

Jurisprudence Discussion Group – University College – Oxford**Week 2 – Thursday 29th January 2009***Universal jurisdiction through Dante's eyes*

The topic I wish to discuss with you tonight is the notion of universal jurisdiction. I shall do this with a little help from Dante's treatise *On Monarchy* where he argues for a *universalem mundi jurisdictionem* (*Monarchia*, II, viii, 14) – a “universal jurisdiction” over the whole world. I have decided to make use of Dante's text because he tried to justify a universal Monarchy, and therefore universal jurisdiction, in the name of peace. I hold that an analysis of Dante's political work could be illuminating for those interested, as I am, in the peace-related arguments used in current legal discourse to justify and develop a “universal jurisdiction”. Yet, the concept of “universal jurisdiction” as used in *De Monarchia* is very complex and the meaning of such an expression is not even clear in our political language. So, first of all, let's define what we are talking about.

The word “jurisdiction”, in its common legal use, has at least four possible meanings:

- (i) a government's general power to exercise authority over all persons and things within its territory;
- (ii) a court's power to decide a case or issue a decree;
- (iii) a geographic area within which political or judicial authority may be exercised;
- (iv) a political or judicial sub-division within such an area.¹

We know that states enact criminal laws which allow their national courts to prosecute anyone accused of committing crimes on their *territory*, regardless of the nationality of the accused or the nationality of the victim (this is what is usually known as “*territorial jurisdiction*”²). Nevertheless, there is also a form of jurisdiction called *universal jurisdiction*, which allows national courts to investigate and prosecute a person suspected of committing *certain crimes* anywhere in the world regardless of the nationality of the accused or the victim or the absence of any links to the state where the court is located. What kinds of crimes are at issue here? This seems to be the criterion to distinguish between “national/domestic jurisdiction” and “universal jurisdiction”.

¹ “Jurisdiction”, entry in: H.C. Black, *Black's Law Dictionary*, St. Paul (MN), Thomson West Group, 2004, (8th Ed.).

² The definition of “territorial jurisdiction” provided by the *Black's Law Dictionary* is the following: 1. jurisdiction over cases arising in or involving persons residing within a defined territory 2. territory over which a government, one of its courts, or one of its subdivisions has jurisdiction.

The Preamble of the *Rome Statute of the International Criminal Court* (entered into force on 1 July 2002) recalls that it is “the duty of every State to exercise its criminal jurisdiction over those responsible for *international crimes*” but also emphasizes “that the International Criminal Court established under this Statute shall be complementary to *national criminal jurisdictions*”.

In 2001 Henry Kissinger published in *Foreign Affairs* an article entitled “*The Pitfalls of Universal Jurisdiction*”³ underlining how the notion of universal jurisdiction was as new as it was risky. In Kissinger’s opinion, such a notion is risky because it could lead to a judicial tyranny. Moreover, given that *universal jurisdiction* does not appear in the *Black’s Law Dictionary*, Kissinger holds that this expression is new in legal language. In fact, the closest related entry Kissinger managed to find was *hostes humani generis* (enemies of the human race). This expression was traditionally used to refer to pirates, but today is generally used to mean people convicted of serious crimes of international concern, namely genocide, crimes against humanity and war crimes. This demonstrates, in my view, that even critics of *universal jurisdiction* shared the belief that the distinction between domestic and universal jurisdiction is based on a matter of substance: there are *certain crimes* – the ones just mentioned, perhaps together with torture, extrajudicial executions and “disappearance” – considered an offence against *the humanity as a whole* and have to be treated specifically.⁴

Paragraph 7 of Article 2, Chapter I, of the Charter of the United Nations (entered into force on 24 October 1945) affirms that: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the *domestic jurisdiction* of any state or shall require the members to submit such matters to settlement under the present Charter.”⁵

These words imply the idea that some matters are “essentially” within national jurisdiction, whereas others are not. We have just seen that those crimes perpetrated by *hostes humani generis* cannot be considered as plain domestic matters, but rather fall into the domain of universal jurisdiction.

What about *disputes among states*?

This matter cannot be decided within any national jurisdiction, since *nemo iudex in parte sua* (no-one should be a judge in their own cause). In addition, in the current international discourse conflicts are thought to be decided not by force but by peaceful procedures defined by the international community.

