In Quite a State: The Trials and Tribulations of an Old Concept in New Times

By Florian Hoffmann

A. *Introduction – Finding the State*

> I believe that when the history of our times comes to be written with the perspective which only a half-century can bring, our generation will be distinguished, above all else in the field of social relations, for the progress which we have made in organizing the world for co-operation and peace.[1]

Seventy-five years after Professor Manley O. Hudson dared write these prophetic words, their content strikes one as, on one hand, evidently anachronistic and, in light of the great suffering dawning over the old and new worlds at that very moment, cruelly misjudged. On the other hand, juxtaposed with the contemporary world, these words can be read to contain more than just a grain of truth. *Prima facie*, of course, the world today can hardly be considered to be any more pacific or collaborative than the world of the 1920s and early 1930s. While the sort of international organizations to which Hudson dedicates his book may have come a long way since his time of writing,[2] examples abound of the deliberate lack of cooperation in contemporary international relations. And, while war in the classical sense may no longer be formally considered an option, its continuing *de facto* occurrence in many places, as well as its general shift to a wider, if hazier, object in the form of terrorism, also seems to belie Hudson's optimism. However, in a different and perhaps unintentional sense, Hudson's vision points to the emergence of a host of processes that, in the aggregate, can be said to stimulate cooperation and to privilege peace over war in the traditional sense. The rise of new types of international organizations such as the European Union or the World Trade Organization, which are endowed with partial sovereignty and hard sanctions for non-compliance with their norms, would appear to point to "progress" in international cooperation. As does many a government's realization that some form of multilateralism is needed even in that most uncooperative of

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[1] Manley O. Hudson, Progress in International Organization 5 (1932).

[2] *See* Kaiser, in this volume.

Muller & Bratspies (Eds), Progress in International Law, pp. 263–288.

Would this be progress? Would it be possible to show that "international organization" had made progress, or not, if states went "medieval"? Hudson, when reflecting on the vision he had of the times to come, was frank about the difficulty of distinguishing between judgment and enthusiasm. He felt that by discerning the general trends, it would be possible to evaluate the reality of international relations in their light. And this led him to be modestly optimistic. Even though we know that this optimism was, in the short term, not warranted, it may still be taken to represent a legitimate way to deal with the certainty of the coming of the unknown. Perhaps, then, it would be appropriate to end this reflection on the state with a note of optimism on what will become of the state: no matter in what form, where, and how, it has a future.

international activities, armed conflict – a realization from which even the hegemony of then and now, the United States, arguably, is not exempt.[3] Likewise, states' use of the power to wage war has, today, generally become a liability rather than an asset, as the kind of instability created by armed conflict is severely punished by the highly sensitive transnational capital streams that can financially make or break countries, regions, or entire continents. Hence, while the world may not be all that much more peaceful now, the stakes of waging war have increased immensely.[4] In this sense, Hudson's words have indeed proven to be visionary, though, arguably, in a rather different way than he may have imagined in 1932. For him, it was self-evident that "progress" in cooperation and peace would be the outcome of deliberate and, at least to some extent, rational agency by what even to his liberal internationalist mind would always count as the original and primary actors of international relations: (nation) states. Yet, as shall be explored in this chapter, while the formal qualities of the state may not have changed much since Hudson's day, the environment within which the state operates has altered profoundly – so profoundly, indeed, that the idea of its exclusive, *sovereign* agency has to be revised. Hence, to a considerable extent, the "progress" in Hudson's vision is the result of processes in which the classical sovereign state is, at best, one among several actors. More radically, the state is itself profoundly redefined by processes it originally may have helped to bring about, processes over which it no longer exercises control. Nonetheless, then as now, the concept

[3] While general attention is, of course, currently focused on the United States's unilateralism in relation to its decision to invade and occupy Iraq, it should not be forgotten that at all stages of its campaign, President George W. Bush's administration has sought the assistance, whether symbolic or material, of other governments. After effecting regime change, the United States availed itself of the humanitarian and other services provided by the United Nations and its auxiliary organizations. The old realist argument that the United States acted this way entirely of its own volition and could have acted differently is unpersuasive, as the "real" empirical facts tell a different story.

[4] The contention that the world has not become fundamentally more peaceful is, however, contestable. For example, the *Human Security Report 2005*, authored by the University of British Columbia's Human Security Center, purports to show that there has been a forty percent decrease in the number of wars waged around the world since 1990, and an eighty percent decrease of genocides and similar mass atrocities. The United Nations Development Program's *Human Development Report*, however, suggests that, while the number of armed conflicts may have decreased, their death tolls have increased, especially if indirect deaths resulting from armed conflict are counted. The point made here, however, does not hinge on statistics, but on the widely-held impression that today's world is still marred by bloody conflicts, a sentiment that may have been aggravated by the dimension terrorism and the fight against it has reached. *See* HUMAN SECURITY CENTRE, HUMAN SECURITY REPORT 2005: WAR AND PEACE IN THE 21ST CENTURY; UNITED NATIONS DEVELOPMENT PROGRAM, HUMAN DEVELOPMENT REPORT 2005, at 149 (2005), *available at* http://hdr.undp.org/reports/global/2005/.

of the state still figures as the centerpiece of virtually all international analyses, whether as a reincarnated Renaissance Leviathan, a spiraling star system continuously losing mass and energy, or simply an empty rhetorical shell. Therefore, an appreciation of Hudson's vision of "progress" cannot bypass this old bedfellow of modernity, but must attempt to locate it in the universe of contemporary social relations.

Where can that search begin? Where to look for the state? Initially, it is, as usual, a question of language, namely of what kind of phenomena are denominated by what kind of concept. Here, the state, like few other concepts, abounds with different definitions and points of origin. To account for the concept of the state one has to move along an, at its most abstract level, two-dimensional matrix with one axis denoting the historical phenomenon of that entity now called the state, and the other denoting the different theoretical paradigms through which that phenomenon has been conceived. The only fixed point within this matrix is the specific historical period during which the very term *state* comes into usage for the phenomenon in question, notably the period between the late Middle-Ages and the early modern period, when initially the generic Latin *status*, denoting a condition or position, acquires the added meaning of estate, or seat of rule, seat of power.[5] It thus becomes Machiavelli's *stato* which, however, then only denotes a particular and potentially changing condition or status of power-holding.[6] It is Bodin who, in his concept of *état*, sees power as permanently institutionalized through the person of the monarch ruling over a specific territory and, thus, establishes the sovereign state as a formal (legal) category.[7] Yet, it is only with the French and American Revolutions at the end of the eighteenth century that the state acquires its modern and contemporary connotation, namely as an abstract (legal) persona and organizational system differentiated from the person of the monarch and endowed with sovereignty by its people.[8]

However, neither on the phenomenological nor on the theoretical axes have reflections on the state been confined to this particular historical period. With regard to the former, the term *state* quickly became the generic term for all public organizational units above the family, be it the imperial "state," the city "state," the church "state," or the feudal "state."[9] Hence, as a phenomenon, this generic

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[5] *See* MARTIN VAN CREVELD, THE RISE AND DECLINE OF THE STATE (1999); WOLFGANG MAGER, ZUR ENTSTEHUNG DES MODERNEN STAATSBEGRIFFS (1968).

[6] *See* NICCOLÒ MACHIAVELLI, *The Prince & The Discourses, in* THE PORTABLE MACHIAVELLI (Peter Bondella & Mark Musa trans., 1979).

[7] JEAN BODIN, BODIN: ON SOVEREIGNTY (Julian H. Franklin ed. & trans., 1992).

[8] *See* ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA (Gerald Bevan trans., Penguin Books 2003). *See also* EDMUND BURKE, REFELECTIONS ON THE REVOLUTION IN FRANCE (J.C.D. Clark ed., 2001).

