world system, these two forms of transnationalization are more intensely contradictory than the first two. Since they are inherently contested terrains, their organizing principles are countercurrent and precarious. While globalized localism and localized globalism are part of the normal, albeit contested, operation of world capitalism, cosmopolitanism and common heritage of humankind only exist as oppositional struggle and social movement. As

regards the distribution of these forms in the transnational legal fields, the first two are the blueprint of the first three legal fields, while the last two constitute the blueprint of the last four legal fields.

My third conclusion is that the dialectical tensions are played out differently in the different transnational legal fields. For instance, as regards the tension between regulation and emancipation, the three first transnational legal fields are dominated by a regulatory logic, and the last three by a more or less contradictory emancipatory logic. In the middle, and literally in a kind of no-man's-land, there is the legal field of subordinate transnational migrations. An artifact of regulatory failure, this legal field is likewise hostile to grounding an emancipatory logic. The analytical core of this chapter was, however, directed to the dialectical tension between deterritorialization and reterritorialization and specifically between globalization and national sovereignty. The major conclusion here is that deterritorialization and globalization are occurring very selectively and, indeed, in tandem with reterritorialization and national sovereignty, and that the logic of this articulation is the following: deterritorialization, globalization and the erosion of national sovereignty are taking place with great intensity in legal fields directly controlled by world capitalism, either as globalized localisms or as localized globalisms; in legal fields controlled by cosmopolitan principles in the name of oppressed social groups or a jeopardized common heritage of humankind, the tension between deterritorialization and reterritorialization is very high, and the prerogative of national sovereignty, far from eroding, seems rather untouched in its hegemonic claims. Though existing in the world system as a whole, these asymmetries assume different forms, and carry different consequences in the core and in the periphery of the world system. In the core, the erosion of national sovereignty is a relatively autonomous and nationally controlled political process, conducted by internal initiative, and in the name of national interests that are deemed to be better served by less rather than by more sovereignty, that is to say, better served by less of the old, exclusive, narrowly territorial sovereignty and more of a new, shared, interdependent and relatively deterritorialized sovereignty. This is particularly the case of the EC, as well as, in a less developed form, of legal transformations in the G-7 countries, agreed upon in their annual economic summits and resulting from decisions on multilateral cooperation whereby the member states relinquish significant elements of economic sovereignty. At the other extreme, in the periphery of the world system, the erosion of national sovereignty is, in most cases, a more or less direct imposition of core countries or international financial institutions they control, like the World Bank and the IMF, in the form of stabilization, foreign debt or structural adjustment policies.

The erosion of national sovereignty is, then, most visible in the field of economic sovereignty, and takes very different meanings in the core and in the periphery of the world system. The same asymmetry can also be identified in the converse instances in which sovereignty seems well in place, if not gaining in strength. In the core countries, the affirmation of political and ideological sovereignty is often a function of the high leverage of these countries in the interstate system, as witness the reinforced control over entry and membership imposed by new restrictive legislation against undocumented migrant workers and refugees; or the double standards dictated by overriding national interests conceptions concerning the evaluation of international human rights violations; or the attacks on the common heritage of humankind in the name of mixed political, military, ideological and economic sovereignty claims. In the periphery of the world system, the affirmation of political and ideological sovereignty most often takes the form of authoritarianism, internal political repression and violations of human rights. This affirmation is, however, very selective, and depends upon the repressive and administrative resources of the state. These resources are very often lacking. We observed how the peripheral states, among which the largest transnational migrations have been occurring, were impotent to police their borders, even if they wished to do so. Moreover, it is in the periphery and semiperiphery that "primordial" ethnic identities have been more successful in confronting the nation-states, a success that is not a mere function of the fact that peripheral or semiperipheral states are more multiethnic or multinational than the core states. Thus, in the periphery and semiperiphery, authoritarianism and massive violations of human rights invoked as prerogatives of sovereignty go together with the collapse of the state as a functioning institutional setup. The collapse of the Soviet Union and Yugoslavia has contributed to the trivialization of both the demolition and the creation of states. But while, in these cases, national conditions played a key role, in other instances, particularly in the periphery, the collapse of the state is very often related to transnational (financial) pressures. In the latter cases, hegemonic forms of globalization, by eroding the national space, contribute to the relocalization and reterritorialization of social and political processes in the periphery of the world system.

To conclude: the inquiries conducted in this chapter indicate that the current dispersal of sovereignty is a highly selective and internally differentiated political process with, moreover, very different and often contradictory consequences in the core and in the periphery of the world system. The international legal ecumene is much more advanced as regards forms of legal transnationalization directly organized by world capital than as regards cosmopolitan forms that seek to meet the new risks and hardships as an emancipatory challenge made possible by the intensification of transnational practices in general. In other words, the international legal diaspora still allows for transnational coalitions informed by cosmopolitanism and the common heritage of humankind, particularly those adopting a paradigmatic reading of current times, to transform it into an emancipatory legal ecumene.