



Period. -  
B

## **BERKELEY LA RAZA LAW JOURNAL**

Volume 17, No. 1

Boalt Hall School of Law

2006

### **LATCRIT X: CRITICAL APPROACHES TO ECONOMIC IN/JUSTICE**

#### **INTRODUCTION**

#### **ARTICLES**

ENDOGENOUS GROWTH THEORY, STATUS QUO EFFICIENCY, AND GLOBALIZATION  
*Steven A. Ramirez*

ECOLOGICAL ECONOMICS: A PROGRESSIVE PARADIGM?  
*Kristen A. Sheeran*

CORNEL WEST, MEET RICHARD POSNER: TOWARDS A CRITICAL-NEOCLASSICAL  
SYNTHESIS  
*Francisco E. Guerra-Pujol*

ECONOMIC PARADIGMS AND LATIN AMERICAN DEVELOPMENT THEORY: THE  
SEARCH FOR NIRVANA  
*Rafael A Porrata-Doria, Jr.*

DECONSTRUCTING THE MYTHOLOGY OF FREE TRADE: CRITICAL REFLECTIONS ON  
COMPARATIVE ADVANTAGE  
*Carmen G. Gonzalez*

CONTEMPLATING THE WTO FROM THE MARGINS  
*Ruth Gordon*

TRADE NEGOTIATIONS OR TRADE CAPITULATIONS: AN AFRICAN EXPERIENCE  
*Patricia Michelle Lenaghan*

ECONOMIC GLOBALIZATION ASCENDANT AND THE CRISIS OF THE STATE: FOUR  
PERSPECTIVES ON THE EMERGING IDEOLOGY OF THE STATE IN THE NEW  
GLOBAL ORDER  
*Larry Catá Backer*

#### **AFTERWORD**

# Berkeley La Raza Law Journal

VOLUME 17, No. 1

SPRING 2006

## LATCRIT X: CRITICAL APPROACHES TO ECONOMIC IN/JUSTICE

### INTRODUCTION

### ARTICLES

- ENDOGENOUS GROWTH THEORY, STATUS QUO EFFICIENCY,  
AND GLOBALIZATION..... *Steven A. Ramirez* 1
- ECOLOGICAL ECONOMICS: A PROGRESSIVE  
PARADIGM?..... *Kristen A. Sheeran* 21
- CORNEL WEST, MEET RICHARD POSNER: TOWARDS A  
CRITICAL-NEOCLASSICAL SYNTHESIS..... *Francisco E. Guerra-Pujol* 39
- ECONOMIC PARADIGMS AND LATIN AMERICAN  
DEVELOPMENT THEORY:  
THE SEARCH FOR NIRVANA..... *Rafael A. Porrata-Doria, Jr.* 51
- DECONSTRUCTING THE MYTHOLOGY OF FREE TRADE:  
CRITICAL REFLECTIONS ON  
COMPARATIVE ADVANTAGE..... *Carmen G. Gonzalez* 65
- CONTEMPLATING THE WTO FROM THE MARGINS..... *Ruth Gordon* 95
- TRADE NEGOTIATIONS OR TRADE CAPITULATIONS:  
AN AFRICAN EXPERIENCE..... *Patricia Michelle Lenaghan* 117
- ECONOMIC GLOBALIZATION ASCENDANT AND  
THE CRISIS OF THE STATE: FOUR PERSPECTIVES ON  
THE EMERGING IDEOLOGY OF THE STATE IN THE  
NEW GLOBAL ORDER..... *Larry Catá Backer* 141

### AFTERWORD

Berkeley La Raza law journal  
Received on: 05-22-07  
TULANE LAW LIBRARY

# Economic Globalization Ascendant and the Crisis of the State: Four Perspectives on the Emerging Ideology of the State in the New Global Order

Larry Catá Backer\*

There has been a lot of talk recently, and especially among the very thoughtful participants in LatCrit X,<sup>1</sup> about the crises created by, or resulting from, economic globalization<sup>2</sup>. Globalization brutalizes not only the people of the

---

\* Professor of Law, Pennsylvania State University, Dickinson School of Law. The author may be contacted at lcb11@psu.edu. This essay memorializes a presentation made at LatCrit X, San Juan, Puerto Rico, October 8, 2005. My thanks to the participants at the conference panel on Trade, Development and Economic Theory, for their insightful comments. Special thanks to my research assistant, Pedro Hernandez (Penn State Law 2006) for his usual excellent work. In keeping with the spirit of the essays contributed to this collection, I have kept footnotes and references to a minimum.

1. Tenth Annual LatCrit Conference, 'Critical Approaches to Economic In/Justice, San Juan, Puerto Rico, October 8-9, 2005 (hereinafter LatCrit X). Latino and Latina Critical Theory, or "LatCrit" theory emerged in 1995 as a self-consciously autonomous genre of critical "outsider jurisprudence." Its "twin goals . . . have been: (1) to develop a critical, activist and inter-disciplinary discourse on law and policy towards Latinas/os, and (2) to foster both the development of coalitional theory and practice as well as the accessibility of this knowledge to agents of social and legal transformation." Latino and Latina Critical Theory, *Saludos, Greetings, Bienvenidas/os, available at* <http://personal.law.miami.edu/~fvaldes/latcrit/> (last visited March 30, 2006). For my own understanding of this genre, and its application in the field of law, see Larry Catá Backer, *Using Law Against Itself: Bush v. Gore Applied in the Courts*, 55 RUTGERS L. REV. 1109 (2003); Larry Catá Backer, *Not a Zookeeper's Culture: LatCrit Theory and the Search for Latino/a Authenticity in the U.S.*, 4 TEXAS HISP. J.L. & POL'Y 7 (1998).

2. Thomas Friedman, a leading popularizer of globalization as a system of ideas provides a good, simple, definition of globalization: "The globalization system . . . has one overarching feature—integration. The world has become an increasingly interwoven place, and today, whether you are a company or a country, your threats and opportunities increasingly derive from who you are connected to." THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 8 (2000). Friedman explains that integration of this sort is grounded in precise and specific values:

"The driving idea behind globalization is free market capitalism—the more you let market forces rule and the more you open your economy to free trade and competition, the more efficient and flourishing your economy will be. Globalization means the spread of free-market capitalism to virtually every country in the world. Therefore, globalization also has its own economic rules—rules that revolve around opening, deregulating and privatizing your economy, in order to make it more competitive and attractive to foreign investment. . . . Unlike the Cold War system, globalization has its own dominant culture, which is why it tends to be homogenizing to a certain degree. . . . Culturally speaking, globalization has tended to involve the spread . . . of Americanization."

*Id.* at 9. I concede, like virtually every writer on the subject, that globalization does not have a credo, nor a catechism, nor an institutional structure for maintaining fidelity to a single variant of the current form of the human desire to integrate. See Larry Catá Backer, *Harmonizing Law in an Era of Globalization – An Introduction and Essay on Convergence, Divergence and Resistance* 1-29, in HARMONIZING LAW IN

developing world,<sup>3</sup> but may also adversely affect many—especially subordinated populations—in the developed world.<sup>4</sup> Globalization has a great detrimental effect on the environment, especially on the bio-diversity necessary to minimize risk of famine.<sup>5</sup> And, of course, its foundations<sup>6</sup> may just be plain wrong<sup>7</sup> – and deliberately so.<sup>8</sup>

I will focus here on another great crisis proceeding spawned by globalization: *the crisis of the state and state system as the foundational form of global political organization*. The contours of the debate about the effect of globalization on the global state system are well known.<sup>9</sup> Perhaps less well understood is the way in which major views of globalization all tend to posit the end of the state system. The result does not change even when considering state friendly conceptions of globalization. More interesting still is that even the great anti-globalization perspectives do little to defend the traditional state system. Whatever the form of opposition, each essentially posits a global system in which the state plays a subordinate role.

For purposes of this paper I broadly describe the relationship between globalization and nation-states from three perspectives. The first applies the logic of

AN ERA OF GLOBALIZATION: CONVERGENCE, DIVERGENCE AND RESISTANCE (Larry Catá Backer, ed., forthcoming 2006).

3. See generally Ruth Gordon, *Contemplating the WTO From the Margins*, 16 BERKELEY LA RAZA L.J. 95 (2006); Ruth Gordon, Panel Presentation, Plenary Session: Economic Theory, Practice and the Developing World. Conference: LatCrit X, *supra* note 1.

4. See generally Steven Ramirez, *Endogenous Growth Theory, Status Quo Efficiency, and Globalization*, 16 BERKELEY LA RAZA L.J. 1 (2006); Steve Ramirez, Panel Presentation, Plenary Session: Economic Theory, Practice and the Developing World. Conference: LatCrit X *supra* note 1.

5. See generally Carmen G. Gonzalez, *Deconstructing the Mythology of Free Trade: Critical Reflections on Comparative Advantage*, 16 BERKELEY LA RAZA L.J. 65 (2006); Kristen Sheeran, *Ecological Economics: A Progressive Paradigm?*, 16 BERKELEY LA RAZA L.J. 21 (2006); Carmen Gonzalez, Panel Presentation, Plenary Session: Economic Theory, Practice and the Developing World. Conference: LatCrit X, *supra* note 1.

6. Manfred Steger, a sympathetic academic critic of globalization provides an excellent summary of its principle foundations grouped into five claims: (1) globalization is about liberalization and global integration of markets (the key to globalization is the elimination of political barriers to economic and other interactions among the peoples of the earth); (2) globalization is inevitable and irreversible (there is no better alternative and its dynamics mirror human nature and thus are unavoidable); (3) nobody is in charge of globalization (it is private, controlled by individuals, and market driven rather than public, controlled by states, and planned); (4) globalization benefits everyone (global integration is a moral good); and (5) globalization furthers the spread of democracy in the world (free markets and democratic theory are inseparable and perhaps even synonymous terms). MANFRED B. STEGER, *GLOBALISM: THE NEW MARKET IDEOLOGY* 47-79 (2002).

7. See generally Rafael Porrata-Doria, *Economic Paradigms and Latin American Development Theory: The Search for Nirvana*, 16 BERKELEY LA RAZA L.J. 51 (2006).

8. See generally Martha McClusky, *A Critical Guide to Law and Economics*. Panel Presentation, Critical Economic Thinking. Conference: LatCrit X, *supra* note 1.