³ In the issue of *Foreign Affairs* published in September/October 2001 Kenneth Roth (*Executive Director of Human Rights Watch*) replied to Kissinger’s article defending the idea of universal jurisdiction.

⁴ *Amnesty International* is currently one of the main supporters of state enactment of universal jurisdiction legislation.

⁵ It is possible to read the complete text of the Charter on the website of the United Nations: <http://www.un.org/aboutun/charter/>. For a preliminary discussion of such a Charter cf. H. Kelsen, *The law of the United Nations: a critical analysis of its fundamental problems*, New York, Praeger, 1964.

The first of the four purposes stated in the First Article of the Charter of the United Nations is the following: « To maintain international peace and security, and to that end [...] to bring about by peaceful means, and in conformity with the *principles of justice and international law*, adjustment or settlement of international disputes or situations which might lead to a breach of the peace. »

The maintenance of international peace and security does not logically imply the necessity of an international court – which, in fact, was explicitly established as the principal judicial organ of the United Nations in Article 7 of the same Charter.⁶ Even though it would be interesting to analyse why we are inclined to interpret the words “peaceful means” as “impartial judgment”, in the international reality we live in an “International Court of Justice” exists.

The ICJ has a dual jurisdiction: *jurisdiction in contentious cases* and *advisory jurisdiction*. The former means that the Court decides, in accordance with international law, disputes of a legal nature that are submitted to it by States, whereas the second means that the Court gives advisory opinions on legal questions at the request of the organs of the United Nations or specialized agencies authorized to make such a request.⁷

A shared definition of “*international jurisdiction*” is the following: a court’s power to hear and determine matters between different countries or persons of different countries. We could thus say that the jurisdiction of the International Court of Justice *in contentious cases* is clearly an example of “international jurisdiction”; yet we have just seen that such a Court has another jurisdictional function. Given that the Court says it acts as “world court”, I therefore suggest the use of the expression “world jurisdiction” to denote the dual jurisdiction of the International Court of Justice. This will help us to distinguish its jurisdiction from the jurisdiction of the International Criminal Court, which I would define a proper “*universal jurisdiction*”.

This terminology will be useful for our understanding of Dante’s work. Furthermore, we will see that Dante’s arguments in favour of a “universal jurisdiction” are in fact referring to an “international jurisdiction”. This implies that in the framework of current international law discourse such arguments can be reasonably taken into account only in relation to the jurisdiction of the ICJ.

⁶ Cf. *Charter of the United Nations*, Chapter III, Article 7, Paragraph 1.

⁷ <http://www.icj-cij.org/jurisdiction/index.php?p1=5> . Only States may apply to and appear before the International Court of Justice and the Court can only deal with a dispute when the States concerned have recognized its jurisdiction; an international legal dispute can be defined as a disagreement on a question of law or fact, a conflict, a clash of legal views or of interests. Since States alone have capacity to appear before the Court, public (governmental) international organizations cannot as such be parties to any case before it. A special procedure, the advisory procedure, is, however, available to such organizations and to them alone. Advisory opinions also, in their way, contribute to the elucidation and development of international law and thereby to the strengthening of peaceful relations between States.

The “world jurisdiction” of the ICJ is said to be functional to the development of a peaceful international community; at least, this is what the Charter of the UN suggests. On this regard, one could notice that in history of political thought has developed several theories to explain *how* it would be possible to make a human society live “peacefully” in a “secure territory”. You will agree that the soundness of such projects rests on the contextual meaning of the words “peace” and “security”. Furthermore, why does peace have to be understood as a positive value? Even if we can think about normative and judicial authorities as reasonable solutions for co-ordination problems within a community, is there a qualitative difference between asking such a question within a national legal system and doing the same in the context of the international legal order?

The discussions that nowadays arise in international legal discourse about international jurisdiction and the function of the International Court of Justice is the result of centuries-old experiences, normative theories and utopias about political life.

It is not my intention to analyse the history of all the political projects drawn for securing world peace. I simply want you to remember just one of the “classics” on this topic: “*Perpetual Peace: a Philosophical Sketch*”, published by Immanuel Kant in 1795. Kant’s project is articulated in two main steps that the international community should take to reach a situation of peace. The second step is made by three “definitive articles” which will provide the proper ground for perpetual peace:

- The civil constitution of every state should be republican;
- The law of nations shall be founded on a federation of free states;
- The law of world citizenship shall be limited to conditions of universal hospitality).