[9] VAN CREVELD, *supra* note 5.

state has been traced back to the origins of human civilization as such, even if there is a strong point for limiting reference to the state to only those entities that conceptually and empirically correspond to the clearly defined, historically-evolved paradigm alluded to above. On the theoretical axis, the concept of the state is so closely tied to the emergence of many of today's distinct social science disciplines that it would be an understatement to say that sizeable bodies of literature on the state have evolved in each of these – in truth, they are, in their very essence, conceptually premised on the state. As Hedley Bull pointedly put it: "[...] one reason for the vitality of the state system is the tyranny of the concepts and normative principles associated with it."[10] In other words, the difficulty with accounting for the state and for changes in the nature of the state across time is not only due to the fact the state as a phenomenon has changed, but also to the partial inability of traditional disciplinary paradigms to conceptualize these changes, as is amply evidenced, for example, in international law's perennial difficulty of dealing with non-state actors in light of the classical conception of state sovereignty inherent to the discipline.[11] Thinking about the state of the state requires, hence, a reflection across the boxes[12] of disciplinary horizons that aims to shed light on the position of the state on either of the aforementioned axes, notably as an organizational phenomenon and as a theoretical construct.

That said, the very omnipresence of the state both as a phenomenon and as a theory makes the quest to locate it all the more difficult, for there seems to be no way, at least within reasonable limits of time and space, to determine where to start, where to end, and which particular story of the state to tell. As hinted above, most of today's academic social science and some of the humanities disciplines are premised on it, most notably law, both in its domestic (constitutional) and international variant; political science with its political theory and comparative politics branches and its now mostly independent offspring of international relations; sociology and general social theory; (macro-) economics; and, of course, general history. It thus becomes almost impossible to localize *it* within this analytical cacophony; though, to some extent, it is precisely this omnipresence that makes the state rather ephemeral, deeply implicating the (social scientific) observer's perspective in the phenomenon to be observed, with all the limitations as to objectivity this implies.

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[10] Hedley Bull, The Anarchical Society: A Study of Order in World Politics 275 (1977).

[11] *See* Shurtman, in this volume; Miller, in this volume.

[12] On thinking inside and outside of boxes, *see* David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. Int'l L. & Pol. 335 (Winter 2000).

For this reason, the following reflection will merely attempt to survey some of the changes that have occurred with the state as a theoretical concept during the last roughly seventy years of "progress in international organization."

B. *The State in Theory*

The contemporary reflection on the state has essentially concentrated on identifying the causes and assessing the consequences of changes impacting on the classical conception of statehood. That classical conception, as mentioned in the introduction, sees the state as a form of political organization based on a fixed geographical territory and a culturally defined nationality.[13] It is characterized by sovereignty, that is, internally, the monopolization of the use of force by an abstractly defined government and the (regular) exercise of power by law,[14] and, externally, by the mutual recognition of the equality of that (internal) sovereignty, and, hence, of all states.[15] In its modern version, sovereignty is additionally taken to be based on popular consent.[16] This classical conception is, in turn, challenged by the host of processes commonly subsumed under the term globalization. In a very broad sense, the main symptom of that challenge with regard to the state can be said to be the gradual shift from inter-state, *i.e.* international, to transnational relations, a movement driven by actors both above and below the level of the state and increasingly outside of its *de facto* control.[17] The potential consequences of this shift are manifold, though two stand out as particularly relevant: (1) globalization's impact on the concept of (state) sovereignty; and (2) globalization's effect on the conceptual marriage between the state as a form of political organization and the nation as a culturally-rooted political community. The following survey will attempt to sketch, in the first place, how globalization processes prompt changes in the classical conception of statehood, and, in the second place, how these changes specifically impact in sovereignty and the state-nation relationship.

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[13] *See generally*, JENS BARTELSON, A GENEALOGY OF SOVEREIGNTY (1995); Janice E. Thomson, *State Sovereignty in International Relations: Bridging the Gap Between Theory and Empirical Research*, 39 INT'L STUD. Q. 213, 214 (1995).

[14] *See, e.g.*, John H. Jackson, *Sovereignty Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT'L L. 782 (2003); Jenik Radon, *Sovereignty: A Political Emotion, Not a Concept*, 40 STAN. J. INT'L L. 195 (2004).

[15] *See, e.g.*, Dan Sarooshi, *Sovereignty, Economic Autonomy, the United States, and the International Trading System: Representations of a Relationship*, 15 EUR. J. INT'L L. 651, 652 (2004).

[16] *Id.* at 654.

[17] *See, e.g.*, ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006). *See also* Rebecca M. Bratspies, *"Organs of Society": A Plea for Human Rights Accountability for Transnational Enterprises and Other Business Entities*, 13 MICH. ST. J. INT'L L. 9 (2005). *See* Schurtman, in this volume; Miller, in this volume; Kaiser, in this volume; Paulus, in this volume.

I. *The State of the World: Globalization Abounds*

In a tribute to Louis Henkin in the *Columbia Journal of Transnational Law*, Oscar Schachter identified three different processes that apparently contribute to the erosion of state sovereignty, namely what he terms (global) capitalism, the new civil and uncivil society, and latter day national particularisms.[18] This echoes many other accounts of the contemporary state, all of which attribute pressures on the old Westphalian idea of statehood to any or all of these processes. The common label they are almost always given is "globalization." The sound bite version of the latter is, perhaps, well summed up in Thomas Friedman's popular description, notably that globalization is:

> the inexorable integration of markets, nation-states and technologies to a degree never witnessed before – in a way that is enabling individuals, corporations and nation-states to reach around the world farther, faster, deeper and cheaper than ever before, and in a way that is enabling the world to reach into individuals, corporations and nation states farther, faster, deeper, cheaper than ever before.[19]

It is, put in more abstract terms, a "process with spatial co-ordinates that links and relates particular places through flows of people, information, capital, goods and services."[20] It is invariably described as a process, implying constant movement. It affects the conception of space and time. It alters relationships between people. And it is more or less all-encompassing. Zygmund Bauman speaks of a global figuration in which

> the network of dependencies spreads to absorb and embrace the furthest corners of the globe [so that] nothing that happens anywhere can be safely left out of account in calculations of causes and effects of actions: nothing is indifferent, or of no consequence, to the conditions of life anywhere else.[21]

More specifically, globalization processes have been associated with a number of quite clearly bounded "domains of activity and interaction,"[22] including the

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[18] Oscar Schachter, *The Decline of the Nation-State and its Implications for International Law*, 36 COLUM. J. TRANSNAT'L L. 7 (1997).

[19] THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION (2000).

[20] Rosemary J. Coombe, *Culture: Anthropology's Old Vice or International Law's New Virtue?*, 93 AM. SOC'Y INT'L L. PROC. 261 (1999).

[21] Zygmund Bauman, Wars in the Globalisation Era (unpublished conference paper prepared for War and Social Theory: Reflections After Kosovo conference held at European University Institute and organized by Gerard Delanty, Heidrun Friese, & Peter Wagner, Mar. 10–11, 2000, on file with author).

[22] *See* CULTURE, GLOBALIZATION AND THE WORLD-SYSTEM: CONTEMPORARY CONDITIONS FOR THE REPRESENTATION OF IDENTITY (Anthony D. King ed., 1997); MANY GLOBALIZATIONS: CULTURAL DIVERSITY IN THE CONTEMPORARY WORLD (Peter L. Berger & Samuel P. Huntington eds., 2003); JAMES N. ROSENAU, DISTANT PROXIMITIES: DYNAMICS BEYOND GLOBALIZATION (2003); THE CULTURES OF GLOBALIZATION (Fredric Jameson & Masao Miyoshi eds., 1998).

economic, political, technological, military, legal, cultural, and the environmental.[23] Of these, three have received particular attention, namely economic, socio-cultural, and political globalization.[24] Indeed, a large number of globalization stories consist of intermingled references to ongoing processes in these three discursive fields.