9. For a sampling of authors arguing that globalization is fatal to the state system, see, e.g., RICHARD FALK, *PREDATORY GLOBALIZATION: A CRITIQUE* 34-47 (1999); KENICHI OHMAE, *THE END OF THE NATION-STATE* (1995); ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* (1990); JAMES N. ROSENAU, *TURBULENCE IN WORLD POLITICS: A THEORY OF CHANGE AND CONTINUITY* (1990); and Ali Kahn, *The Extinction of Nation-States*, 7 AM. U. J. INT'L L. & POL'Y 197 (1992). For a taste of academic arguments that globalization has little or no effect on the strength and pervasiveness of the state system, see, e.g., Anthony Smith, *Towards a Global Culture?*, in *GLOBAL CULTURE* (Michael Featherstone, ed., 1990); Michael Mann, *Has Globalization Ended the Rise and Rise of the Nation-State?*, 4:3 REV. INT'L POL. ECON. 472 (1997); PAUL HIRST AND GRAHAME THOMPSON, *GLOBALIZATION IN QUESTION: THE INTERNATIONAL ECONOMY AND THE POSSIBILITIES OF GOVERNANCE* (1999).



the so-called Washington Consensus of private economic transactional neo-liberal globalization to examine its consequences for the nation-state.<sup>10</sup> The second applies a more traditionally state-centered and international relations based analytical perspective to the consequences for the nation-state for the current form of economic globalization.<sup>11</sup> The third examines globalization's effects on the nation-state from the analytical framework current in certain parts of the developing world, as well as among some major Western religious institutions, which takes the form of a moral and political critique of Western led economic globalization.<sup>12</sup>

I will show how all three perspectives ultimately posit the same consequence for nation-state systems. All three suggest that economic globalization will have significant negative effects on the position of the nation-state as the foundation of world order and suggest a revolution in the current world order based on a "all nation-states are formally equal" system in which the community of such equal states together serve as the foundation of law making in the global system of political governance. Each perspective differs only in the nature and form of the new global system that will replace the now traditional system of political governance. In the first view, all states ultimately suffer the same fate, though perhaps not all at the same time, as political power becomes more diffuse and shared among political, economic, religious, scientific and other communities.<sup>13</sup> The second and third produce a perversion of the state system with a few hyper-states acting as the driving force of international norm making over an amalgamation of other actors, including states, and other political, economic, scientific, religious and related communities.<sup>14</sup>

All perspectives also imply that an Aristotelian form of aristocratic governance will result at the global level beyond the nation-state level—in which a few states will effectively govern for the community of nations, subject to a set of norms that transcend national boundaries.<sup>15</sup> The first suggests a more vestigial role

10. For a discussion and critique of the Washington Consensus, see JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 67 (2002). Stiglitz describes the Washington Consensus as systemization of ideas, dominating policy since the 1980s, of the sorts of economic and other policies that would work best for global economic development and stability, developed by consensus between the United States Department of the Treasury, the International Monetary Fund and the World Bank. *Id.* at 16. The focus of the Washington Consensus is on dismantling command economies, government participation in the economy as an economic actor, trade protectionism, and loose monetary policies. *Id.* at 53-54. Its driving characteristic is market fundamentalism, a belief that the establishment of markets (and the system of property rights associated with markets) would help produce the institutions that would ensure the continued efficient working of robust market economies. *Id.* at 73-74.

11. For a provocative variant, see, MICHAEL HARDT AND ANTONIO NEGRI, *EMPIRE* (2000).

12. For a more thorough discussion, see Larry Catá Backer, *Ideologies of Globalization and Sovereign Debt: Cuba and the IMF*, 24 PENN STATE L. REV. - (forthcoming 2006).

13. See Gunther Teubner, *Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory?*, in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 3-28 (Christian Joerges, Inger-Johane Sand and Gunther Teubner, eds., 2004); Gunther Teubner, *Global Bukovina: Legal Pluralism in the World Society*, in GLOBAL LAW WITHOUT A STATE 3 (Gunther Teubner, ed., 1997).

14. In this case, interdependencies of globalization produce stratification on a variety of levels. For an early analysis of the consequences of interdependence, see RICHARD N. COOPER, *THE ECONOMICS OF INTERDEPENDENCE* (1968).

15. ARISTOTLE, *POLITICS* (WILLIAM ELLIS, TRANS. 1912). Of course, Aristotle noted that aristocracy comes in a wide variety of forms, from simple semi-democratic to monarchical aristocracy. Applied by analogy to the governance by states within a community of nations, the former is likely to prevail where a large body of the community is of moderate means, and the latter where few in the community have enormous wealth and power. See *id.* at 118-19 (Bk. IV, Ch. VI). To the extent that any such form of governance takes into account the common good, Aristotle tended to be indifferent as to the

for all states and the rule of amalgamations of private and public power, the characteristics of which will be determined by the aggregate desires of individuals pursuing private benefit. In effect state and non-state actors will share more equally in increasingly broad areas of global governance. This is the sort of governance that can usefully be seen as corresponding roughly to an Aristotelian notion of aristocracy.<sup>16</sup>

The second suggests a substantially larger role for some but not all nation-states, but views this transition as benefiting all people. States continue to play a dominant role in governance, but only the most powerful of states will reserve to themselves the full range of power and authority to manage global governance in partnership with transnational non-governmental actors—such as economic, religious and social organizations. This roughly corresponds to Aristotle's notion of oligarchy—a flawed aristocracy.<sup>17</sup>

The third perspective indicts this transition to globalization as the embrace of multiple systems of subordination: racial, economic, ethnic, social, political, and the like. In this view, certain powerful members of the community of nations will appropriate for themselves not only all of the power, but also all of the benefit of power for themselves to the detriment of others. I provide context for this assertion by looking briefly at the current debate over sovereign debt and its amelioration. This perspective suggests that globalization roughly takes the form of Aristotle's aristocratic or even monarchical tyranny.<sup>18</sup>

But the processes I describe, in which every variation appears to claim the Westphalian state as a casualty of globalization, is both messier and more complicated than the three models of crisis suggest. I end this essay with a nod to the messiness, which serves as my fourth perspective. Simultaneously developing alongside globalization, or surviving its ascendancy, are other systems incompatible with, and likely to engage in conflicts for dominance with, both the current Westphalian state system and the ascending system of globalization. These competitor systems will challenge not only the dominant system (or at least systems perceived as dominant), but also will likely engage in sharp conflict with each other as well.

The threats from these incompatible systems arise primarily from three

---

form of governance; however, in their corrupted form "a tyranny is a monarchy where the good of one man only is the object of government, an oligarchy considers only the rich, and a democracy only the poor." *Id.*, at 79 (Bk. III, Ch. VII).

16. Aristotle describes an aristocracy as a polis "governed by the best men, upon the most virtuous principles. . . . which is the best of all governments." *Id.* at 120 (Bk. IV, Ch. VII).

17. Aristotle describes four classes of oligarchy: where the right to offices is restricted by a certain census that effectively excludes the poor from any share in governance; where those in control are all of small fortune but retain the power, solely among themselves, to control the institutions of government (this, class of oligarchy, Aristotle suggests, is the closest in form to an aristocracy where the selection is made from among the best of the community at large, but it becomes closest in form to an oligarchy where the choice is restricted to an arbitrarily small group); where power is hereditary (that is based on a characteristic other than worthiness; in a modern context, for example, perhaps race, ethnicity, or the like); and lastly, where the hereditary nobility rules without regard to law but only with regard to its own desires (this corresponds closest to the form of monarchical tyranny). *Id.* at 117 (Bk. IV, Ch. V).

18. Aristotle describes tyranny as a corruption of either monarchy or democracy, but shows his greatest concern with what he describes a third distinct class of tyranny "which is the very opposite to kingly power; for this is the government of one who rules over his equals and superiors without being accountable for his conduct, and whose object is his own advantage, and not the advantage of those he governs." *Id.* at 125 (Bk. IV, Ch. X).

sources. The first include alternative universalizing systems of global organization, based principally in religion. The second include non-religion based universalizing systems in decline, principally the Marxist-Leninist vision of the past century. The last set of threats to globalization is based on a desire to advance divergence, and includes a number of anti-universalizing and anarchistic systems, groups and individuals. These include everything from anti-globalization groups, eco-activists, old-fashioned Westphalian state system isolationist conservatives, anarchists, and ethno-nationalists. Ironically, it is from within this last group that the greatest defenders of the current state system are drawn.

Irony, in this case is also laced with perversity. It seems that the only defense of the traditional state systems is essentially reactionary and increasingly anachronistic. The current nation-state system thus seems to have few real defenders.<sup>19</sup> The consequence for the traditional state system appears to be the same, whatever the form of globalization embraced, from the most benign to the most aggressive, and whatever the character of opposition to globalization endorsed. The attachment to a particular nation-state bounded by a finite territory no longer appears to be the critical factor in the debate about globalization.

## I.

### NEO-LIBERALISM AND THE CRISIS OF THE STATE

The internal logic of the current form of globalization, especially in its reductionist form known as the Washington Consensus, points to the end of the state as the highest, or at least the central form of the organization of power, and its replacement with a diffuse system of governance made up of horizontally and vertically integrated spheres of private and public law.<sup>20</sup> Washington Consensus globalization is driven by nations representing the dominant economic powers and their financial instruments—the International Monetary Fund and the World Bank. Washington Consensus free market globalization posits that growth can occur only in a tightly integrated global economy, founded on trade liberalization, privatization, and macro-stability.<sup>21</sup> Micro-stability will always come—in the long run.

19. However, the September 11, 2001 attacks on New York and Washington, D.C. produced a renewed interest in the state as the great bulwark against the anarchy of international terrorism. See, e.g., Viet D. Dinh, *Nationalism in the Age of Terror*, 56 FLA. L. REV. 867 (2004). But it is not clear that interest in the police power of states will necessarily affect the relation of the state to an increasingly global community of other actors. It is also not clear whether the current war on terrorism will not produce a greater interest in the creation of global police forces outside the control of any single state. This idea has strong roots in the construction of a strong United Nations system from well before the events of 2001. See Thomas Franck & Faizal Patel, *UN Police Action in Lieu of War: "The Old Order Changeth,"* 85 AM. J. INT'L L. 63 (1991). Fear of the creation of a world police force has animated the American Right. See, e.g., Norman Grigg, *Civilian Disarmament*, 17(22) THE NEW AMERICAN 25 (Oct. 22, 2001).

20. See, e.g., Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1995) (arguing that the state system has been effectively replaced by a system of interlocking actors, institutions and systems, committed to unrestricted global market economy and liberal democracy). This understanding is critiqued from what I would characterize as my third perspective in Outi Korhonen, *Liberalism and International Law: A Centre Projecting a Periphery*, 65 NORDIC J. INT'L L. 481 (1996).

21. The ten points of Washington Consensus action are nicely summarized in RICHARD GOTT, *IN THE SHADOW OF THE LIBERATOR: HUGO CHAVEZ AND THE TRANSFORMATION OF VENEZUELA* 52-53 (2000).

Washington Consensus globalization views regulatory institutions—like the nation-state—much the way Enlightenment *philosophes* understood God, as the great clockmaker whose function was limited to delineating the parameters under which individuals could freely and fairly optimize their condition. In the parlance of economic globalization, the state functions best as a sort of foundational or meta-enterprise, providing the stability through which private ordering can fuel wealth, by reducing transaction costs and costs of information, and by policing the system to ensure that all parties play by the same set of aggregate wealth maximizing rules. And all nation-states, of course, must police private transactions in accordance with the same set of rules derived from a universally applicable set of norms. Regulation—in a sense, the exercise of sovereign power reflecting the will of a political community—is transformed into a ministerial act. Substance has been determined outside the nation-state. Local law making may add local color to the mix, but modifying core objectives is out of bounds. Regulatory differentiation, except at these margins, is punished, principally in two ways: by the inexorable operation of the universal laws of economic behavior, and more immediately, by the community of states conforming their behavior to this model.