Let’s focus our attention on the second of these articles. I don’t want to discuss here whether or not such a solution could suit the problem of international peace. I would rather stress how this article reflects all the modern European political thinking – a thinking that has shaped our current international situation. The following ideas are summarised in the second article: the idea of a particular law ruling the international community (law of nations), the idea that a legal order requires a ground of legitimacy, (foundation of a legal authority), the idea of equality (federation) and the idea of national sovereignty (free states).

The idea of a sovereign power, justified by an “act” like a “social contract”, which says and enforces the law within a community whose members created such a sovereign, is obviously a Hobbesian heritage. I want to underline just two things: already in Hobbes view the value of peace is what justifies the decision of making the contract of submission.

The idea of sovereignty, so important for all the modern political theories, is in the result of the medieval conflicts of jurisdiction between Church and Empire. It is well known that the notion of sovereignty has run together with the historical process culminating at the Peace of Westphalia (1648 A.D.), even though the concept of sovereign (i.e. the concept of the supreme political authority) has been used and improved at least from Roman juridical reflections through all the Medieval times. Actually, a definition of the concept of sovereignty as we know it has been made possible thanks to the late medieval experience of the legal disputes among Empire, Church and the “new” European Monarchies. Dante Alighieri (1265 – 1321) lived just at the time when Europe started knowing the new doctrine which would push it towards modernity: the *national* sovereignty theory. The entire work of Dante – when I say “entire” we have to bear in mind that the author of the *De Monarchia* is the same poet who wrote the *Divine Comedy*, the *Banquet*, the *De Vulgari Eloquentia*, the “*The Rhymes*” and the “*The New Life*” – has doubtless a strong political profile and every history of political thought rightly mentions Dante as one of the theorists of the “Medieval Empire”.

The background of Dante’s political theory is, by Aquinas reflections about political life, Aristotle’s idea that the political existence of the city has an intrinsic positive value (Dante, in this case, refuses the Christian tradition of the origin of the State as a punishment and/or a remedy for sins – *poena et remedium peccati*), the object of his political study is not simply the city, but rather the free, the sovereign city (*civitas superiorem non recognoscens*). City is here a political not a geographical concept. Dante thinks that the very life of a “citizen” can find realisation also in a kingdom (*Regnum*). *Civitates* and *Regna* are thus conceptually at the same level because both are regarded as sovereign political entities having the same positive value for human life that the πόλις had in Aristotle’s political theory. Yet, the highest form of political autonomy (i.e. *sovereignty*) is embodied in the concept of universal Empire.

From Augustine of Hippo’s *De civitate Dei* the ideal of a universal Empire has been discussed in many medieval public law treatises; however, Dante treated and analysed such an ideal by giving a comprehensive and original account of its problematic aspects. In the first page of the *De Monarchia*, Dante regards himself as the first thinker to dedicate an entire treatise exclusively to the topic of universal temporal Monarchy.⁸

⁸ Dante, *De Monarchia*, I, i, 5: « Cumque inter alias veritates occultas et utiles, temporalis monarchiae notitia utilissima sit et maxime latens et propter non se habere immediate ad lucrum, ab omnibus intemptata, in proposito est hanc de suis enucleare latibulis; tum ut utiliter mundo pervigilem, tum etiam ut palmam tanti bravii primus in meam gloriam adipiscar. »

The first move made by Dante is clarifying the notion of temporal Monarchy (*temporalis Monarchie notitia*). Temporal Monarchy, Dante says, is what man call 'Empire':

« is a single sovereign authority set over all others in time, that is to say over all authorities which operate in those things and over those things which are measured by time.»⁹

In the definition, Dante stresses the category of time because this allows him to distinguish the temporal domain from the eternal domain, which is the ground for the separation between the political authority of the Empire and the spiritual authority of the Church.

Emperor and Pontiff should guide human beings to their two final ends, the temporal and the eternal *happiness* (*beatitudo* in Latin – Aquinas made a big effort to “translate” the Aristotelian concept of “*eudaimonia*” into the Latin Christian world) as the independent lights of two suns would shine.¹⁰

(The idea of a double human authority seems to be in tension with the *principium unitatis* which is so important for the medieval understanding of the world, but this is not the occasion to discuss it.)