In essence, economic globalization denotes the gradual global interconnection of economic activities, both through the numerical increase of international and interregional business transactions, and through the gradual emergence of a global and transnational, as opposed to national or inter-national, frameworks of reference. However, the main aspect of economic globalization is not the replacement of national and regional markets with a plurality of segmented but genuinely global market spaces, but the global interconnection of, *inter alia*, local markets, production facilities, consumption habits, and legal framework.[25] Socio-cultural globalization, in turn, emerges from the "shambles" of an all-encompassing modernization process characterised by the "disembedding" of social relations out of their local-historical contexts, of a general process of "de-traditionalization," and of "de-territorialisation," the "interlacing of social events and social practice 'at distance' with local contextualities."[26] Here, the picture is one of fragmentation and individualization, which, however, allows the cosmopolitanized actor to construct and reconstruct, seemingly at will, a plurality of segmental identities from an ever increasing socio-cultural repertoire.[27] Yet, new constraints also emerge, such as global consumption and fashion patterns, professional codes and ethics, homogenized merchandise, "hyper-" and "hyperreal" spaces,[28] or stereotypical

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[23] David Held, *The Changing Contours of Political Community: Rethinking Democracy in the Context of Globalization, in* GLOBAL DEMOCRACY: KEY DEBATES 20 (Barry Holden ed., Routledge 2000).

[24] For this tri-partite distinction, *see, e.g.*, Helmut Wiesenthal, *Globalisierung: soziologische und politikwissenschaftliche Koordinaten im neuartigen Terrain, in* GLOBALISIERUNG UND DEMOKRATIE 21 (Hauke Brunkhorst & Matthias Kettner eds., 2000).

[25] *See, e.g.*, Peer Zumbansen, *Quod Omnes Tangit: Globalization, Welfare Regimes and Entitlements, in* THE WELFARE STATE, GLOBALIZATION, AND INTERNATIONAL LAW (Eyal Benvenisti & Georg Nolte eds., 2003).

[26] Michael Kearney, *The Local and the Global: The Anthropology of Transnationalism*, 24 ANN. REV. ANTHROPOLOGY 549 (1995); ANTHONY GIDDENS, MODERNITY AND SELF-IDENTITY 22 (1991).

[27] Though not even Giddens would describe the consequences of modernity in such overenthusiastic and unproblematized terms, his work has, arguably, contributed to rendering this rough image, especially outside social theory circles.

[28] A "hyperspace" denotes, according to Kearny, "environments such as airports, franchise restaurants, and production sites that, detached from local reference, have monotonous qualities." Kearney, *supra* note 26, at 535. Hyperreal spaces, in turn, refer to amusement parks and, increasingly virtual reality spaces where simulacra replace the "real" reality. *See* UMBERTO ECO, TRAVELS IN HYPERREALITY (1986).

multiculturalism. The "new" consciousness that globalization configures is, therefore, neither concrete nor unified,[29] but is, as Mike Featherstone has put it, like "a heap, a congeries, or an aggregate ... of cultural particularities juxtaposed together on the same field, the same bounded space [...]."[30]

Lastly, economic and social-cultural globalization drive political and legal globalization. On one hand, increased economic and social-cultural interdependence fosters the institutionalization of inter-state relations through an ever tighter net of international organizations. On the other hand, ever more relevant economic and social-cultural decisions are taken by non-state actors within a transnational, rather than international frame of reference. Under such conditions, the classical conception of the state as the primary global actor comes under immense pressure. This is also reflected in the way politics is conceived: the theory of cosmopolitan democracy, for instance, is premised on the decentralized democratization of those aspects of globalization that fall outside of the ambit of the nation-state. As one of its proponents, David Held, puts it: "in essence, the cosmopolitan project attempts to specify the principles and institutional arrangements which seek to render accountable those places and forms of power which are currently transcending the space of democratic [nation-state] control."[31] The vision that emerges here is remarkably present in Hudson's account of international organization. He speaks, for example, of the extra-legal international standard-setting generated by some of the League of Nations' and the International Labour Organization's activities.[32]

All of these processes and tendencies exert immense pressure on the classical concept of the state, and the first cracks may be appearing in its supporting columns.[33] However, despite the mounting pressure, these columns are still held together by two mighty concepts, sovereignty and nationality, which, for better or worse, keep the classical concept of the nation-state in the game as formally

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[29] JOHN TAGG, *Globalization, Totalization, and the Discursive Field, in* CULTURE, GLOBALIZATION, AND THE WORLD SYSTEM, *supra* note 22, at 155.

[30] Mike Featherstone, *Localism, Globalism, and Cultural Identity, in* GLOBAL/LOCAL: CULTURAL PRODUCTION AND THE TRANSNATIONAL IMAGINARY 70 (Rob Wilson & Wimal Dissanayake eds., 1996). Another phenomenon that contributes to socio-cultural globalization is, of course, the massive increase in cross-border migration, which leads to large-scale cultural *mesclage* in both the migrants', the "recipients," and also in the "left behind" culturespheres. *See* STEPHEN CASTLES & ALASTAIR DAVIDSON, CITIZENSHIP AND MIGRATION: GLOBALIZATION AND THE POLITICS OF BELONGING (2000); AIHWA ONG, FLEXIBLE CITIZENSHIP: THE CULTURAL LOGICS OF TRANSNATIONALITY (1999).

[31] GOVERNING GLOBALIZATION: POWER, AUTHORITY, AND GLOBAL GOVERNANCE 115 (David Held & Anthony McGrew eds., 2002).

[32] HUDSON, *supra* note 1, at 25, 46.

[33] *See* Peer Zumbasen, *Die Vergangene Zukunft de Völkerrechts*, 34 KRITISCHE JUSTIZ 46 (2001).

still the most senior player. Only what Thomas Kuhn would term a revolutionary paradigm shift could unfasten these conceptual anchors and result in the state slowly drifting out of sight. Is such a revolution really in the offing? Are sovereignty and nationality about to be undermined?

II. *Beyond the Holy Grail: Sovereignty-old and Sovereignty-new*

Sovereignty has, of course, traditionally been considered as the "gold standard"[34] of international relations. As with many such defining concepts, it has always been averse to precise definition,[35] even though categorizations abound. Probably the best known contemporary definition comes from neo-realist international relations scholar Stephen Krasner, who distinguishes four types of references to the term (state) sovereignty: (1) interdependence sovereignty; (2) domestic sovereignty; (3) Vattelian sovereignty; and (4) international legal sovereignty.[36] Each implies a different dimension of sovereignty. The first refers to the state's power to effectively control its (territorial) borders and regulate transborder movements. The second refers to the state's authority over its internal affairs, most notably through the monopoly on the legitimate use of force within its borders as well as the rule of law. The third refers to the state's right to exclusivity of such (internal) rule, implying the right not to have any outside actors interfere with domestic affairs in law and in practice. The fourth refers to the principle that these features are bestowed upon political communities through recognition by other states, implying, in turn, the fundamental equality of actors so endowed. Krasner's fourfold distinction coincides with a number of other classifications, including the conception of two spheres of sovereignty: (1) internal (domestic) sovereignty as thematized in political and sociological theories of the state; and (2) external (interdependence, Vattelian and international legal) sovereignty, which is the main conceptual pillar of international law and one of the primary objects of study of international relations.[37] In addition, sovereignty has been likened to the concept of personal liberty in political theory, with its dual nature of the negative protection against (outside) intrusion, and the positive

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[34] Michael Milde, *Contemporary State Sovereignty Under the Microscope*, 52 U. Toronto L.J. (2001).