Taken to its limit, this system suggests that the nation-state—as an independent actor reflecting a political will derived principally from within its borders—would be transformed into a new form of a political institution. The principal characteristic of this new form would be dependence. The nation-state would be reduced to the status of a dependent actor implementing the will of a community of non-resident actors controlling a normative structure over which a state has little control. The state, as such, operates in vestigial form. Its outward form remains unaffected—flag, regional cuisine, language, religion and the like remain bound by place. But its power is drained away. States become hollow, as part of a global system in which organizational power is transferred and shared among a new set of actors. In extreme form they might even come to resemble places like Somalia today (but perhaps with less violence).<sup>22</sup>

Ironically, the state has been an active participant in its own demise. Globalization, after all, originated in the political power of states, and was given life by states. But globalization, as implemented ideology,<sup>23</sup> has jumped the borders of states and assumed a life of its own.<sup>24</sup> It has developed to such an extent that, as

---

22. Indeed, writings about so-called failed states can be seen as symptomatic of the structural changes in the global system of human governance norms. See Philip C. Aka, *Human Rights As Conflict Resolution In Africa In The New Century*, 11 *TULSA J. INT'L & COMP. L.* 179 (2003-2004); GERARD KREIJEN, *STATE FAILURE, SOVEREIGNTY AND EFFECTIVENESS: LEGAL LESSONS FROM THE DECOLONIZATION OF SUB-SAHARAN AFRICA* 84-87 (2003). That these failed states can exist at all can be viewed as evidence that governance power has shifted to other actors, some global, some local, that have substituted for the state. See, e.g., Steve Kibble, *Somaliland: Surviving Without Recognition: Somalia Recognised But Failing?*, 15(5) *INT'L REL.* 5 (2001).

23. See Larry Catá Backer, *Cuban Corporate Governance at the Crossroads: Finessing the Tensions Between Cuban Marxism and Free Market Globalism*, 14 *JOURNAL OF TRANSNATIONAL LAW & CONTEMPORARY PROBLEMS* 337, 375-381 (2004) (discussing the implementation of globalization as ideological add-on by the government of the People's Republic of China and its potential use in Socialist Cuba). "Ideology adds a moral dimension to globalization theory." TED C. LEWELLEN, *THE ANTHROPOLOGY OF GLOBALIZATION: CULTURAL ANTHROPOLOGY ENTERS THE 21<sup>ST</sup> CENTURY* 9 (2002).

24. I make no claim here that the developments I outline here, in any of its four perspectives, are either inevitable or certain. There is no attempt here to fashion an ideology or extract universals of human organizational transformation "through a Baconian search for cultural universals, a kind of public

immature as it may be,<sup>25</sup> globalization may already threaten even its creators, the great economic powers of the world today, by its logic and consequences. The process mimics, in ideological form, the pattern of concentration of power within both American and European federalism.<sup>26</sup> The implications of the current form of economic globalization suggest a development path that puts it on a collision course with even the most nominal idea of the state system. This path to collision is fairly straightforward:

1. States create or embrace an ideology of organization. For our purposes, that ideology is represented by the Washington Consensus, or "neo-liberalism," or some other or similar set of terms, all of which identify the same set of ideological structures. It is this ideological element that distinguishes current economic globalization from past state centered systems of competition for advantage:

"Globalization began to be represented as a finality, as the logical and inevitable culmination of the powerful tendencies of the market at work. The dominance of economic forces was regarded as both necessary and beneficial. States and the interstate system would serve mainly to ensure the working of market logic. . . . [G]lobalization became an ideology."<sup>27</sup>

As ideology, globalization assumes a position similar to that of religion—something inevitable, unavoidable, and leading to a fairly predictable and necessary change in global human communal organization.<sup>28</sup> The ideology of globalization, like its religious rivals, offers to its adherents the path to attain as close a level of perfection as possible within communal organization.<sup>29</sup>

2. This ideology produces systems of governance, justified on increasingly

---

opinion polling of the world's peoples in search of a *consensus gentium* that does not in fact exist." CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 40 (1973) (cf. *id.*, at 44; culture is best seen as "a set of control mechanisms—plans recipes, rules, instructions (what computer engineers call 'programs')—for the governing of behavior").

25. See, e.g., Pippa Norris, *Global Governance and Cosmopolitan Citizens*, in *GOVERNANCE IN A GLOBALIZING WORLD* 155 (Joseph S. Nye, Jr., and John D. Donahue, eds., 2000) (noting that despite half a century of efforts by European elites, the national identities of the European Union's Member States remain stronger than a common European identity, and still matter though to a much smaller extent than in the past). But see Larry Catá Backer, *The Euro and the European Demos: A Reconstitution*, 21 Y.B. EUR. LAW (England) 13 (2002) (suggesting that elites can, over time, fashion political states from among disparate political communities that are related to each other at some level of generality).

26. See Larry Catá Backer, *Restraining Power from Below: The European Constitution's Text and the Effectiveness of Protection of Member State Power Within the EU Framework*, The Federal Trust for Education and Research, Online Paper No. 15/04 (July 2004) at [http://www.fedtrust.co.uk/uploads/constitution/15\\_04.pdf](http://www.fedtrust.co.uk/uploads/constitution/15_04.pdf).

27. Robert W. Cox, *A Perspective on Globalization*, in *GLOBALIZATION: CRITICAL PERSPECTIVES* 21-23 (James H. Mittleman, ed., 1996).

28. See, e.g., THOMAS L. FRIEDMAN, *supra* note 2; Harald Baum, *Globalizing Capital Markets and Possible Regulatory Responses*, in *LEGAL ASPECTS OF GLOBALIZATION: CONFLICT OF LAWS, INTERNET, CAPITAL MARKETS & INSOLVENCY IN A GLOBAL ECONOMY* 78 (Jurgen Basedow & Toshiyuki Kono eds., 2000); DANIEL YERGIN & JOSEPH STANISLAW, *THE COMMANDING HEIGHTS: THE BATTLE BETWEEN GOVERNMENT AND THE MARKETPLACE THAT IS REMAKING THE MODERN WORLD* (1998).

29. For a discussion of this relationship between the perfectibility inherent in religion and globalization, see, THOMAS FRANK, *ONE MARKET UNDER GOD: EXTREME CAPITALISM, MARKET POPULISM, AND THE END OF ECONOMIC DEMOCRACY* (2000).

universal or absolute terms. In this case, and ironically, it suggests a focus on economic rather than social or political norms as the highest source of organization. It values private over public transactions, webs of contract between individuals or freely formed groups over political regulation, and on markets rather than on political communities. It separates markets from states.

3. Starting from slightly different places, these systems, grounded in variations of a singular ideological base, *converge*. Indeed, the history of law in the West, explicitly since 1900, has been one of convergence and a search for the one true and universal truth reflected in a single form of law "getting it right" That should be applied all over the world. Since the mid-20<sup>th</sup> century, legal convergence has been aided by a number of unlikely allies. In the economic sphere, for example, convergence has been the object of the transnational business community, civil society human rights actors, and the international community. However, though all groups seek globalization and convergence, they differ quite substantially on the context and focus of that convergence. Civil society human rights actors and the international community have focused on regularizing norms governing markets for labor.<sup>30</sup> But the transnational business community resists this form of convergence, preferring to leave such regulation to individual states, even if the certainty and predictability of labor regulation convergence might even reduce the administrative costs of dealing with multiple labor market rules enough to justify the added costs of wages and benefits that are the object of human rights community driven labor law internationalization.<sup>31</sup> The business community would prefer to focus on convergence of business practices.<sup>32</sup> But this is of less interest to civil society human rights actors. Likewise, all groups believe that convergence of the practices of transnational business enterprises is important. But again, there is no agreement on the form or objects of this convergence.<sup>33</sup>

4. Convergence has produced a sense, perhaps even a belief, in the

---

30. For example, see the work of the International Labor Organization, <http://www.ilo.org>.

31. The Organization for Economic Co-operation and Development (OECD) has promulgated its Guidelines for Multinational Enterprises, available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>. The OECD website suggests that these guidelines "constitute a set of voluntary recommendations to multinational enterprises in all the major areas of business ethics, including employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation. Adhering governments have committed to promote them among multinational enterprises operating in or from their territories." OECD, *The OECD Guidelines for Multinational Enterprises: About*, available at [http://www.oecd.org/about/0,2337,en\\_2649\\_34889\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/about/0,2337,en_2649_34889_1_1_1_1_1,00.html) (last accessed March 6, 2005). With respect to labor practices for example, the *Guidelines* suggest that transnational corporations "[o]bserve standards of employment and industrial relations not less favourable than those observed by comparable employers in the host country." Guidelines, Part IV(4).

32. Thus, for example, there have been substantial governmental and private efforts to harmonize financial reporting among companies in the United States and the European Union. See U.S. Securities and Exchange Commission, International Reporting and Disclosure Issues in the Division of Corporation Finance (Oct. 1, 2003), available at <http://www.sec.gov/divisions/corpfin/internatl/issues1004.htm>.

33. For a discussion of the difficulties of the convergence of rules transnational corporate governance, and of the greater difficulty of internationalizing such governance regimes, see Larry Catá Backer, *MULTINATIONAL CORPORATIONS, TRANSNATIONAL LAW: CORPORATE SOCIAL RESPONSIBILITY AS INTERNATIONAL LAW*, 37 COLUM. HUM. RTS. L. REV. 287 (2006).

autonomy of the rules or norms on which convergence is based. A transnational autonomous system implies hierarchy in which states become more and more like the actors they initially regulated. States lose their primacy as the apex of regulatory agency and become just another institutional producer of law among multiple horizontally related regulatory systems. States become more often objects of transnational systems than the source of their regulation.

5. Powerful states see in such systems a means of projection of national power and are willing, on that basis, to tolerate autonomy as fundamentally connected to state interests. Resistance emerges from those left behind. The seductiveness of globalization for states thus lies in their inability to understand its fundamental nature in terms other than those of traditional state power.

6. Systemic autonomy through convergence also tends to provide a basis for the autonomy of non-state actors, critical to the implementation of global systems of private activity. Rules governing merchants, for example, have become more independent from the commercial rules of particular states, especially with respect to transactions that cross borders.<sup>34</sup> Corporations that own themselves,<sup>35</sup> markets that are self regulating within the bounds of transnational rules,<sup>36</sup> and non-state actors free of the constraints of regulation by a particular nation-state become more common and important.<sup>37</sup>

7. Institutional and systemic autonomy must be preserved. Preservation tends to produce institutions, in this case transnational institutions for the regularization, harmonization, integration, and ultimately, the enforcement of the norms and the systems it produces. This reinforces autonomy and suggests supremacy.