After the definition of temporal Monarchy Dante identifies three problems (“*tria dubitata*”) which are related to this subject:

- First, is temporal Monarchy necessary to the well-being of the world?
- Second, did the Roman people take on the office of the monarch by right?
- Third, does the monarch's authority derive directly from God or from someone else (his minister or vicar)?¹¹

For the present discussion I think we can focus our attention much more on the first of these problems, than on the others two. The second problem concerns the legitimacy of the Empire: to prove it, Dante uses the theory of the *translation imperii*: a succession of transfers of power from a supreme ruler to the next (in particular, from Roman Emperors to the Holy Roman Empire). The third problem concerns the source of Emperor's (divine) authority and has relevant effects on problems of obligation. Dante argues, against the Church official position (see Boniface VIII and his Bull of 1302 *Unam Sanctam*), that God was the primary and direct source of imperial authority, nonetheless he claims that its ground is essentially the “human” law: *imperii vero fundamentum jus humanum est* (*De Monarchia*; III, X, 7).

⁹ Dante, *Monarchy* (Ed. By P. Shaw), Cambridge, CUP, 1996; p. 4. Cf. Dante, *De Monarchia*, I, ii, 2: «Est ergo temporalis Monarchia, quam dicunt 'Imperium', unicus principatus et super omnes in tempore vel in hiis et super hiis que tempore mensurantur. »

¹⁰ Cf. Dante, *Divina Commedia*, (Purgatorio, XVI, 106-108): “Soleva Roma, che 'l buon mondo feo, / due soli aver, che l'una e l'altra strada / facean vedere, e del mondo e di Deo.”

¹¹ Dante, *De Monarchia*, I, ii, 3: « Primo (dubitatur et queritur) an de bene esse mundi necessaria sit; secundo (dubitatur et queritur) an remanus populus *de iure* Monarche uffitium sibi asciverit; tertio (dubitatur et queritur) an auctoritas Manarche dependeat a Deo immediate vel ab alio, Dei ministro seu vicario. »

Before addressing these three problems, Dante specifies the methodology he will follow in his analysis. In doing this Dante wants to make the knowledge of his subject “truth”. Please notice how clear it was for a medieval mind that the truth of any inquiry depends on the principles, which are proper to the particular discipline we are dealing with. He holds that, politics being the subject of his inquiry, his discussion will not be directed towards theoretical understanding, but rather towards action. Keeping the Aristotelian distinction between theoretical and practical sciences Dante affirms that there are things which are within our control and so, when we think about them, theorizing is for the sake of taking action; and politics is a paradigmatic example of such “things”.¹² Given that in the domain of actions it is the final end (*ultimus finis*) the cause – in Aristotelian terminology – that counts, Dante holds that:

«Whatever constitutes the purpose of the whole of human society [*finis universalis civilitatis humani generis*] (if there is such a purpose) will be here the first principle. »

Dante thinks that such a purpose exists on the condition that we meaningfully speak about purposes in several given societies. Since we do that, it would be foolish, in Dante’s opinion, to suppose that there is one purpose for this society and another for that, but not a common purpose for all of them. As we will see soon, the analogy between the part and the whole is very relevant for Dante’s theoretical construction; here the principle is “what holds true for the part is true for the whole”.

Dante has a teleological conception of the (human) nature. To make his argument work, he tries to find the common purpose of human society as a whole (*Nunc autem videndum est quid sit finis totius humane civilitatis*). Dante’s scholastic reasoning goes as follows: since the essential essence of any created beings is not an ultimate end in itself, but rather that essence exists for the sake of the activity which is proper to that nature, if there is any activity specific to humanity as a whole that will be the final end we are looking for. The common purpose of mankind rests on intellectual potentiality. This is a technical word coming from a distinction made by Aristotle in the *De Anima (On the Soul)*) between potential and actual intellect; such a distinction will be discussed during the Middle Age and the concept of mankind’s potential intellect will play an important role in Averroes’ philosophy. The activity belonging to mankind as a whole is constantly to actualize the full intellectual potential of humanity, primarily through thought and secondarily through action as a function and extension of thought. («*proprium opus humani generis totaliter accepti est actuare semper totam potentiam intellectus possibilis*»).

¹² Cf. J. Finnis, *Aquinas*, Oxford, Oxford University Press, 1998, pp. 20-23.