[35] Radon, *supra* note 14, at 195.

[36] *See* Stephen Krasner, Sovereignty: organized hypocrisy (1999). Interestingly, in this monograph Krasner originally uses the term "Westphalian" instead of "Vattelian" sovereignty, though in a later article he switches to the latter term – this being, of course, evidence of his changed interpretation of the historiography of the concept of sovereignty. *See* Stephen Krasner, *Rethinking the Sovereign State Model*, 27 Rev. Int'l Stud. 17 (2001).

[37] *See* Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument 240–385 (2d ed. 2005).

affirmation of a particular identity.[38] In the case of sovereignty, this duality is manifested through the principle of territorial integrity and non-intervention, in the coupling of the state to a nation, and in the legitimating of the state's exercise of power by that latter component. Another distinction differentiates between formal and operational sovereignty, the former denoting the formal attributes of sovereignty possessed by the state, as outlined above, and the latter the *de facto* exercise of these attributes by any actor capable of doing so, whether state or non-state.[39] This distinction already points towards a possible dissociation of the concept of sovereignty from the concept of the state, which is one of the globalization-induced changes discussed below.

Yet, despite these attempts to structure the debate through classification, sovereignty has remained an "essentially contestable concept."[40] At the base point of that contestability lie the two basic positions that characterize stances on sovereignty across the disciplinary boundaries of international relations and international law. On the one hand, liberal interdependence theorists in international relations, and positivists in international law see as the essence of sovereignty the ability to control actors and activities within and across territorial borders, by means of institutional structures that operate through legal norms.[41] For realists in both international relations and international law, on the other hand, sovereignty is the state's *de facto* ability to make authoritative decisions, including those either surrendering sovereignty to other entities, as well as those fundamentally negating the sovereignty of other states, as occurs in war.[42] Martti Koskenniemi has analyzed these two approaches by stylizing them into what he terms the "legal" and the "pure fact" approaches, epitomized by Hans Kelsen and Carl Schmitt respectively.[43] To the former, sovereignty essentially denotes the competences of the primary subjects of international law (states) as determined by a legal order (international law) presumed to precede it.[44] From this normative,

[38] Paul W. Kahn, *The Question of Sovereignty*, 40 STAN. J. INT'L L. 259, 262 (2004).

[39] Robert O. Keohane, *Hobbes's Dilemma and Institutional Change in World Politics: Sovereignty in International Society, in* WHOSE WORLD ORDER: UNEVEN GLOBALIZATION AND THE END OF THE COLD WAR 165 (Hans-Henrik Holm & Georg Sorenson eds., 1995).

[40] *See* Sarooshi, *supra* note 15, at 652. Sarooshi, in turn, refers to Samantha Besson. *See* Samantha Besson, *Sovereignty in Conflict: Post-sovereignty or Mere Change of Paradigms, in* TOWARDS AN INTERNATIONAL LEGAL COMMUNITY?: THE SOVEREIGNTY OF STATES AND THE SOVEREIGNTY OF INTERNATIONAL LAW 131 (Stephen Tierney & Colin Warbrick eds., 2006). *See also* Costas Douzinas, *Speaking Law: On Bare Theological and Cosmopolitan Sovereignty, in* INTERNATIONAL LAW AND ITS OTHERS 35 (Anne Orford ed., 2006).

[41] KOSKENNIEMI, *supra* note 37, at 228.

[42] *Id.* at 228.

[43] *Id.* at 226.

[44] *Id.* at 228.

i.e. "ought-based" perspective, sovereignty is not external to (legal) normativity, but a function of it. It cannot, by definition, be invoked against (international) law to describe or justify unilateral state action. Instead, it delimits the scope of action of an entity called the state the identity of which can only be understood from within the legal system or paradigm.

The "pure fact" approach sees sovereignty as outside of and, indeed, beyond the reach of the law. This perspective emphasizes the factual power or authority of historically grown political communities called states, with (international) law being, at best, a reflection of that "reality." Here, sovereignty is an analytical category for which law is merely an epiphenomenon, as articulated in Schmitt's idea that sovereignty does not primarily manifest itself when law is regularly complied with, but rather when it is deliberately broken in the instance of exception.[45] Sovereignty is, therefore, inherently external to the law, and yet its necessary foundation. Koskenniemi further points out how the "legal" approach is often associated with a restrictive, the "pure facts" approach with an expansive view of sovereignty, even if there is no necessary link between either approach and these respective positions.[46] More relevant, in the present context, than the scope each approach assigns to sovereignty, is the question of how each perspective conceives of the linkage between sovereignty and the nation-state, or, in other words, how changes in that linkage can be accounted for on either side of the dichotomy. Is it possible to conceive of sovereignty as divested from the state, as a free floating attribute that can be attached to all sorts of new actors? Or, conversely, can the concept of the state be meaningful without the attribute of sovereignty? Importantly, the response to these questions hinges not only on how the effect of globalization is interpreted by either theoretical horizon, but also by the way sovereignty is conceptualized in the first place.

On the "pure facts" side, which is today mostly associated with realist and neo-realist international relations scholarship, as well as with both critical and hyperrealist approaches – such as the "economic analysis of law" – in international law, two positions can be distinguished. On one side, there is what could be termed the "zero-sum" view of sovereignty,[47] which views sovereignty as a clearly identifiable set of features that are disposed of by international actors in an either/or way. Hence, any loss of all or part of these sovereignty-defining features by the state implies a correlative sovereignty gain by other actors, such as international organizations or sub-state actors such as private corporations, and

[45] *Id.* at 226.

[46] *Id.* at 234.

[47] *See* Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 J. INT'L ECON. L. 841 (2003).

vice versa. From this perspective, the status of full-sovereignty-bearing classical statehood can be assessed by measuring the degree to which it still possesses the features constituting sovereignty. Although definitions of these features abound, most seem to include the following core elements:[48] effective control over territory and the people in it, including the monopoly on the use of force; and the recognition of that effective control by other states and the *de facto* lack of intervention by these states. In addition, there is what Janice Thomson has described as "meta-political authority," *i.e.* the ability to exclusively define the limits of the political sphere, and, hence, the area within which the sovereignty-holder can legitimately coerce.[49] From the "zero-sum" perspective, a further feature of sovereignty is, of course, its mutual exclusivity: any transfer of sovereignty-features to another entity, whether state or non-state, amounts to a loss of sovereignty on part of the original holder. Or, in other words, sovereignty cannot be shared; different features of sovereignty may be held by different entities, but no two such entities can hold the exact same features. This, in turn, implies a view of sovereignty as an essentially monolithic category that may change places, but that does not fundamentally change itself.

A slightly different take of this "zero sum" view has been elaborated by John Jackson, who sees sovereignty as a denominator for power allocation.[50] Power, in Jackson's view, is essentially decision-making power by actors with governing responsibilities, with these actors not being limited to the nation-state. Indeed, "sovereignty-modern," as he terms it, should no longer be considered a formal attribute hermetically tied to the state, but as an analytical expression of which actor exercises which degree of decision-making power on which level. Jackson thereby expands the semantic field occupied by sovereignty, but his conception of it still leaves its constitutive element, decision-making power, untouched. Sovereignty-modern nonetheless goes a considerable way towards merging the concept of sovereignty into the concept of governance, where the latter, on the most abstract level, represents the idea of political organization based on universally comprehensible principles of rationality and efficiency, as opposed to historically-contingent, state-based government. Yet, unlike the perspective explored below, sovereignty-modern does not incorporate a fundamentally different conception of the state, nor is its main ingredient, decision-making power, more than an extension-by-analogy of the way states have traditionally exercised their internal and external sovereignty. Sovereignty-modern remains within the "zero-sum"

[48] *See, e.g.*, Helen Thompson, *The Modern State and its Adversaries*, 41 Gov't & Opposition 23 (Winter 2006); Thomson, *supra* note 13.