8. The system, as well as the non-state and non-public actors critical to its implementation, are initially dependent on state support. Corporations are excellent examples of this initial dependence on the state; multinational corporations show that independence of states is possible even for economic organizations nominally beholden to political units (like states). No system, or transnational actor can emerge independent of the states that produced it. But such systems and actors, whose

34. See, e.g., Michael T. Medwig, *The New Law Merchant: Legal Rhetoric and Commercial Reality*, 24 L. & POL. INT'L BUS. 589 (1993) ("Over the last century, merchants have slowly begun to extricate their commercial disputes from the tangled regulatory web of the national legal order." *Id.* at 589).

35. See Katsuhito Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 AM. J. COMP. L. 583 (1999) (describing why under the form of capitalism adopted in Japan, corporations can effectively own themselves through the practice of cross ownership among a small number of corporations).

36. The rise of international and transnational systems of dispute resolution, subject to their own rules, is a case in point. See, e.g., Tim Ginsburg, *The Culture of Arbitration*, 36 VANDERBILT J. TRANSNAT'L L. 1335 (2003).

37. For a discussion of the possibility that under current globalization regimes, transnational corporations may essentially regulate themselves, see Larry Catá Backer, *The Autonomous Global Corporation: On the Role of Organizational Law Beyond Asset Partitioning and Legal Personality*, 41(4) TULSA L.J. - (forthcoming 2006).



objectives or horizons cross the borders of the entities which created them, seek autonomy within the fields of their activities.

9. State support, once critical to the organization and functioning of non-state actors, becomes secondary, and systems move toward self-regulation once such non-state actors can institutionalize their transnational structural elements. In this case, systems of transnational economic and regulatory organizations become the foundation for such regulation.<sup>38</sup> When well enough developed, the participants themselves have incentives to enforce the systems themselves, and even greater incentive to preserve the autonomy of the systems created. This is made possible in part by the fluidity of borders.<sup>39</sup> States can impede but seem unable to reverse this fluidity.

10. The original world system is thus turned upside down. States can now reinforce the system—a system whose operation and normative structure is beyond the control of any of them—or run the risk of isolation or irrelevance. Some states enable and some states resist the devolution of authority implied by economic globalization. “Public policies have significantly influenced the character and pace of economic integration, although not always in the direction of increasing economic integration.”<sup>40</sup> Isolation becomes riskier in a world in which its costs can be great—from the loss of access to capital to the inability to purchase and sell goods beyond the national borders; Cuba provides a great modern example of a nation-state willing to take on those costs.<sup>41</sup> And isolation may, in any case, be impossible where agitation for domestic change can be made relentlessly from outside the state through global media and the parallel development of a global culture.

The global community can leak into even the most isolated state, in one form or another. Even where its effects can be quarantined, knowledge of a world “outside” will invariably color the shape of things within even an isolated state. Even North Korea is affected by globalization, if only by way of the tremendous amount of state resources devoted to keeping global culture out and the North Korean population in, resources that might otherwise be spent on food, or economic development. Nonetheless, states do not come to this naturally—even the most willing will seek to bend the system to its purposes—and thus the relationship of states to economic globalization will vary significantly across the globe.

11. Absent a rejection of globalization in any form, and at its limit, the state as an independent and superior entity eventually would be overcome. “The primary

---

38. See Charles R.P. Pouncey, *Decentering the Corporation: Maximizing Human Opportunity by Reconstructing the Business Enterprise*, Panel presentation: Critical Economic Thinking, Conference: LatCrit X, *supra* note 1.

39. See Gunther Teubner, *Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory*, *supra* note 13.

40. Michael Mussa, *Factors Driving Global Economic Integration*, Speech delivered at a symposium sponsored by the Federal Reserve Bank of Kansas City on “Global Opportunities and Challenges,” Jackson Hole, Wyoming, Aug. 25, 2000, available at <http://www.imf.org/external/np/speeches/2000/082500.htm>.

41. For a discussion, see Larry Catá Backer, *Cuban Corporate Governance at the Crossroads: Finessing the Tensions Between Cuban Marxism and Free Market Globalism*, 14 J. OF TRANSNATIONAL LAW & CONTEMPORARY PROBLEMS 337, 390-403 (2004).

function of management of the traditional public realm . . . has gradually come to be . . . the maintaining of the conditions required for the well-being of the economy, including, above all, the legal conditions."<sup>42</sup> States might become subordinate parts of global systems of administration, much like corporations today are important subordinate parts of national systems. Alternatively, states might be replaced by a now fully autonomous and superior set of self-enforcing norm systems.

12. Note the nature of the newer subordinate role of the state in this meta-system: States serve as the administrator of labor—though not of the labor markets that themselves have become part of the global economic matrix.<sup>43</sup> The state in this role may be compelled to use its police and tax powers to maintain an efficiency maximizing population.<sup>44</sup> But even these powers can be taken from the state.

Consider three possible alternatives currently in development: First, the creation of joint ventures for police operations—such as the creation of private military forces in places like Africa to provide security as well as order among employees—provide a glimpse of this reality.<sup>45</sup> Second, the creation of centralized and autonomous entities controlled by private webs of economic and other non-state actors for the maintenance of order suggest that even the police power of the state can be privatized. The great success of the Pinkertons in the 19<sup>th</sup> century provides an in-state template for transnational versions of security corporations now beginning to operate in zones of combat throughout the world. The successful testing of the ability of private corporations to meet some of the military needs of even the most powerful states—in places like Iraq and New Orleans—provide a glimpse into that future.<sup>46</sup> Third, clusters of economic actors or other non-state actors raise their own security forces that begin to act like the private armies of the pre-modern age and are used both to maintain order and as an instrument of economic competition. The nature of the civil wars in mineral and diamond rich Central Africa contains hints of this possibility among the non-state actors competing for control of the diamond

42. PHILIP ALLOTT, *THE HEALTH OF NATIONS: SOCIETY AND LAW BEYOND THE STATE* 311-312 (2002). The full quote read thus: "The primary function of management of the traditional public realm, where social power is exercised exclusively in the public interest, has gradually come to be, not the service of some common interest of well-being conceived in terms of general values (say, justice or solidarity or happiness or human flourishing), but the maintaining of the conditions required for the well-being of the economy, including, above all, the legal conditions."

43. Consider the discussion of Salvadoran migrants through this matrix. See generally, Celcilia M. Rivas, *Transmigrantes: Death and the Salvadoran Transnational Journey*, Panel Presentation: Spaces of Death: Race, Law and the Borders of Freedom. Conference: LatCrit X, *supra* note 1.

44. Parallel developments of a cultural system underlying the economic system would also be implemented at the local level. Education for the labor market and the development of a morals and ethics justifying the system are critical components in the creation of autonomy and longevity of the system. That portion of the model is not my focus here.

45. The recognition of this possibility was important in the Construction of the TNC Norms that sought to curb the power of independent economic actors to raise armies and assert the police power within territories effectively under their control. See Larry Catá Backer, *Multinational Corporations, Transnational Law: Corporate Social Responsibility as International Law*, 37 COLUM. HUM. RTS. L. REV. - (forthcoming 2006). See also Cruz Caridad Bueno, paper presentation, *At the Intersection of Racial and Gender Subordination: Afro-Dominican Women in Export Processing Zones*, presented at Panel: Land, Trade and the State. Conference: LatCrit X, *supra* note 1.

46. See, e.g., ROBERT MANDEL, *ARMIES WITHOUT STATES: THE PRIVATIZATION OF SECURITY* (2002); P.W. Singer, *Peacekeepers, Inc.*, 2003 POLICY REVIEW 59 (2003) (a Heritage Foundation publication).

mines for revenues and competing with the state for political power.<sup>47</sup>

13. The state, as a vestigial enterprise, may also remain as the focus for those elements of non-global society left behind. Globalization's refugees, those left in a world of the purely local, may be regulated by a state shorn of power over much else. States, especially states in the developing world, now serve as additional tools in the complex game of international economic advantage rather than as independent actors aggressively defending their own interests. An excellent glimpse into this reality can be gleaned from a history of the maritime industry's constant search for flag ports among nations eager to revamp their legal system for the economic advantage of much more powerful non-state actors. The Bahamas, Liberia, and similar states provide great case studies of this effect.

14. In a world in which the economic becomes the basis of human organizational ordering, and the political becomes secondary and local, the state remains a locus of activity important to this aspect of communal organization, the limits of which are now determined not by political or even moral will, but by the norm structure of economic foundations. These economic foundations begin to appear suspiciously deterministic. But now, rather than leading down the road predicted by Marx, economic determinism leads to the Eden of a neo-liberalist world order.<sup>48</sup>

The debate over sovereign debt provides an excellent illustration of the effects and consequences of this emerging and incomplete global dynamic. The governing ideology would posit that when private enterprises fail, they must be subject to reordering under rules meant to minimize the risk of aggregate loss to the economic communities within the state. But within this emerging system, regulatory bodies, like the state, are also subordinate to, and serve a higher master. Each state is bound by the rules of a community of states that has acquired an autonomous personality constituting all nation-states as a singular body corporate. This international community is meant to be superior to any of its constituent parts and is

---

47. See Paul Collier, World Bank, *Economic Causes of Civil conflict and Their Implications for Policy 9-11* (2000), available at <http://www.worldbank.org/research/conflict/papers/civilconflict.pdf>. Collier notes that the control of resources enables groups to assert the most basic of state powers—the power to project military force. Business and state functions converge in modern civil strife:

"The Michigan Militia was unable to grow beyond a handful of part-time volunteers, whereas the FARC in Colombia has grown to employ around 12,000 people. The factors which account for this difference between failure and success are to be found not in the 'causes' which these two rebel organizations claim to espouse, but in their radically different opportunities to raise revenue."

*Id.* at 2.

48. The conclusion mimics, though does not accept, the critique of what George Soros has called the "market fundamentalist" world order. See GEORGE SOROS, *THE CRISIS OF GLOBAL CAPITALISM: OPEN SOCIETY ENDANGERED* (1998). Soros is right, however, in describing a world that "has entered a period of profound imbalance in which no individual state can resist the power of global financial markets and there are practically no institutions for rule making on an international scale." *Id.* at xxviii. Soros is uneasy about a globalized economic world without a globalized political state. "At present there is a terrific imbalance between individual decision making as expressed in markets and collective decision making as expressed in politics. We have a global economy without a global society." *Id.* at xxix.

charged with providing stability through which state ordering can fuel wealth for its citizens.

When states fail (when they cannot pay their own debts), they too ought to be treated like any other failed enterprise and be made subject to rehabilitation rules imposed by the community of states and global financial instrumentalities (principally the International Monetary Fund). Those rules have recently taken the form either of a strong contractarianism, requiring implementation of the terms of sovereign debt instruments, or of a state enterprise-type bankruptcy standard, imposing a stay on debt collection efforts, broad enforcement of absolute priority, creditor approval of the proposed reorganization plan, and well protected new interim financing pending restructuring. The IMF has recently suggested a more powerful implementation of the state bankruptcy mechanism through Anne Krueger's proposal to create a "Sovereign Debt Restructuring Mechanism" in which the IMF would serve as a sort of bankruptcy court for states.<sup>49</sup>

The focus of this perspective internalizes the foundational norms of the emerging system. Its focus is essentially economic rather than social or political. The object is to provide a mechanism through which the state can correct its failures and resume its role as a clock maker, while protecting the market for private and public debt, and while maximizing protection of creditors (states and institutions). Risk is allocated to the state's "equity holders"—its citizens and local enterprises. The state is expected to pay its debts by using its citizens' wealth (through taxation) or by selling its assets.