In Dante's argument, as for the single human being (the part) to grow "in judgment and wisdom" requires rest and calm, the necessary condition so that mankind (the part) can actualise its potential intellectual is given by the tranquillity of peace. Peace, therefore, becomes the principle which explains the necessity, for the well-being of the humanity, of a world temporal monarchy.

Since temporal Monarchy is for Dante identical to Empire and Empire is defined by Dante as a jurisdiction which embraces within its scope every other temporal jurisdiction (*Imperium est iurisdictio omnem temporalem iurisditionem ambitu suo comprehendens*; III, x, 10), we can conclude that temporal monarchy is a jurisdiction which embraces within its scope every other temporal jurisdiction. Hence, one of the main features of universal temporal Monarchy is its universal jurisdiction, understood as the highest jurisdiction possible. Is this jurisdiction a *territorial jurisdiction*? What does *comprehendens* (this gives the idea of embracing, including) means in this context? I think that the use of the expression "within its scope" (*ambito suo*) close to 'embraces' could lead us to understand what kind of jurisdiction is at issue here. Let's read a passage taken from Book I of the *De Monarchia* where Dante provides an argument for the necessity of a universal Monarchy.

«There is always the possibility of conflict between two rulers where one is not subject to the other's control; such conflict may come about either through their own fault or the fault of their subjects; therefore there must be judgment between them. And since neither can judge the other (since neither is under the other's control, and an equal has no power over an equal) there must be a third party of wider jurisdiction who rules over both of them by right. And this person will either be the monarch or not. If he is, then our point is proved; if he is not, he in his turn will have an equal who is outside his jurisdiction, and then it will once again be necessary to have recourse to a third party. And so either this procedure will continue *ad infinitum*, which is not possible, or else we must come to a first and supreme judge, whose judgment resolves all disputes either directly or indirectly; and this man will be monarch or emperor. Thus monarchy is necessary to the world».¹³

Dante recognises the necessity of a higher jurisdiction for every possible quarrel between two political powers (let's say two *kingdoms*) and argues in favour of the subjection of all particular legal systems to one supreme and "universal" legal order. The Emperor would be a good judge because he is the ruler of the world and so he cannot desire anything more; the desire of power (*libido dominandi*), that in Dante's opinion is that destroy the justice of a ruler, cannot enter into the picture.

¹³ Dante, *Monarchy* (Ed. By P. Shaw), Cambridge, CUP, 1996; p. 14. Cf. Dante, *De Monarchia* (Book I, x, 2-6).

It is true that the idea of a universal Empire is connected with the idea of a unique territory and people, but it is clear – and it was clear also at that time – that the world peoples cannot be regarded as a unity sharing common culture, language, history, territory and law (which are the elements that shape our idea of a nation). What I want to stress here is the idea of the Emperor as a judge and of the Empire as a jurisdiction. Territory and people of this universal Monarchy, therefore, could be regarded as the space and personal spheres of the application of the rules that make that “universal” legal order. One could now reasonably ask what the relation between the Emperor as an authority and the Empire as a legal institution is, considering that Dante believes that imperial power (*Imperium*) is always legally bound. In particular, the role of the emperor has to be explained through an appeal to the good of the State, which, in its turn is in harmony with the good of the law.

«All jurisdiction is prior to the judge who exercise it, for the judge is appointed for the sake of the jurisdiction, and not vice versa; but, the empire is a jurisdiction which embraces within its scope every other temporal jurisdiction: therefore it is prior to its judge, who is the emperor, for the emperor is appointed for its sake, and not vice versa. From this it is clear that the emperor, precisely as emperor, cannot change it, because he derives from it the fact that he is what he is.»¹⁴

Imperial power is the highest political authority; nonetheless Dante says it is bound so that the Emperor as a judge is in function of his jurisdiction. This consideration could open a discussing about the “constitutional form” of the universal monarchy (or the universal legal order) Dante is studying. The problem here at issue is the primary source of legal-political power and the tension between law, jurisdiction and sovereignty. Now we could also say that the relationship between the Empire (i.e. universal Monarchy) level and the kingdoms level might be discussed as the tension between an international jurisdiction and domestic(national)-level jurisdictions. Dante’s idea of a universal Monarch is a complex one, because it unifies those powers that we are used to thinking as separate in our state legal systems and that, in turn, we think as separate when we discuss problems related to the international legal order. Nevertheless, it is originality connected to the concept of peace which, in turn, refer to the ideal of a “universal human community” (*humana civilitas*). Such an ideal is an important feature of the current international political discourse; it seems to me this is clearly shown by all the human rights declaration or conventions signed by the majority of States in the last sixty years.