[49] Thomson, *supra* note 13, at 222.

[50] Jackson, *supra* note 14, at 789.

perspective, in which a finite and clearly delimited quantum of power is spread across different actors, the fundamental nature of which is, however, not affected by variations in their share of that power.

On the other side of the "pure facts" approach lies what could be termed the "sovereignty-revealed" perspective, which can be most closely associated with Stephen Krasner's neo-realist attempt to unmask classical state sovereignty as an "organized hypocrisy."[51] The part of the argument relevant here is Krasner's assertion that globalization does not so much challenge the state as that it reveals its true nature. By seemingly cutting into classical sovereignty, it merely brings to the fore what has, in his view, always been true about the Westphalian model, namely, that real state practice and the main components of classical sovereignty – the principles of non-intervention and of mutual recognition – simply do not match. The real-existing asymmetries of power among states, different levels of domestic legitimacy, and, generally, the absence of any higher authority capable of centrally determining valid norms and resolving disputes[52] relegate formal state sovereignty to the level of "organized hypocrisy," while implicitly acknowledging that such hypocrisy is inherent in a complex and potentially anarchical international society. Behind the smokescreen of formal sovereignty, however, states have, in Krasner's view, always tended to act on the basis of an assessment of the consequences of their actions in light of some pre-defined "national interest," rather than according to the appropriateness of their actions in relation to any supervening norm system.[53] What distinguishes the "sovereignty-revealed" perspective from the "zero-sum" perspective is that, while for the latter, sovereignty is a real expression of power or authority, the locus of which may shift in between actors, for the former, it is an epiphenomenon of the "real" functioning of international environments on the level of a productive myth. It is productive, because, in Krasner's view, the recurring rhetorical reference to formal sovereignty and the norms associated with it allows actors to, *prima facie*, satisfy the expectations of a multiplicity of domestic and international constituencies, while *de facto* acting according to a logic of consequences. From this perspective, the particular organizational form of the nation-state has never been more than one actor among several actors – such as empires, tributary state systems, city states, feudal oligarchies – even if it may have been the most successful one by evolutionary standards from the mid-seventeenth century up to today. Globalization, by challenging that organizational hegemony, may speed up the demise of the idea of state sovereignty, but not of the state itself, which has, in this view, always acted outside the conceptual straightjacket of sovereignty.

[51] *See* KRASNER, *supra* note 36.
[52] *Id.* at 21.
[53] *Id.* at 42.

Diametrically opposed to this strand, of course, are the perspectives associated with the "legal" approach for which the norms associated with sovereignty are definitive of the identity of the state and of international society. The traditional "legal" approach, still held by many positivist international lawyers, sees sovereignty as the normative force that keeps the elements of international society, most notably states, in a stable orbit. To these "classicists," divergence from that orbit, *i.e.* non-compliance with international norms, by individual (state) actors threatens not only the stability of what they consider to be an international system, but, indeed, the very system itself, and with it, the identity of each of its elements. While non-compliance on the part of states simply represents the traditional realist "pure facts" challenge to the "legal" approach's concept of formal sovereignty, the "hemorrhaging" of sovereignty to supra- and sub-state entities as a result of globalization processes falls outside of that dichotomy. This, in turn, has been perceived as profoundly threatening to the "legal" approach, because it undermines its contractarian foundations, which are premised on the exercise of hierarchically-conceived *government* by clearly defined individual sovereign entities. It replaces this approach with diffuse and a-hierarchical *governance* that emerges from the norm-oriented interaction of a diversity of actors.

There have been, however, a host of attempts to mount a defense of the "legal" approach in the face of these challenges. The main argument of that defense has been twofold. On the one hand, it has consisted of proposals to re-conceive the international norm structure, so as to better reflect current realities without surrendering the presumption of the norm-based character of the latter. Hence, in a move not dissimilar from Jackson's power-allocation analysis, Christoph Schreuer, among others, has argued that the traditional canon of international law has to be significantly revised to reflect the increasing verticalization of international relations.[54] Shadowing some of the discussions in European law on the nature of the European Union and its relationship with its member states, he suggests that international law itself should open itself up to other actors that increasingly assume governmental functions. This implies, in particular, a revision of the sources doctrine, including: (1) the (equalization) of international organizations with regard to treaty-making competences, and their recognition as a source for and not merely evidence of international custom; (2) a different conception of the relationship between domestic and international law – beyond the dualism-monism dichotomy and towards a more functionalist doctrine that takes into account the de facto vertical division of powers between sub-state actors, states, and international organizations; (3) a new stance towards participation in international

[54] Christopher Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International Law*, 4 Eur. J. Int'l L. 447 (1993).

relations – the granting of full legal personality to international organizations, the rationalization of state recognition criteria, the opening up of international conferences to international organizations and, perhaps, even other non-state actors such as NGOs; and (4) the granting of standing to these latter actors in international adjudicatory bodies such as the International Court of Justice. Besides, existing evolutionary trends in international law, notably the ever wider and deeper international protection of human rights, the internationalization and humanitarianization of the use of force, as well as its applicability to non-state actors such as terrorists, and the occasional internationalization of the central element of sovereignty, namely the control over territory and people, would all need to be consolidated and further expanded. However, Schreuer, like many reform-minded "legalists," leaves open the question *how* an international legal order based on classical state sovereignty is supposed to transform itself into a system of norm-based multilevel governance. Is it likely that states, already fearful of their waning role, will readily agree to their own conceptual marginalization?

Proponents of this approach point to the highly innovative nature of the European Union, as well as to some intra-state neo-federalist arrangements, such as those resulting from devolution in the British context. Neill McCormick, for one, the eternally brilliant enfant-terrible of British jurisprudence, derives from his analysis of the legal relationship between the European Union and its member states, as well as from his ruminations about the nature of devolution in the United Kingdom, the notion of "post-sovereignty" – essentially positing that international law does not need old-style state sovereignty in order to maintain stability, and that the latter has, indeed, been a hindrance towards the realization of democracy and subsidiarity as conceived from what he terms a "liberal nationalist" point of view. This notion will be discussed briefly in the following section.[55]

While these "legal" approaches essentially attempt to trade off the centrality of the state in favor of the preservation of sovereignty within a re-defined international legal framework, another line of thought takes an almost inverse direction by seeking to preserve the centrality of the state through a radical re-definition of sovereignty. For liberal internationalists such as Abram and Antonia Chayes or Anne-Marie Slaughter, this "new sovereignty" is based on the assertion that "states can only govern effectively by actively cooperating with other states and by collectively reserving the power to intervene in other states' affairs."[56] New

[55] Neil Maccormick, Questionning Sovereignty: Law, State, and Nation in the European Commonwealth (1999); Milde, *supra* note 34.