This easy movement from economic globalization to the corporatization of the state suggests at least the outer framework of a system in which state power must give way to the center, and the political will of national communities must give way to the greater good of supra-national norms. This argument is not grounded in any particular quarrel with the general parameters of economic globalization or with the Washington Consensus in particular. It merely suggests one of the great collateral consequences of the construction of a system of supra-national economic norms on the state system previously (more or less) in place.

From an Aristotelian perspective, globalists might argue that this consequence is for the greater good. The principles of economic globalization can be put in place on a global scale with the Aristotelian aristocracy.<sup>50</sup> In a world in which nation-states, non-state actors, individuals and others operate on more or less equal terms, and where the object of each is to act for the benefit of the community of actors, then the mechanics of the principles of free and open markets will tend to ensure that governance will always wind up "in the hands of the most worthy citizens."<sup>51</sup> The most worthy may, but need not always, consist of nation-states.

---

49. See Anne O. Krueger, *A New Approach to Sovereign Debt Restructuring*, International Monetary Fund, April 2002, available at <http://www.imf.org/external/pubs/ft/exrp/sdrm/eng/index.htm>.

50. I suggest the analogy in this sense—that the consequence of globalization as outlined, leads to a governance system in which the most effective actors tend to wield the greatest authority in the service of the great principles of human ordering, the rule of law, the free market and the principle of democratic organization. Thus Aristotle suggests that only "a state governed by the best men, upon the most virtuous principles, and not upon any hypothesis, which even good men may propose, has alone the right to be called an aristocracy, for it is there only that a man is at once a good man and a good citizen." Aristotle, *supra* note 15 at 120 (Bk. IV, Ch. VII).

51. *Id.* at 78-79 (Bk. III, Ch. VII).

## II.

## STATE POWER CONVERGENCE AND THE CRISIS OF THE STATE

Clearly, I have gone out on a limb with what can be justly characterized as divination in the form of an explanation of global dynamics under the regime of economic globalization ascendant. It is a perspective, perhaps, that is too much derived from an observation of the consequences of modern internationalism on the smaller, weaker and poorer states. There are certainly other ways of looking at the problem. Consider an example drawn from a perspective that more realistically reflects the interests of the conduct of larger, stronger and richer states.<sup>52</sup> But like the other understanding of globalization, this perspective also points to the end of the nation-state as the highest, or at least as the central, form of the organization of political power. This perspective also suggests the rise of a similar substitute—a diffuse global system made up of spheres of public law centered on political units and private law centered on other amalgamations of economic, social and religious power.<sup>53</sup> Like the first perspective, the path to collision between globalization and the state system is straightforward:

1. The current system of globalization represents the culmination of the Westphalian state system of global governance. Globalization does not threaten that system of state-centered governance. Instead, modern globalization implements a state-dependent internationalism that seeks to privatize much human activity, but which retains for the states, individually or as a whole, the ultimate regulatory power over such privatized activity, as well as power over the entire system.

2. Globalization, however, draws into sharper relief a natural distinction among nation-states. States thus fall within two broad categories. The first, with fewest members, are the great states, all distinguished by their wealth, power and influence. This group includes the United States, Japan, the European Union, Russia (eventually) and China. Group membership is not static; the marginal great powers may decline as a result of inter-state competition, and others may join them—Brazil for example. The second category of states, and the one with the greatest number of members, is made up of the remaining states. These states are distinguished by their lack of power, wealth, and influence, relative to first category states. More importantly, power in these states tends to be undermined and subverted by first category states.

3. Globalization thus serves as the cover for a very traditional attempt by powerful states to project their power for the benefit of their citizens. Modern

---

52. For an early variation from political theory, critical of these realities from the perspective of Latin American integration, see UNITED NATIONS ECONOMIC COMMISSION FOR LATIN AMERICA, *THE ECONOMIC DEVELOPMENT OF LATIN AMERICA AND ITS PRINCIPAL PROBLEMS* (New York, 1950), discussed in RAFAEL A. PORRATA-DORIA, JR., *MERCOSUR: THE COMMON MARKET OF THE SOUTHERN CONE 7-9* (2005) (describing the work of the Argentine economist Raul Prebisch and the problems of the division of power between the great states of the center and those of the periphery, the need for state action and the reality of integration to overcome the limitations of limited state power).

53. For an example, see Jens Steffek, *Sources of Legitimacy Beyond the State: A View From International Relations*, in *TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM* 81, *supra* note 13.

economic globalization represents a more successful and insidious form of imperialism and subordination.

4. The critical contests between the great states today is for control of resources and control of markets. Second order states may possess these resources and markets, but increasingly will lose control of both. For that purpose, first order states will use a variety of indirect techniques of domination, from the implementation of international and regional economic agreements, to naked political and economic pressure.<sup>54</sup>

5. These contests are fought through agents. The best known of these agents are large economic organizations.<sup>55</sup> But other private entities can also serve, including NGOs, transnational private voluntary regulatory authorities, standard setting bodies and the like. As long as transnational agents continue to repatriate money or power or influence, back to the home state, they serve their purpose.

6. Economic organizations serve as a basis for extensions of state power through the mechanics of exploitation of weaker states, and the subversion of smaller economic groupings and cultural assimilation to a set of ideological norms through which the victims happily participate in their own subordination and exploitation—the norms of modern economic globalization.

7. The system is based on the maintenance of a hierarchy of states and the use of private entities instrumentally to assert and maintain state power. Internally, this form of state power is asserted through the use of the police power.<sup>56</sup> Excellent examples include the prosecutions of Worldcom in the United States, Parmalat in Italy, Royal Ahold in the Netherlands, and Yukos in Russia.<sup>57</sup> Externally, this form of state power is asserted through the extraterritorial application of internal rules.

54. For a discussion of the way the Goa Accords worked in this way, see Patricia M. Lenaghan, *Trade Negotiations or Trade Capitulations: An African and South African Experience*, 16 BERKELEY LA RAZA L.J. 117 (2006); Patricia M. Lenaghan, *Trade Negotiations or Trade Capitulations – The European Union and the African Caribbean and the Pacific Grouping: A South African Experience*. Panel Presentation: Trade, Development and Economic Theory. Conference: LatCrit X, *supra* note 1.

55. For a discussion of the effect of an entity based conception of corporations on the ordering of political communities, see, Charles R.P. Pouncey, *Decentering the Corporation: Maximizing Human Opportunity by Reconstructing the Business Enterprise*, Panel presentation: Critical Economic Thinking. Conference: LatCrit X, *supra* note 1.

56. For a discussion of the process of legal enforcement and legal reforms regulating corporations founded on a combination of state power and normative movement, see Jose M. Gabilondo, *Financial Moral Panic: Embracing the Appearance of Volatility*, 36 SETON HALL L. REV. (forthcoming 2006); see generally, Jose M. Gabilondo, *There will Always be an Enron: Discursively Thematizing Cash Flow in the Law*. Work in Progress presentation. Conference: LatCrit X, *supra* note 1.

57. See generally, John C. Coffee, *A Theory of Corporate Scandals: Why the U.S. and Europe Differ*, Columbia Law and Economics Working Paper No. 274 (March, 2005), available at <http://ssrn.com/abstract=694581>. For a discussion of European reform in the context of the Parmalat and Royal Ahold corporate scandals, see Sylwia Gornik-Tomaszewski and Irene N. McCarthy, *Response to Corporate Fraud in the United States and Europe: Towards a Consistent Approach to Regulation*, 26 REV. OF BUS. 15 (2005); Klaus C. Engelen, *Preventing European "Enronitis": How European Regulators Are Handling the Spillover Effects of Sarbanes-Oxley*, 18(3) THE INT'L ECONOMY 40 (2004). For Yukos, see, e.g., Stephen F. Cohen, *The Struggle for Russia*, available at <http://www.thenation.com/doc/20031124/cohen>.

The antitrust rules of the United States, or the competition rules of the European Union provide good examples of this impulse to extraterritoriality.<sup>58</sup>

Other areas of extraterritorial application of state rules have been suggested as necessary to solve transnational problems.<sup>59</sup> They are also asserted through the construction of a system of international law and organization meant to serve the interests of those states at the top of the hierarchy, as well as through systems of strategic bi-lateral treaties favoring the powerful. The recent efforts by the United States, through bilateral treaties, to exempt itself from the application of the Rome statute, are a recent case in point.<sup>60</sup>

8. In either case, globalization will usher in a new world order of caricatured states in which adherence to the forms of the traditional state system will serve as a cover for a global system operated by a corrupted aristocracy—an Aristotelian oligarchy—of super states and associated non-state actors. In the process, globalization will institutionalize—that is, it will create—a sort of “rule of law” normative system for nation-state equality.

9. This system will be marked by several important features:

A. First, among the most powerful states, the character of state organization will expand beyond recognition as these states assume power with no parallel, over political and economic communities.

B. Second, among the rest of the states, the character and nature of state power will shrink dramatically. These hollow states will have limited practical authority and function essentially like special purpose corporations.<sup>61</sup>

C. Third, power will devolve to the so-called private sphere as agent of the first category states and competitor to the second category state, or there may be mergers of the last two (small states and private entities). Private actors, as agents of the great states, may well assert more power than the smaller hollow states.

D. Fourth, authority and sovereignty will become more diffuse and thus less based on traditional notions of territoriality—to the benefit of the great states whose status will increase, and to the detriment of the other emerging hollow states.

---

58. For a discussion of the problems posed as states and supra-national organizations seek to extend the power of their domestic laws abroad, see William E. Kovacic, *Sauce for the Gander: Foreign Extraterritorial Regulation of U.S. Parties, Extraterritoriality, Institutions, and Convergence in International Competition Policy*, 97 AM. SOC'Y INT'L PROC. 309 (2003); Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT'L L. 478, 481 n.13 (2000).

59. Cf. Jonathan Turley, “When in Rome”: *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598 (1990).

60. See, e.g., Chet J. Tan, Jr., *The Proliferation of Bilateral Non-Surrender Agreements Among Non-Ratifiers of the Rome Statute of the International Criminal Court*, 19 AM. U. INT'L L. REV. 1115 (2004).

61. Some have argued that this has been the case well before the rise of the current form of economic globalization in the 20<sup>th</sup> century. See STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999) (“The bundle of properties associated with sovereignty—territory, recognition, autonomy, and control—have been understood, often implicitly, to characterize states in the international system. In fact, however, only a very few states have possessed all of these attributes. Control over both transborder movements and internal developments have often been problematic.” *Id.* at 220).



that will tend to lose coherence as autonomous, superior and independent actors.<sup>62</sup>

In this version, as well as in the first, however, the great international bodies, like the IMF, continue to foster a process in which only a few states exist, and the rest serve as amalgams of partial authority for the benefit of a system designed to increase the wealth and authority of first category states. Even the United Nations provides a hollow vehicle for the appearance of participation in a world in which only a few states speak with authority and the rest survive as they may. The point here is not that it is or is not a lamentable state of affairs. The point is that a system with these characteristics will inevitably produce a crisis of the state. In this case, the crisis differs from the prior version only with respect to the character of what emerges from the mature system.