¹⁴ Dante, *Monarchy* (Ed. By P. Shaw), Cambridge, CUP, 1996; p. 82. Cf. Dante, *De Monarchia*, III, x, 10: «Preterea, omnis iurisdictio prior est suo iudice: iudex enim ad iurisdictionem ordinatur, et non e converso; sed Imperium est iurisdictio omnem temporalem iurisdictionem ambitu suo comprehendens: ergo ipsa est prior suo iudice, qui est Imperator, quia ad ipsam Imperator est ordinatus, et non e converse. »

I think reading Dante as a relevant link in the chain of peace projects running through European political history could still help us to illuminate the present international situation. Let's come back to the notion of a "world jurisdiction" and how it can be justified in the name of peace. Since "classical" political reflections the concept of peace has been recognised to be connected with the concept of order, a concept which is crucial for understanding the concepts of law.

In 1944, before the end of World War II and the establishment of the United Nations, Hans Kelsen published *Peace through law*, a book thought to be a contribution to the most burning problem of that time.¹⁵ Since then many things have changed – we have more operative international organisations and more powerful nuclear weapons – but that problem is still burning cities and lives.

Obviously, it is possible to approach the problem of peace from several perspectives, but the legal standpoint has the privilege of offering a useful combination of theoretical analyses and practical projects. Kelsen believed that it was impossible to secure world peace without an effective international organisation preventing war between nations together with a reform of the "specific technique of order" regulating the relationships between states, viz. the Law of Nations. The concretisation of such a reform should have been realised, in Kelsen's view, by:

- *guaranteeing compulsory adjudication of international disputes*

together with

- *individual responsibility for violation of international law.*

To a certain extent, these are the ends the two kind of jurisdiction we identified at the beginning of this paper as related to the International Court of Justice (*international jurisdiction*) and to the International Criminal Court (*universal jurisdiction*).

Any given society, in order to guarantee peace among its members (*ne cives ad arma veniant*), establishes a community monopoly of force; when such a monopoly is centralised we usually call that community a State. In the history of European "peace-projects" it has been argued that the solution for the problem of an enduring peace is a (Federal) World State – as Kant did. This idea mirrors the modern idea of a state: in such a World State the powers of the national states are at disposal of a world government operating in accordance to the legal framework provided by a world parliament.

¹⁵ H. Kelsen, *Peace through law*, Chapel Hill, The University of North Carolina Press, 1944.

Despite the utopian character of such a solution (given the present international situation), it is interesting to examine how a theory developed in a particular time to justify a particular political entity is still present in the discussions about the international scenario.

Many think the problems involved in such discussion come from a “structural” *impasse* which arises when we think about a community of “sovereign states”. The Charter of the UN, for instance, clearly shows this *impasse* when it tries to put together the idea of peaceful adjustment of international disputes (maybe by means of an International Court...) with the idea of national sovereignty (Article 2 of the Charter: “The Organization is based on the principle of the sovereign equality of all its Members”). Yet, I think state sovereignty has been used *rhetorically* in order to limit jurisdiction in the very same way theological arguments were used to narrow Empire competence. It is not a matter of “structure”, it’s a matter of words, concepts and reasoning. A profitable way of thinking about sovereignty is the one suggested by Kelsen, i.e. as the relationship between the state legal order and the international legal order. Great contributions to the analysis of such a relationship came from the works of legal theorists as H.L.A. Hart (1907-1992), Alf Ross (1899-1979) and Hans Kelsen (1881-1973).

Law is a dynamic system evolving through time. From its primitive beginnings the whole evolution of the law has been a continuous process of centralisation. In Kelsen’s opinion the reform of the international order should support the establishment of an international court also because the centralisation of the law-applying functions has historically preceded the centralisation of the law-creating functions. The process of centralisation in the practice of the law of people tends, therefore, toward an international judiciary rather than toward an international government or legislation. The idea of legal evolution and the similarity between international law and “primitive law” is present in Kelsen’s work as well as in Hart’s *The Concept of Law*.¹⁶

Hart justifies such a similarity explaining how two kinds of law lack of secondary rules of change, adjudication and recognition; the formal structure of international law lacking a legislature, courts with compulsory jurisdiction and officially organised sanctions appears different from that of municipal law. In his view, international law is a set of norms, it is not a (legal) system; the analogy between municipal and international law, therefore, holds only for the content and for the function, not for the form. These two kinds of law shared a common content of concepts, principles, techniques and methods; also their function is the same, which is making order in a human community and making its members relationships certain and secure.