[56] Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 Stan. J. Int'l L. 283, 285 (2004).

sovereignty is, in other words, a relational concept that expresses "[a state's] capacity to engage, rather than to resist."[57] Sovereignty is reconceived as the right to participate in international cooperation, with such cooperation considered not just one among several options, but the new paradigm of international reality. To these authors, globalization is not like some meteorite from outer space smashing into an inelastic structure of sovereign states, but rather like a light beam that is reflected by everything it falls upon. They take pains to accrue evidence that state actors are already, and quite voluntarily, interacting in "government networks" involving different governmental branches and levels of administration. In their view, such collaboration now forms the epistemic horizon that shapes the way states see themselves, as a result of a real transformation of the nature of sovereignty, rather than merely an assumed interest calculus. International organizations, like the United Nations, but even more so such institutions as the World Trade Organization, play a preeminent role in this "new world order,"[58] and they are seen as actually "sovereignty-strengthening" because they preserve effective (global) governance in the face of ever weaker individual state governments. This, then, could be called the "reflection" perspective of state sovereignty, since the latter's colors are taken to be profoundly changed by the lights of globalization. One interesting implication of this reconceptualization is that the state is not seen as the passive object of globalization processes slowly eating it up, but as a proactive subject, alongside other actors, and within ever tighter government-governance networks moving according to a common normative script.

Ultimately, both the "pure facts," and the "legal" approach attempt, in one way or other, to reconceive sovereignty, whether: (1) in the somewhat cynical form of Krasner's "sovereignty-revealed"; (2) as multi-level power-allocation in "sovereignty-modern"; (3) as participation in global governance processes in the "new sovereignty"; or (4) as the ultimate disentanglement of state and nation in "post-sovereignty."

III. *Heading Towards Divorce: Nation and State*

As was hinted above, globalization does not only impact on the nature of sovereignty and its relation to the state, but also on the second central premise of classical statehood, namely the "marriage" between state and nation, or, as Ernest Gellner would have it, between organization and culture.[59] As was already seen, statehood is the particular, historically contingent way to organize a political community – a

[57] *Id.* at 325.

[58] *See* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).

[59] ERNEST GELLNER, NATIONS AND NATIONALISM (1983).

res publica – that emerged from the centralized territorial dominion by a monarch, and that, within the European context, turned out to predominate over other organizational forms such as empire, feudal oligarchy, or cities. That predominance is, arguably, the result of a particular turn the state's territory-based form of organization took from the late eighteenth century onwards, or, more specifically, through the French and American revolutions. The important conceptual turn here was the re-definition of the political power, *i.e.* sovereignty, exercised over state territory away from the person of the monarch and towards the people inhabiting the territory, namely the nation. Importantly, however, the concept of nation is not, therefore, seen as simply derivative of the state, but is conceived of as a distinct entity parallel to and, indeed, preceding the state. The term comes, of course, from the Roman *natio*, denoting originally birth and origin, and then used as a generic reference to peoples with archaic, pre-political forms of organization. Indeed, the glue that integrates the nation is a shared culture based on common descent, rather than political organization, in the sense of *ethnos*, rather than *demos*. Even Kant, who, through his *Perpetual Peace*, became one of the matchmakers of the state's liaison with the nation, nonetheless still originally defines nation as "that group of people, which, on account of its members' common descent, comes to perceive itself as a civic community ... "[60] Hence, *prima facie*, state and nation are far from an obvious match. On one hand lies the state with its rationality of administration. On the other hand lies the nation, rooted in an imagined community.[61] The state is bound together by political power. The nation is bound together by a broadly-understood idea of *Kultur* that includes, *inter alia*, shared language, ethnicity, habits, rituals and religion.[62] The crucial impulse for a union of the two comes only when the state's first spouse, namely the monarch, is revealed as a pathological adulterer and is thrown out. Instead, the nation, which through its linkage between people and territory, provides a ground for the state's political power much superior to the inherent cosmopolitanism of dynastically-organized monarchies, is chosen as the next and apparently definitive partner. The marriage is then celebrated in practice by the French and American Revolutions, and in theory by the social contractarians – Hobbes, Locke, and Rousseau – and by Kant. Both state and nation change through their union; the nation looses its

[60] Immanuel Kant, *Anthropologie in pragmatischer Hinsicht abgefaßt - 2. Theil*, vol. 7 of ibidem., KANTS WERKE, BERLIN: KÖNIGLICH PREUßISCHE AKADEMIE DER WISSENSCHAFTEN 311 (1968\69).; *see* JÜRGEN HABERMAS, *Staatsbürgerschaft und nationale Identität, in* FAKTIZITÄT UND GELTUNG: BEITRÄGE ZUR DISKURSTHEORIE DES RECHTS UND DES DEMOIKRATISCHEN RECHTSSTAATS 635 (4th ed. 1994).

[61] *See* BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGINS AND SPREAD OF NATIONALISM (1991).

[62] GELLNER, *supra* note 59, at 89.

primordial cultural authenticity and, instead, becomes the source and exclusively legitimate ground of sovereignty within the state which, in turn, functions as a mechanism for the realization of that sovereignty. Thus, state and nation merge into the nation-state, a form that, from then on, appears as an indissolvable unity. One consequence of this union, was, however, a gradual shift in emphasis away from the substance of a shared culture and common descent, and towards the form of the practice of national sovereignty through increasingly democratic decision-making. Culturally-defined nationality became, hence, secondary to formally-defined citizenship. It is the modern nation-state's citizenry which, in Kant's conception, is at once subject and object of political power. Even though it would take roughly another 150 years until this model of political organization became consolidated, the basic tenets of what would be known as the liberal democratic state with universal suffrage, separation of powers, rule of law, *etc.*—stem from this "age of revolutions."[63] The shift in emphasis from national to citizen had an important implication: it meant that membership in the political community was increasingly defined through abstract participation rights, rather than by common cultural descent. This led to an individualization and desubstantialization of nationhood, or, in other words, to a shift from the idea of an organic national whole to the idea of a community of citizens, as expressed in Ernest Renan's well-known phrase "l'existence d'une nation est ... un plébiscite de tous les jours."[64] However, paradoxically, the very process that led to this transformation of nationality into citizenship also created the momentum for the subsequent re-appropriation of a culturally-defined national identity. Indeed, nationalism, the nation-state's monstrous offspring, is much more premised on the popular sovereignty brought about by the union of its parents, than it is on real common descent or shared culture. Nor is nationalism necessarily the nation-state's only or most dominant child. What is important is that, from the beginning, the liberal Kantian lighting of the stage of the state-nation wedding has not been able to reach some darker corners, and it is these which have continuously threatened the harmony of the union. Whenever irredentist aspirations to reaffirm national identity within and among states were able to dominate the expression of popular sovereignty, the state-nation relationship became instable, risking, and sometimes losing both territorial integrity and national sovereignty. The 20th Century "age of extremes" provides ample evidence for this self-destructive streak of the relationship.

Apart from the centrifugal potential that inheres in the very concept of the nation-state, the same globalizing processes that are so profoundly affecting classical

[63] *See* ERIC HOBSBAWM, THE AGE OF REVOLUTIONS: 1789–1848 (1996).