In this version the international system does not lose its focus on the political or on the importance of political communities, but it is more nakedly hierarchical and the hand and dynamics of state power is more apparent. The world is divided into two, in which traditional notions of state power are perverted—first, to maintain states as bloated versions of the ideology of the traditional nation-state, and second, to create a large class of hollow states, in which the form of the state is preserved but the substance has fallen away.<sup>63</sup>

State debt and its control through a private law-based bankruptcy ordering serves to both reduce the authority of state actors to the level of non-state economic enterprises (already the instrument of first order states), and to enhance the power of the first order states to control these reduced-in-power entities. The regularization of debt repayment, and the blending of patterns of regularization tend to provide incentives to blend the form of the nation-state, at least at a certain level, with that of the corporate collective. Distinctions in the culture of sovereign debt, between the super states, for example the United States, and smaller states, for example Nicaragua, also serve to cement the distinction between the different classes of nation states emerging from the system of globalization based state domination.

Even the notions of "odious debt" and debt forgiveness can be used to the disadvantage of the recipients of this largesse. Perversely, the rise of the possibility of repudiation on the basis of an odious debt doctrine has made it more difficult for creditor states to forgive debt. Debtor nations become suspicious that such forgiveness offers are motivated solely by a desire by creditor states to avoid exposure of possible connections between creditor states and governments

62. See Inger-Johanne Sand, *Polycontextuality as an Alternative to Constitutionalism*, in *TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM* 41-65, *supra* note 13.

63. Ironically, this idea seems better understood by people engaged in the business of international investment than by learned academics. A book meant to provide advice to American business people seeking to successfully navigate the global marketplace explains:

"Foreign companies are highly visible symbols that often serve as a focal point for all the frustrations the local people feel about their poverty, lack of political autonomy, cultural dilution, diminished world standing or whatever it is that bothers them. . . . One result is that people tend to feel the Americans don't deserve to keep an equity position or make a reasonable return on investment. As soon as there is a conflict, people start grumbling, 'This is my country. You come here, invest a little money; we do all the work, and you take most of the profits. What's in it for us?'"

LENNIE COPELAND AND LEWIS GRIGGS, *GOING INTERNATIONAL: HOW TO MAKE FRIENDS AND DEAL EFFECTIVELY IN THE GLOBAL MARKETPLACE* 43 (1986).

implicated in violations of national or international laws and norms.<sup>64</sup> Moreover, forgiveness on these terms provides a means for creditor states to retain power to control forgiveness so that it remains an extraordinary act controlled wholly by creditor states. Debtor states are reduced to begging for debt forgiveness. And thus, forgiveness on its current terms retains the hierarchies of power and dependence that serve to perpetuate the power disparities between states.

With this perspective, the system fostered through economic globalization appears not as a means to a web of governance by collections of "the best," but as a means to the perpetuation of the rule of a narrow band of the richest states for their own benefit. In this sense, globalization provides a framework for the perpetuation of an Aristotelian oligarchy—a corruption of governance.<sup>65</sup> In this perspective, the Westphalian state system itself, at its limit, implies corruption, where status (as a nation-state) does not guarantee equality within the community of states.

### III.

#### GLOBALIZATION CRITIQUES AND THE CRISIS OF THE STATE

Current forms of resistance to either version of this modern globalization reveal their impotence, as well as the powerlessness from which these forms of resistance spring. Opposing the dominant vision are a cluster of anti-corporatist visions articulated by a variety of global actors from ideologues like Fidel Castro of Cuba and Hugo Chavez of Venezuela.

The basics of this view are also easy enough to summarize as a blend of economic determinism and politics, together pointing to systemic changes threatening the state as an autonomous unit of an international system of states:<sup>66</sup>

##### 1. The current global economic system cannot be understood without first

---

64. See reactions to proposals for forgiveness at the September 2004 IMF meeting in DC and the G-8 and World Bank forgiveness programs of September 2005. "Under the G8 proposal 18 nations (Benin, Bolivia, Burkina Faso, Ethiopia, Ghana, Guyana, Honduras, Madagascar, Mali, Mauritania, Mozambique, Nicaragua, Niger, Rwanda, Senegal, Tanzania, Uganda, and Zambia) as a group will be spared \$1 billion to \$2 billion per year in debt service for loans from lenders like the World Bank and the International Monetary Fund." Stanford Graduate School of Business, *The G8 Debt Relief Plan May Not Help* (June 2005), available at [http://www.gsb.stanford.edu/news/research/econ\\_henry\\_g8debtrelief.shtml](http://www.gsb.stanford.edu/news/research/econ_henry_g8debtrelief.shtml) (describing research results undertaken by Stanford's Peter Henry and economist Serkan Arslanalp of the International Monetary Fund, that suggests that foreign aid rather than debt relief would most help the poorest states, and criticizing the plan as diverting attention from the obligations of the richest states to aid the poorest). For a critique of both the IMF and G8 debt forgiveness plans in the popular leftist press, see, e.g., Karl Beitel, *False Promises and Real Relief: Towards a Real Alternative to the G8 Decision on Debt Forgiveness*, COUNTERPUNCH (July 9-10, 2005) available at <http://www.counterpunch.org/beitel07092005.html>.

65. "Now a tyranny is a monarchy where the good of one man only is the object of government, an oligarchy considers only the rich, and a democracy only the poor; but neither of them have a common good in view." Aristotle, *supra* note 15 at 79 (Bk. III, Ch. VII).

66. This summary is derived from Fidel Castro Ruz, *Una Revolucion Solo Puede Ser Hija de la Cultura y Las Ideas*, Discurso pronunciado por el Presidente del Consejo de Estado de la República de Cuba, Fidel Castro Ruz, en el Aula Magna de la Universidad Central de Venezuela, 3 Feb. 1999, available at <http://www.cuba.cu/gobierno/discursos/1999/esp/f030299e.html>. The essence of the arguments are familiar to American academics. See generally Angela Harris, Yanira Reyes, Celina Romany, Carolina Stefoni, Leti Volpp, Adrien Wing, discussants in Current Affairs and Critical Theory Opening Roundtable: *Global Critical Race Feminist Approaches to Economic Injustice*, Conference: LatCrit X, *supra* note 1.

acknowledging the basic political context in which it has developed: one must start with the reality of a *single* hegemonic power seeking to reshape the world in its own image.

2. The effects of this singular hegemon are global, and dominated by a political ideology—an ideology of neo-liberalism—masquerading as a neutral and apolitical system of governance. Ideology, in this context, must be understood as proxies for assertions of military and political power. It is the essence of the new mechanics of imperial power and its most visible manifestation.

3. But neo-liberalism is neither neutral nor apolitical. It masks a singular political aim: (a) to convert the entire public sphere into a vast sphere of private activity, and (b) to transform all nation-states into private property on par with traditional private enterprises, for example, corporations.

4. Within this vast private space, nation-states would serve best as parts of a giant special trade zone. Within this global special trade zone two primary rules apply. First, no state may extend the public power (for example the power to tax) within this zone or its actors. Second, all domestic production is to be eliminated in favor of an export model grounded in two key concepts: (a) production specialization and (b) over production. The model produces a strong global zone under the control of the hegemon but otherwise produces state failure.

5. Production specialization eliminates state control over its labor markets. All states participate in a unified labor system that produces and sustains an immense stratification, not within states *per se*, but between different forms of labor. Non-technical jobs are exported to the least developed states. Most advanced and skilled work flows up to the most developed states. To fill these jobs, skilled labor is imported from least to most developed states while the costs of educating these workers is effectively shifted down to the least developed states.<sup>67</sup> As a consequence, the least developed states are locked into a cycle that requires them to spend capital to produce workers for developed countries. The most highly trained workers emigrate and do not contribute to the broadening of production or tax base. The least well trained remain, to be provided for, in many cases, by the state. Thus, within the vast private sphere of globalized economic activity, labor is creamed and poorer states are left with high cost populations and no prospect of increasing wealth.

6. Overproduction amplifies the effects of production or labor specialization. It is tied to consumerism. Consumerism is the cultural arm of

---

67. In a sense, labor-training costs are externalities best borne by those states least able to subsidize the educational costs of the richer states. The current system essentially allocates the costs of educating future high wage labor to low wage countries. The products of those educational systems are then absorbed (as immigrant labor) by the richer states and serve to produce greater wealth for those states. The states providing the education services are left with lower wage and less skilled labor and less ability to leverage education of the labor force for wealth production. For discussion of a parallel pattern see, Hari M. Osofsky, *Litigating Energy's Externalities: A Modern Westphalian Geography of Corporate Responsibility*, Panel Presentation: Human Rights, Sovereignty, Violence and Religion. Conference: LatCrit X, *supra* note 1.

ideological economic globalization. Its aim is to create a singular world culture of consumption. Consumption, or its desire, targeted at goods overproduced, serve as an inducement for the poorest segments of the world labor market to continue to participate in their own subordination. It provides a justification for overproduction. Everyone is induced to believe that with just a little more effort, wealth and the power to induce their consumerist desires could be theirs.<sup>68</sup>

7. Overproduction creates a deliberate misallocation of resources in the name of market efficiency, designed to transfer the real costs of production from consumers in the richest states to those in the states in which overproduction occurs. Western conceptions of market efficiency actually mask its political dimension. It is constructed to confirm, rather than test, the benefits of a system based on overproduction and labor stratification. Overproduction is defined as competition. The value of overproduction is based on reductions in *price*. But price reductions are not *cost* reductions. Price reductions are in reality no more than cost reallocations to labor (reduced labor costs), the future (fewer resources), and the state (effectively left to subsidize misallocations from current wealth).

8. It is this mandatory subsidy that serves to reduce all states other than the hegemon to a state of economic peonage. States must participate in the global construction of the neo-liberal market place. States must pay the cost to subsidize the labor specialization and overproduction that are the key provisions of this system. They are induced to participate through the coercive power of the hegemon and also because of the strength of the cultural power of consumerism.

But the system produces wealth for the developed states (and principally the hegemon) and substantially limits the ability of subsidizing states to generate wealth sufficient to pay the costs they are forced to subsidize. States are consequently required to borrow to meet their subsidy costs. Loans come from developed states, from the wealth acquired through the cost misallocation windfall of the global economic system. Wealth, representing transferred value from the poorer states, is loaned under conditions designed to perpetuate the inability of poorer states to generate wealth sufficient to pay off their debts. And so states must borrow ever-increasing amounts to pay the subsidy and the increasing costs of carrying ever-larger amounts of debt.