¹⁶ Cf. H.L.A. Hart, *The Concept of Law*, Oxford, Clarendon Press, 1994², pp. 213-237.

Yet, certainty is ordered to the human person for whose sake law is made as every idea of peace involves an idea of man.¹⁷

A useful framework to set the problem of peace in the international scenario has been provided by Ross' following distinctions: "world society" denotes the situation where all nations are united under a world government, "international society" denotes the society among nations (characterised by interdependence and solidarity as a "fact", in the sense that men and nations are bound together in a common fate), and "international community" denotes the community where the "fact" lying beneath international society shapes the minds of men to such a degree they feel themselves as members of the same group¹⁸. In Ross's time there was an international society, but no international community, whereas a world society was a mere object of speculation unity – our time is pretty much the same –; nevertheless, Ross suggests that an evolution from international society toward an international community is possible and in a similar growth law plays a crucial role.

Many hold that in order to achieve a state of law and justice in international society an international organization having legal powers to decide all disputes between states in a way which has to be binding for the states and to be maintained, if necessary, by force has to be established. People like Kelsen suggest that compulsory and unconditional jurisdiction has to be given to the International Court of Justice, which should also be provided with effective means to enforce its decision. Sometimes a similar propose clashes with a "magical conception" of law, by which law is thought to be created by means of mere words; on the contrary, in order to be properly binding, law needs an interest in the common good that cannot be created simply by legal statements; furthermore, such a conception forgets that the main feature of any legal order, its dynamic character. A theoretical mistake made by some legal positivists is considering judicial activity as a mere static procedure for maintaining a given order by applying to particular cases the general rules stated by legislation. Given that the evolution of the international society toward a peaceful community requires changes of power relations, such a misunderstanding of legal practice maintains that compulsory jurisdiction for an international court cannot secure international peace.

¹⁷ J. Finnis, *Natural Law Theories*, Stanford Encyclopaedia of Philosophy, 2007: «Talk of human flourishing's or wellbeing's aspects, and of principles of practical reason, should not be allowed to distract attention from an important truth, implicit both in classical Greek and Roman philosophical and juristic treatments of justice and in modern juristic attributions of human rights. Indeed, the Universal Declaration of Human Rights (1948) links the two traditions of discourse by placing at the head of its articulation of human rights the core ("all human beings are born free and equal in dignity and rights") of the Roman juristic saying (*Institutes* 1.2.2) that "by nature, from the outset, all human beings were born free and equal," a saying about *iustitia*, justice as a ground and standard for *ius*, law. »

¹⁸ A. Ross, *Law and the Growth of International Society*, «University of Illinois Law Forum», 1956, pp. 262-269.

In fact, at worst having a judge without a legislator is possible, not vice versa. When disputes between states arise, there is the need for an authoritative solution; in order to perform this action the role of the judge is unchangeable because he has to decide whether or not the law has been violated.

Kelsen and Ross recognised the dynamic character of judicial activity and its importance in international legal politics: «An international court which exercises the jurisdiction of deciding all the legal disputes of those parties subject to the law, even if it is empowered by the constitution to apply only the positive law, gradually and imperceptibly will adapt this law in its concrete decisions to actual needs. The history of Roman and Anglo-American law shows how judicial decisions create law. ».¹⁹

What I want to stress here is that the solutions offered to the problem of peace in international relations depend not only on given conceptions of humanity but also on given conceptions of law.

Among the problems arising in international legal discourse I would like to analyse the normative question *whether or not the International Court of Justice should have compulsory jurisdiction for deciding international disputes..*

Since this is the problem of how it is possible to justify an “international jurisdiction”, I think it would be useful to address such a question in the light of Dante’s arguments, but this could be held for further discussions.

¹⁹ H. Kelsen, *Peace through law*, Chapel Hill, The University of North Carolina Press, 1944, p. 23.