[64] Ernest Renan, *What is a Nation?, in* NATION AND NARRATION, 8 (Martin Thom & Homi K. Bhabha eds., 1990) (translation of speech given at the Sourbonne on March 11, 1882).

mixed, and the question remains whether what was conceived, even if always artificially, as a monogamous relationship between one form of organization and one culture is amenable to being transformed into a polygamous one, with one state being married to a multiplicity of nations. The European Union's ongoing struggle to grow into such a multinational state is evidence of the difficulties that this divergence from the classical model still entail.[67]

Beside either the hypostazation or the proliferation of nationhood, a third consequence of globalization processes on the state-nation relationship has been taken to be the withering away of the concept of nation. With the classical liberal thesis of the absorption of collective nationality into individual citizenship as a starting point, Thomas Franck, for one, has gone to considerable length to argue that the union between state and nation has essentially been a mechanism to forcefully impose an imagined national identity onto individual identity, with state sovereignty being the enforcement mechanism of that imposition.[68] Globalization, in this liberal millenarian view, breaks open this oppressive structure, by diffusing state sovereignty, and, yet more importantly, by increasingly empowering individuals to freely define their identities, and, in line with these, their loyalties. Polypatrism and *intercitoyenneté* are, hence, likely to become the norm, for the state will, in Franck's vision, remain in existence for some time to come, if only as one among several co-equal actors. Indeed, to Franck, the world is "on the verge of a new stage of human evolution in which loyalty to the [S]tate is transformed into a higher loyalty to humanity, symbolized by global ... institutions of government, commerce, education, and communication [...]."[69] It is a world fundamentally shaped by individuals and their supposedly freely defined preferences, and in this sense Franck's brave new *Promethea*[70] can be seen as closely linked to the cosmopolitan democratic project referred to above. In this cosmopolis, substantial (collective) culture gives way to a meta-culture consisting of the shared experience of continuous individual identity creation. This (meta-) culture of self-fulfillment is protected by global governance mechanisms based on liberal premises. The nation becomes a redundant category, and the state merely lends aspects of its organizational form to a de-centered network of global institutions. Although yet clearly a utopian vision, liberal millenarians and cosmopolitans see the world's *de facto* functional evolution clearly pointing towards their vision, as evidenced in the daily lives of an ever increasing number of people.[71]

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[67] *See* YAEL TAMIR, LIBERAL NATIONALISM (1993); Geneviève Nootens, *Liberal Nationalism and the Sovereign Territorial Idea*, 12 NATIONS & NATIONALISM 35 (January 2006).

[68] FRANCK, *supra* note 65, at 1.

[69] *Id.* at 59.

[70] *See* Florian Hoffmann, *The Empowered Self: Law and Society in the Age of Individualism*, 15 LEIDEN J. INT'L L. 725 (2002).

[71] Again, Hudson already prefigured this to some extent. HUDSON, *supra* note 1, at 1.

state sovereignty, are also having an impact on the state-nation marriage. The most common consequence actually has to do with precisely the construction fault line that haunts the nation-state. For the pressures of globalization on individual states or regions, including, prominently, economic adjustment processes, cultural de-rooting, and large-scale im(migration), have in some cases, re-awakened the nationalist beast, destabilizing existing states, threatening the peaceful co-existence of neighboring states, and subduing formal popular sovereignty to substantive national self-determination and aggrandizement. This trend to re-nationalize – *i.e.* culturally homogenize – territory, with the consequent impulse for either fragmentation or expansion, could lead, according to Thomas Franck, to an "unmanageable world of 2000 mutually hostile states, each based on what their leaders claim to be the ideal: a pure-blooded, homogenous nation born to redress and avenge its woeful past."[65] Hence, the potential fostering of nationalist tendencies, and the consequent instable disequilibrium between organization (state) and culture (nation) is a first consequence of globalizing processes.

A second, though inverse, consequence is the proliferation of group identities, whether explicitly called nations or merely following the logic of nationality, within the state. This phenomenon has, of course, been treated within the now vast body of literature on multiculturalism, as well as in communitarian conceptions of political society. Both discussions deal with the question of whether and how different collective identities can be integrated within the same organizational scheme, namely the state. The communitarian, argument, in particular, is based on a critique of the dominant liberal storyline, according to which culturally-defined nationality is taken to have been entirely absorbed into an individualized, functional citizenship.[66] Against this postulate, communitarians assert that the universalist principles of the (liberal) democratic state require some form of cultural rootedness, which in turn, represents one of the core challenges to multicultural states. How can different collective identities be assumed to share, or by what procedures can they be made to share the same substantive commitment to popular sovereignty within the particular territorial boundaries that characterize the state. One response to this challenge has been the reference to so-called constitutional patriotism, which assumes that, in a grown constitutional system such as in the United States, different communities can, nonetheless, come to substantively share a commitment to that constitutional order which enables their self-affirmation. Yet, the empirical evidence on functioning multiculturalism is

[65] THOMAS M. FRANCK, THE EMPOWERED SELF: LAW AND SOCIETY IN THE AGE OF INDIVIDUALISM 23 (1999).

[66] *See* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1996); MICHAEL WALZER, POLITICS AND PASSION: TOWARD A MORE EGALITARIAN LIBERALISM (2005).

C. *Conclusion – Wither the State?*

Hence, what is, then, the current 'state of the (S)tate'? Having embarked on a fly over of contemporary theory of it, the challenge of any conclusion will be to resist the seduction of a "middle-of-the-road" perspective, one which sees the nature of statehood as profoundly affected both by globalization processes and by international relations in the post-Cold War world, but which equally recognizes the continuing relevance of the state despite and, increasingly, because of the very phenomena at the root of its transformation. Such a perspective would be as deeply plausible as it would be reductive and, ultimately, empty of explanatory value.

What else is there to say about the present and future of the state? One way out would be to attempt to evade the question by musing about the nature of the matter that surrounds the contemporary state, namely that institutional-normative gel that has allegedly replaced both purely legal and purely power-based inter-state relations, notably (global) governance. The term was coined in contradistinction to traditional state-based government.[72] It is, however, primarily an analytical concept denoting different forms of rule-based decision making processes. Although it may be defined negatively as the absence of anarchy and chaos,[73] *i.e.*, non-governance, it does not have any particular, positive content. Different regimes imply different forms of governance, and all the generic term denotes here is the presence of some form of regime. Likewise, governance occurs on all political levels, with "global governance," in particular, referring to sets of rules and institutions dispersed across the globe and directed towards global policy issues.[74]

To many theorists of political globalization, governance alone cannot substitute the gaps of political authority created by economic and socio-cultural globalization. It lacks what to this line of thought is the most advanced concept the old

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[72] *See* DAVID HELD, DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE (1995); ASEEM PRAKASH, GLOBALIZATION AND GOVERNANCE (2000).

[73] The term "chaos" being used here trivially, for its mathematical definition is, of course, precisely not as a totally irrational, a-logical, and non-directional state, but as, in fact, obeying certain underlying rules. *See, e.g.*, STEPHEN H. KELLERT, IN THE WAKE OF CHAOS: UNPREDICTABLE ORDER IN DYNAMICAL SYSTEMS (1994).

[74] *See, e.g.*, René Foqué, *Global Governance and the Rule of Law: Human Rights and General Principles of Good Global Governance, in* INTERNATIONAL LAW: THEORY AND PRACTICE 25 (Karel Wellens ed., 1998); David Kennedy, *Background Noise? – The Politics Beneath Global Governance*, 21 HARV. INT'L REV. 3, 52 (1999); Basak Cali & Ayca Ergun, *Global Governance and Domestic Politics: Fragmented Visions, in* REFLECTING CRITICALLY ON GLOBAL GOVERNANCE 161 (Philip Müller & Markus Lederer eds., 2005).

nation-state was potentially able to produce, namely political legitimacy.[75] The latter is, of course, epitomized by two specific forms of governance, namely democracy and (human) rights, the interdependence of which is achieved, in the best of cases, within the nation-state, but not yet on the global level.[76] In respect of these, the literature on political globalization has taken a twofold approach.[77] First, it has adopted a, *prima facie*, empiricist-historicist perspective and thematized the worldwide expansion of both democracy and human rights within nation-states as a simple fact of historical destiny; ranging from the social-theoretical account of expansive modernization, to the historical-philosophical affirmation of the ultimate triumph of liberal (capitalist) democracy.[78] This line of thought seeks to provide empirical evidence for the argument that democracy and human rights are essential aspects of the general globalization process. A second line of thought has endorsed an overtly normative stance. In essence, it charges economic and sociocultural globalization with creating significant legitimacy gaps by promoting the transfer of increasing amounts of political authority away from liberal democratic nation-states, and to unaccountable bodies or wholly decentralized processes.[79] As a consequence, globalization processes need to be democratized – which is generally taken to imply the parallel expansion of human rights regimes.[80] This includes calls for the democratization of international organizations,[81] the greater inclusion of civil society organizations in the international political process,[82] as well as the

[75] *See* GOVERNING GLOBALIZATION, *supra* note 31.