9. Eventually, states must sell their resources to pay their loans, usually to the creditor states or their agents, the transnational corporations. Eventually states become hollow—their natural wealth is owned by others, their labor produces products for others, and they remain obliged to subsidize the system that produces this result. States are stripped of autonomy. Debt acts like an addendum to national constitutions. In effect, the covenants and conditions of mandatory debt modify the constitutional structure of a borrowing jurisdiction. Economic policy is diverted from the state to the creditor. The only authority remaining to the state is over its labor force, from which it can extract wealth, but who serve global rather than

---

68. See generally Luis Fuentes Rohwer, *Territoriality, Sovereignty and Empire: On Making of Happy Slaves*, Panel Presentation: Human Rights, Sovereignty, Violence and Religion. Conference: LatCrit X, *supra* note 1.

national policy.

Thus, the current regime of globalized financial markets produce, rather than decrease, poverty because the system is structured to inequitably favor creditors over borrowers. The economic overlay of the current system masks its political realities: sovereign debt has the effect of ceding a certain amount of sovereignty from the borrower to the lender and its instrumentalities. As a consequence, globalized capital markets are actually slave markets of sorts—where wealthy states, and the private financial institutions that are beholden to them, purchase rights to control borrower states. The purpose of ownership is not crude dominance in the manner of 19<sup>th</sup> century imperialism, but to provide expanded access to capital and labor, suppliers and customers, for the economic activities of the controlling states and their economic “running dogs.” In this view, states may not even rise to the level of transnational corporations. The economic determinism of economic globalization reduces states to passive administrators of a process over which they have little control and are helpless to change.

Clearly, Fidel Castro, the principal source from which I drew the admittedly extreme picture I have painted, has exposed the beast, at least as he sees it. Unlike the other views, however, this posits a tyranny of a solitary super state, rather than the aristocracy of hyper-states. But this view shares with the others a pessimistic view of the future of robust and independent nation-states within the context of the critique. It is true that Castro speaks to state sovereignty in his critique. But he tends to offer this defense of the state only as a foundation for the construction of confederations of (always) subordinated states organized on the basis of a weaker form of transnational ideologically based regionalism.

This solution, Castro suggests, as the only reasonable counter to the threat of the sort of globalization that does not accord with his own.<sup>69</sup> This form of critique offers little by way of instrumental action or ideology to counter the consequences of globalization on the autonomy of states. And why should it? Even this form of critique has as its basis the fundamental belief of Marxist universalism in the need for states to eventually wither away.<sup>70</sup> That, more than anything else perhaps, starkly highlights the power of the social, economic and political movements that are producing the great crisis of the nation-state as outlined above, and the difficulty of resistance.<sup>71</sup>

Thus, this perspective also presents a depressing picture to those who cling to an ideal in which a community of equal and robust states can live in harmony with globalization—at least as it concerns the future of states capable of implementing

69. See Castro Ruz, *supra* note 63.

70. “Not so very long ago, globalization, as we now understand it, wore a Marxist-Leninist face. The relentless and self-evident inevitability of the collapse of capitalism seemed close—first after 1918, then after 1945, and then after 1959. Globalization was then understood as the conflation of law and politics, state control of the means of production, and the establishment of a communist society under the vanguard leadership of the Communist Party.” Larry Catá Backer, *Cuban Corporate Governance at the Crossroads: Finessing the Tensions Between Cuban Marxism and Free Market Globalism*, 14 (2) JOURNAL OF TRANSNATIONAL LAW & CONTEMPORARY PROBLEMS 337, 351 (2004).

71. See e.g., LESLIE SKLAIR, THE TRANSNATIONAL CAPITALIST CLASS (2001) (“The capitalist system, however, is not the only global system or, more accurately, it is not the only social system that has global aspirations. It competes for global hegemony with the international system of states, with global systems of religions, the global environmentalist system, and perhaps others.” *Id.* at 16).

national policy constructed to benefit the collective good of its citizens.<sup>72</sup> Whether presented as an ideology of economic globalization, or as the culmination of the creation of a global community of states with unequal power, globalization serves to concentrate power in the hands of one powerful state, for whose ultimate benefit, the global economic system is run. Adherents of this perspective suggest that, in globalization, one encounters the velvet glove of an Aristotelian tyranny—an imperial system run for the benefit of the United States and its allies.<sup>73</sup> Subordination and the exploitation of states are the unavoidable consequence of the economic determinism of modern economic globalization, however presented.

For those who find the traditional state system useful, for all its warts, the picture does not look good. But emerging transnational systems, whichever way understood, also produce their own threats. Some of these will pose as great a crisis in the traditional state system as that outlined above. It is to these threats that I turn to next, if only for a brief overview.

#### IV.

#### THREATS TO GLOBALIZATION AND A DEEPENING CRISIS OF THE STATE

Globalization, along any of the lines outlined above, is neither inevitable,<sup>74</sup> nor does it reflect the only form or system emerging to threaten or reorder the current system of world order. Simultaneously developing alongside globalization, or surviving its ascendancy are other systems incompatible with and likely to engage in conflicts for dominance with both the current system and the ascending system of globalization. They will likely engage in strong conflict with each other as well. To what extent they will succeed or impede the march of forces I have outlined above remains to be seen.

##### A. Religious Systems

Among the great competing systems are those based on religion. But religious universalism would tend to substitute its own normative framework for that of neo-liberalism or other competing universal systems. The great battleground here is ideological as well, pitting the ideology of prosperity against those of obligation or other values. Whoever the victor, the state as a political entity, would remain subordinate, though this time to the religious normative framework provided by religion. Many religious systems now increasingly claim universalist aims. I highlight two very briefly:

---

72. For an argument that this cycle, and its consequences, is not inevitable, see JEFFREY A. ROSENSWEIG, *WINNING THE GLOBAL GAME: A STRATEGY FOR LINKING PEOPLE AND PROFITS* (1998).

73. "There is a third species of tyranny, most properly so called, which is the very opposite of kingly power; for this is the government of one who rules over his equals and superiors without being accountable for his conduct, and whose object is his own advantage, and not the advantage of those he governs; for which reason he rules by compulsion." Aristotle, *supra* note 15, at 125 (Bk. IV, Ch. X).

74. See generally, Larry Catá Backer, *Harmonizing Law in an Era of Globalization – An Introduction and Essay in Convergence, Divergence and Resistance*, in *GLOBALIZATION LAW: CONVERGENCE AND RESISTANCE* (forthcoming 2006).

## 1. Islam

This ancient and well-developed religion serves as a great example of a potentially competitive universalistic system rejecting the idea of the nation-state as the highest form of collective expression. "In Afghanistan, no law can be contrary to the beliefs and provisions of the sacred religion of Islam."<sup>75</sup> This system is a national reflection of an ancient universal system of governance developed within a global community of believers, whose moral and ethical norms, it is argued, should limit the power of states over their subjects, whether or not members of the community of believers. The Iraqi Constitution provides both that "The Republic of Iraq is an independent, sovereign nation"<sup>76</sup> and that "Iraq is a multi-ethnic, multi-religious and multi-sect country. It is part of the Islamic world and its Arab people are part of the Arab nation."<sup>77</sup> In terms of its legal foundations, the Iraqi constitution provides:

"Islam is the official religion of the State and it is a fundamental source of legislation: (A) No law that contradicts the established provisions of Islam may be established; (B) No law that contradicts the principles of democracy may be established; (C) No law that contradicts the rights and basic freedoms stipulated in this constitution may be established."<sup>78</sup>

Moreover, guaranteeing the Islamic identity of the Muslim majority is a positive obligation of the Iraqi state. For others, only full religious rights (not identity) are guaranteed.<sup>79</sup>

It is possible to base a global system of governance, affecting state and non-state actors alike, on Islamic religious principles and governance norms. Islam dictates religious rules for human conduct. The *Quran* is the touchstone of the law of Islam—*Shari'a*.<sup>80</sup> The *Quran* is a compilation and codification of the divine revelations that Muhammad received during his lifetime. By its own terms, the *Quran* is infallible.

The *sunnah* of the Prophet serves to fill in many of the gaps left in the Quranic jurisprudence. The *sunnah* is the words and deeds of the Prophet Muhammad. Critical to the concept of *Shari'a* is the *ummah* or community of the faithful, from which law may spring. But the *ummah* is not bound by the political borders of nations, and *Shari'a* is necessarily superior to any law made by any organ of a nation state. To the extent that such law conflicts with *Shari'a*, the local law will be void. Islamic religious globalization is on a different conceptual plane from economic globalization. And while not necessarily and invariably inconsistent with the behaviors sanctioned by economic globalization, is never bound by them, especially where there is a conflict with higher law.

75. Afghan Const., Ch.1, Art. 3.

76. Iraqi Const. Ch. 1, Art. 1, available at [http://www.news.bbc.co.uk/1/shared/bsp/hi/pdfs/24\\_08\\_05\\_constit.pdf](http://www.news.bbc.co.uk/1/shared/bsp/hi/pdfs/24_08_05_constit.pdf).

77. *Id.* at Ch. 1, Art. 3.

78. *Id.* at Ch. 1, art. 2.

79. *See id.*

80. *Shari'a*, of course, is quite complicated and well beyond the scope of this essay. For a good introduction, consider RODOLPHE J.A. DE SEIFE, *THE SHARI'A: AN INTRODUCTION TO THE LAW OF ISLAM* (1994).



## 2. Christianity

A great example of activist Christianity can be found in the public statements of the Roman Catholic Church. For the Catholic Church, globalization is an object of regulation, through application of Christian principles.<sup>81</sup> "Faced with the grave social problems which, with different characteristics, are present throughout America, Catholics know that they can find in the Church's social doctrine an answer which serves as a starting-point in the search for practical solutions."<sup>82</sup> John Paul II, like Castro, suggested a "critical analysis of the world economic order, in its positive and negative aspects, so as to correct the present order [and] would propose a system and mechanisms capable of ensuring an integral and concerted development of individuals and peoples."<sup>83</sup>

John Paul II, like Castro, suggested a "critical analysis of the world economic order, in its positive and negative aspects, so as to correct the present order, [and] would propose a system and mechanisms capable of ensuring an integral and concerted development of individuals and peoples."<sup>84</sup> Again paralleling the language of Castro, the Catholic Church, in its pronouncements, would seek a recasting of the current global economic system away from markets and toward development and social justice.<sup>85</sup> These views are echoed by American prelates as well.<sup>86</sup>

Like Castro, John Paul II was no friend of the consumerism that forms an integral part of the global economic system contributing, in some measure, to the need to borrow by states least able to afford the debt.<sup>87</sup> But unlike Castro, the

---

81. "There is an economic globalization which brings some positive consequences, such as efficiency and increased production and which, with the development of economic links between the different countries, can help to bring greater unity among peoples and make possible a better service to the human family. However, if globalization is ruled merely by the laws of the market applied to suit the powerful, the consequences cannot but be negative." John Paul II, *Post-Synodal Apostolic Exhortation Ecclesia In America Of The Holy Father John Paul II To The Bishops, Priests And Deacons, Men And Women Religious, And All The Lay Faithful On The Encounter With The Living Jesus Christ: The Way To Conversion, Communion And Solidarity* (first delivered in Mexico City, Republic of Mexico, Jan. 22, 1999), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/apost\\_exhortations/documents/hf\\_jp-ii\\_exh\\_22011999\\_ecclesia-in-america\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_22011999_ecclesia-in-america_en.html).

82. *Id.* at ¶ 54.

83. *Id.* at ¶ 59.

84. *Id.*

85. "The cry of millions upon millions of poor and marginalized people in our Latin American and Caribbean societies due to this unjust economic system with its 'face of suffering' (S.D. 179), must be heard by the Church in the Americas, and must be faced with evangelical courage, and a desire to promote, for everyone's benefit, this 'new international socio-economic order' based on solidarity and justice." Synodus Episcoporum Bulletin Of The Commission For Information Of The Special Assembly For America Of The Synod Of Bishops 16 November-12 December 1997, English Edition, available at [http://www.vatican.va/news\\_services/press/sinodo/documents/bollettino\\_17\\_speciale-america-1997/02\\_inglese/b06\\_02.html](http://www.vatican.va/news_services/press/sinodo/documents/bollettino_17_speciale-america-1997/02_inglese/b06_02.html).

86. "Another reason we care is that the most vulnerable people in society were not responsible for contracting the debt, yet they pay the price for it. Some countries used borrowed funds to finance their militaries or projects benefiting the elites rather than for projects that would have benefited the poor. Poor people suffer the most by the diversion of scarce resources to debt repayments from human development." United States Bishops, Jubilee, *That's Why We Care About International Debt*, (June 2000) available at [http://www.vatican.va/jubilee\\_2000/magazine/documents/ju\\_mag\\_01071997\\_p-63\\_en.html](http://www.vatican.va/jubilee_2000/magazine/documents/ju_mag_01071997_p-63_en.html).

87. "In the entire American continent, there are indications of the difference mentioned by Pope John Paul II in his Encyclical Letter *Redemptoris missio*: 'the North has constructed (a development model) which is now spreading to the South, where a sense of religion as well as human values are in

Catholic Church condemned universalism based on Marxist-Leninist ideals. The Church has preferred to champion its own universalizing vision as an aspect of conversion to Christianity that is, Catholic, religious universalism.<sup>88</sup> The position of the Church was brilliantly described by Pope Benedict XVI when, as Joseph Cardinal Ratzinger, Prefect of the Congregation for the Doctrine of the Faith, he condemned so-called liberation theology:

"It is only when one begins with the task of evangelization understood in its entirety that the authentic requirements of human progress and liberation are appreciated. This liberation has as its indispensable pillars: 'the truth about Jesus the Savior,' 'the truth about the Church,' and 'the truth about man and his dignity.' It is in light of the Beatitudes, and especially the Beatitude of the poor of heart, that the Church, which wants to be the Church of the poor throughout the world, intends to come to the aid of the noble struggle for truth and justice. She addresses each person, and for that reason, every person. She is the 'universal Church. The Church of the Incarnation. She is not the Church of one class or another. And she speaks of the name of truth itself. This truth is realistic'. It leads to a recognition 'of every human reality, every injustice, every tension and every struggle.'"<sup>89</sup>

And so, like Castro, within his system, the Roman Catholic Church must continue to witness its faith in these manifestations of economic and social justice:

"In the next two years, we plan to do a lot of work on the debt issue. We will continue to press the World Bank, IMF, and US government for more substantial relief for the countries that qualify under the new initiative. We will work with CRS' partners in Africa and Latin America who want to do their own work on debt. We will also support more exchanges of bishops and clergy from countries that are deeply indebted."<sup>90</sup>

danger of being overwhelmed by a wave of consumerism." "Various answers point to the urgent need to find a solution to the problem of the foreign debt in the context of the celebration of the Great Jubilee of the Year 2000, as proposed by the Holy Father in his Apostolic Letter *Tertio millennio adveniente*." Synod of Bishops, Special Assembly for America, *Instrumentum Laboris*, "Encounter With the Living Jesus Christ: The Way to Conversion, Communion and Solidarity in America" (1997) available at [http://www.vatican.va/roman\\_curia/synod/documents/rc\\_synod\\_doc\\_01091997\\_usa-instrlabor\\_en.html](http://www.vatican.va/roman_curia/synod/documents/rc_synod_doc_01091997_usa-instrlabor_en.html).

88. Thus, the issue of sovereign debt has been conceived as forming a part of a total conversion. "Certain economic systems and policies exist . . . generating in some cases an enormous debt for nations and impeding the development of peoples. . . . Such conditions call for conversion. . . . The situation calls out to faith and to conscience—both human and Christian—for a response." Synod of Bishops, Special Assembly for America, *Encounter With the Living Jesus Christ: The Way to Conversion, Community and Solidarity in America: Lineamenta*, available at [http://www.vatican.va/roman\\_curia/synod/documents/rc\\_synod\\_doc\\_01081996\\_usa-lineam\\_en.html](http://www.vatican.va/roman_curia/synod/documents/rc_synod_doc_01081996_usa-lineam_en.html) at ¶ 25.

89. Congregation For The Doctrine Of The Faith, *Instruction On Certain Aspects Of The "Theology Of Liberation,"* XI (Orientations) at ¶ 5, available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19840806\\_theology-liberation\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19840806_theology-liberation_en.html) (citing John Paul II, "Address at the Opening of the Conference at Puebla", AAS 71 (1979) pp. 188-196; Doc. de Puebla II P,c,1.).

90. United States Bishops, Jubilee, *supra* note 83.

### *B. Competing Universalist Systems in Decline*

Another set of competing systems are grounded in older universalizing systems, once ascendant and now in decline. These include ideological systems (such as Marxist-Leninist systems), and the traditional systems of imperial rule (military conquest and occupation, traditional colonialism). These systems are well known, as are the conflicts between either of them and the system of economic globalization ascendant. Ironically, these systems sometimes embrace the third perspective on globalization, discussed above, as critique, and for support of its alternative universalist vision. It is not for nothing that one of the last of the great old style Stalinists, Fidel Castro, should be one of the ablest at articulating that perspective of globalization as American hegemonic tyranny fostering the end of the state system.

### *C. The Anti-Universalist Challenges*

In addition to alternative bases for universalizing political and economic governance, there are systems arising that do not seek universal control but instead seek disintegration of an ordered or unordered type. Some of these, of course, serve the cause of first order states, or economic globalization as a universalizing force. Others look to a disintegration based on a return to the way things were before colonization, conquest, great demographic shifts or the vagaries of history. They include a resurgence of tribalism (ethnic, linguistic, cultural, racial), indigenous territorial claims, recognition of great demographic shifts and migration, and anarchy as a system. Some of these forces would work well with a state system; some are possible only because economic globalization has made the state less necessary as a means of social organization. Others, and principally anarchist based systems, including "return to the land extremism" and violent anti-globalization forces are possible only because economic globalization threatens the autonomy of states, and of members of these groups to more effectively influence them. But even the great establishment documents of modern Western States—the American Declaration of Independence, the Irish Easter Proclamation of 1916, and the French Rights of Man—contain discursive elements that continue to inspire separatist anarchist and revolutionary elements.<sup>91</sup>

I have not meant to suggest anything approaching a complete analysis. The interactions of all of these groups are messy at best, and extraordinarily fluid. I do mean to suggest that the existence of these groups, as well as the others identified above, make any sort of simple prediction—including predictions about the methodology of state disintegration—of barely marginal utility. And thus, I have meant to suggest not the actual course of events, but merely point to the existence of sets of behavioral vectors that appear to take people, and the organizations they are so fond of creating and manipulating, in particular directions.

---

91. See Larry Catá Backer, *Some Thoughts on The American Declaration of Independence and the Irish Easter Proclamation*, 8 TUL. J. COMP. & INT'L L. 87 (2000-2001).

## V.

## CONCLUSION: NOWHERE TO GO

Under any of these models, the state will effectively fall away for all practical purposes. Yet states continue to appear to be quite strong. The state's continued utility today does not suggest any vitality in the primacy of the state system so much as the immaturity of the new global institutional system. The process of change is messy. It is always uncertain. Its future can only be divined—but its vectors can be discerned. Globalization along the lines suggested, and the crisis of the state it suggests, is multi-layered, ushering in a new hierarchy of wealth and power based on levels of integration into emerging global systems. The world is being divided along different, more diffuse, and complex lines. Pockets of inferiority may exist within as well as outside even the most powerful states. Development will not necessarily be determinable within the borders of any states, but like other things, may also jump borders. The poor of Appalachia may have more in common with the slum dwellers of Manila than with the executives and other officers employed in transnational economic enterprises who live within walking distance of their homes.

"The contemporary international political economy is actually multi-layered, with distinct 'levels' being characterized by differing patterns of action and interaction. Globalization may provide an effective metaphor for developments at some levels of contemporary activity, but be seriously misleading at others. Moreover, the differences amongst the characteristics and dynamics of activity at the different 'levels' may well be a major source of future change in the international system and, under certain conditions, the actual reversal of current tendencies toward greater globalization."<sup>92</sup>

In any case, the state will be both a player and object of these processes. But the character of that process and its moral value—whether it is good, bad, neither, or some combination—can vary significantly depending on the perspective of the judge. Looking at the very same process, agreeing even on the basic construction of the reality of globalization, it is possible to see three very different events unfolding. From one perspective, globalization is producing something like an Aristotelian aristocracy of global governance among the state and non-state actors who all serve the law and custom of the market. From a second perspective, globalization is a process of corruption of aristocracy, producing an Aristotelian oligarchy on a global scale. This oligarchy, consisting of a few super states, uses globalization as a cover for the satisfaction of their own desires and perpetuation of their domination over a caste system of inferior states. From yet another perspective, globalization is the cover for a global tyranny by one hegemon, usually the United States (and its allies), for the purpose of perpetuating a global system for its sole benefit and to the detriment of all other persons, entities or states.

---

92. R.J. BARRY JONES, *GLOBALIZATION AND INTERDEPENDENCE IN THE INTERNATIONAL POLITICAL ECONOMY: RHETORIC AND REALITY* 226 (1995). Thus, in a sense, my discussion has been offered in the spirit of Barry Jones's insights about interdependencies.

By whatever perspective one views globalization, the state suffers a detriment to its status, in form or effect (or both). All states cede sovereignty either (1) to a host of actors in the service of the market and the quest for individual value maximization, or (2) to a few super states who alone exercise traditional state sovereign power in the name of, and to further the global system, or (3) to a global tyrant seeking indirect global imperium. Those who would challenge the current system of economic globalization offer little of value to those who would defend the traditional state system,<sup>93</sup> either because they seek to substitute another universalist ideology for that of economic globalization, or seek to undo any sort of political order at all. Whatever the future brings, there is little question that the role of the nation-state will become more complex, less sure, more diffuse, and more differentiated. The meaning of this change will remain far less sure—and in that uncertainty lies the possibility for challenge and change

---

93. Again, I emphasize that the references to the traditional system are made in the full knowledge that the system never worked as perfectly as its theory would indicate, or that it was ever expected to perform that way. *See generally*, STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999).