[76] For what is likely to be the most theoretically elaborate reconstruction of the originally Kantian intertwinement of democracy and human rights within the nation-state, *see* HABERMAS, *supra* note 60. For the global dimension of democracy, *see* THE TRANSFORMATION OF DEMOCRACY?: GLOBALIZATION AND TERRITORIAL DEMOCRACY (Anthony McGrew ed., 1997); GLOBALIZATION AND HUMAN RIGHTS (Alsion Brysk ed., 2002).

[77] *See* DAVID HELD ET AL., GLOBALIZATION THEORY: APPROACHES AND CONTROVERSIES (2007).

[78] Thomas Franck has made a laborious attempt to "prove" that there is now such a thing as a "right to democracy" or democratic governance in international law. *See* THOMAS M. FRANCK: THE POWER OF LEGITIMACY AMONG NATIONS (1990); FRANCK, *supra* note 65 (1999). For a critical analysis, *see* Susan Marks, *The End of History? Reflections on Some International Legal Theses*, 8 EUR. J. INT'L L. 449 (1997); Russell A. Miller, *Self-Determination in International Law and the Demise of Democracy?*, 41 COLUM. J. TRANSNAT'L L. 601 (2003).

[79] McGrew, *supra* note 76.

[80] *See* CAROL C. GOULD, GLOBALIZING DEMOCRACY AND HUMAN RIGHTS (2006); TRANSNATIONAL DEMOCRACY IN CRITICAL AND COMPARATIVE PERSPECTIVE: DEMOCRACY'S RANGE RECONSIDERED (Bruce Morrison ed., 2004).

[81] *See* IAN SHAPIRO & CASIANO HACKER-CORDÓN, DEMOCRACY'S EDGES (1999); ANDREA RIBEIRO HOFFMANN & ANNA VAN DER VLEUTEN, CLOSING OR WIDENING THE GAP?: LEGITIMACY AND DEMOCRACY OF REGIONAL INTERNATIONAL ORGANIZATIONS (2007).

[82] *See* MARY KALDOR, GLOBAL CIVIL SOCIETY: AN ANSWER TO WAR (2003); Richard Falk, *The Nuclear Weapons Advisory Opinion and the New Jurisprudence of Global Civil Society*, 7 IOWA J. TRANSNAT'L L. 333 (1997).

idea of a cosmopolitan democracy.[83] The last of these demands represents the most far-reaching response to the perceived legitimacy gap; instead of subscribing to an evolutionary view of modernity in which a world society, and a corresponding world government, is ultimately bound to emerge in strict analogy to the development of the state, the cosmopolitan democracy project is premised on the decentralized democratization of those aspects of globalization which fall outside of the ambit of the state. As Held puts it, "in essence, the cosmopolitan project attempts to specify the principles and institutional arrangements which seek to render accountable those places and forms of power which are currently transcending the space of democratic [nation-state] control."[84] In cosmopolitan democracy, individuals will have multiple political identities, as citizens, stakeholders, and members of different types of communities.[85] The objective is both to subject all exercise of political authority – in its classical sense, but, potentially, also in the deeper sense of all forms of power exercised over people – to democratic control, and to, thereby, interlink the manifold processes, institutions, and constituencies that are currently dispersed and fragmented. The ideal is not a unified world-state, but a democratic cosmopolis constituted by complementary political fields across diverse levels all of which are subject, in the last instance, to the control of cosmopolitanized individuals.[86] This, then, would be one way to look at, or rather, *through* the contemporary state. In the multiple interlinkages of individual and collective (non-state) actors we would behold "progress in international organization."

Another way to look at the future of the state would be to divest the concept of statehood from that of the "real existing" nation-states and project it onto the global level. Thus, the global world towards which we are allegedly moving would be conceived of as an analogy to the nation-state, as if the same socio-historical processes that led to the development of the latter were to repeat themselves in different conceptual guises on the way to a world-state. Hence, "international organization" would be seen as having an inherent *telos*, notably the increasing integration of the world's states into ever larger units, be they a United States of Europe, a Mercosur or Andean State Community, or, eventually, a United States of the World. Although, *prima facie*, this vision seems to most closely correspond to Hudson's, it is doubtful whether he would hold it today were he to repeat his original survey. Ultimately, the classical statist perspective is bound either to a

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[83] A classic among the now extensive literature on cosmopolitan democracy is DANIELE ARCHIBUGI & DAVID HELD, COSMOPOLITAN DEMOCRACY: AN AGENDA FOR A NEW WORLD ORDER (1995).

[84] Held, *supra* note 23, at 115.

[85] HELD, *supra* note 72, at 226.

[86] *Id.* This resounds, again, with Thomas Frank's millenarian vision. *See* Franck, *supra* note 65.

form of political-economic structuralism, or to a somewhat naïve progressivism,[87] both of which have today lost much of their credibility.

A third way would be to go down the neo-medievalist road and see contemporary statehood as embedded in overlapping neo-imperial structures that may be territorial, such as the European Union,[88] or topical, as, for example, the international trade regime within the ambit of the WTO. In a sense, this neo-medieval option can be seen as a combination of the previous two: relations within the empire or commonwealth would largely correspond to different forms of governance, rather than government, yet there would be enough of a centre, whether geographical or institutional, to hold together and constitute as a recognizable entity the diverse individuals, cultural and ethnic collectivities, political organizations, and territorial boundaries of which it is comprised. The classical state would not, at least initially, cease to exist, but its central attributes would be gradually transformed. Hence, sovereignty would become merely an expression of the existence of empire, an ontological attribute signaling that it was imbued with both power and law. Nationhood, in turn, would give way to a multiplicity of overlapping identities the common trait of which would be their recognition by and within the empire. Lastly, political organization would become more mobile, moving to the level on which particular demands would be most efficiently addressed, whether that be on the old nation-state level, or below or above it. The way to such neo-medieval empires could well be paved by states themselves, notably by the initially quite literally imperialist tendencies of some dominant states or groups of states. Hence the United States and the (Western) states within its orbit, or China and its East Asian allies, besides the European Union itself, may initially act as the power generators that create the gravitational forces necessary to bring and hold together new empires. These core states would not govern in the way states have traditionally governed their people and territory, and they themselves would be profoundly transformed in the process of empire formation, so that in time, they would be taking on a life of their own. In this scenario, the nation-state would not so much wither away, as it would gradually be woven into a larger fabric.

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[87] Habermas, for one, arguably needs to (counterfactually) project the functioning of the late-modern nation-state onto a global frame in order to maintain the feedback loop between democracy and fundamental rights. *See* JÜRGEN HABERMAS, *Zur Legitimation der Menschenrechte, in* DIE POSTNATIONALE KONSTELLATION 170 (4th ed. 1998). For a liberal progressivism seemingly untainted by the "war on terror," *see* ANNE-MARIE SLAUGHTER & G. JOHN IKENBERRY, FORGING A WORLD OF LIBERTY UNDER LAW: U.S. NATIONAL SECURITY IN THE 21ST CENTURY – FINAL REPORT OF THE PRINCETON PROJECT ON NATIONAL SECURITY (Princeton University 2006), *available at* http://www.wws.princeton.edu/ppns/report/FinalReport.pdf (last visited June 2, 2007).

[88] *See* JAN ZIELONKA, EUROPE AS EMPIRE 4 (Oxford University Press 2006).