Globalization and the Rule of Law
Some Westphalian Doubts[1]

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In his posthumous work *Power and Prosperity*, the economist Mancur Olson asked why the economies of many of those countries of the former Soviet Union that had at last adapted to the theoretical and practical presuppositions of the market economy had not seen themselves recompensed with the prosperity that this economic model promises to all those who follow its rules. The core of the answer was in a long paragraph that is perhaps elemental to a jurist but may be original and worth remembering as an innovative thesis in the world of economists. The text says:

> "To realise all the gains from trade, then, there has to be a legal system and political order that enforces contracts, protects property rights, carries out mortgage agreements, provides for limited liability corporations, and facilitates a lasting and widely used capital market that makes the investments and loans more liquid than they would otherwise be. These arrangements must also be expected to last for some time.
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> Without such institutions, a society will not be able to reap the full benefits of a market in insurance, to produce complex goods efficiently that require the cooperation of many people over an extended period of time, or to achieve the gains from other multiparty or multiperiod arrangements. Without the right institutional environment, a country will be restricted to trades that are self-enforcing.
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> To realise the gains from complex transactions and those that take place over a long time, the individuals in a society not only need the freedom to trade but also the right to establish secure title of property and to mortgage property. They must have guaranteed access to impartial courts that will enforce the contracts they make, as well as the right to create new forms of extended cooperation and organisation, such as the joint-stock corporation" (Olson 2000, 185)

Olson affirms that similar considerations apply to production. If legal rules like these did not exist, the processes of production of goods would

1 This is a renewed version of a paper first conceived at the Tampere Club and then presented to the first plenary session of the World Congress of Philosophy of Law celebrated in Granada in 2005.

likewise be weak and contingent, and they could only shape a puny economy grounded in the mere occasional exchange of immediate and perishable products.

Some twenty years before, James Buchanan recalled that some normative limitations on the behaviour of any person with regard to the others, the renouncing of violence, the position of each person regarding the access to resources, goods and services, and the terms in which the enforcement of all these norms would take place, should necessarily shape the first moment of the constitutional compact; otherwise we could not even think seriously in a market economy. So, law and legal statutes appeared almost as a rational priority for the extensive and systematic working of the market economy, and they appeared, moreover, with the characters of a *public good*, i.e. as a good that was not susceptible to be produced by the market itself (Buchanan 1975, c. 7).

Olson´s suggestion and Buchanan´s construction have an immediate relevance in the subject of this essay, since both establish a crucial relation between free market economy and the legal system, a relation so important as to suggest that law is nothing less than a condition of possibility of market economy. That is to say, they affirm that the pre-existence of law is necessary even to think of the possibility of an appropriate functioning of the market economy. In fact this is nothing more than a new and rigorous echo of the old Hobbesian voice. We sometimes forget that close to the celebrated statement on the life of the human being in the state of nature as "solitary, poore, nasty, brutish and sort", there is another previous reflection of incredible insight: "In such a condition, there is no place for Industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of time; no Arts; no Letters; no Society..." (Hobbes 1996,89). This idea is extremely relevant for any approximation to the relations between global economy and the rule of law. Our concern now is to try to understand how this problem is being faced in a historical moment when it is claimed, on the one hand, that market economy is attaining a growing global implantation, whilst, on the other hand, it can be verified that the parameters of legal regulation become more and more blurred between the territorial State, called Westphalian, and certain global guidelines or standards whose nature and scope are not well established yet. The question is whether it is possible to think about a global market economy with a kind of law

which is not global, and whether this type of law can meet the requirements that the ideal of the rule of law, even when conceived in not too ambitious terms, demands in our time.

I.

I shall begin with some brief stipulations on the concept of globalization and on the different senses of the idea of rule of law that can be brought up. Accepting a well-known proposal of definition, I will understand here by globalization,

> "a process (or set of processes) which embodies a transformation in the spatial organization of social relations and transactions – assessed in terms of their extensity, intensity, velocity and impact – generating transcontinental or interregional flows and networks of activity, interaction, and the exercise of power". (Held, MacGrew, Goldblatt & Perraton, en Held & McGrew 2001, 68).

Globalization is a very complex and extended process of human interactions rising over the established state borders, which determines the existence of a web of political, economic, cultural and social relations that seems to float above the local, regional and national confines to constitute itself as a sort of new transnational civilisation. Although historically there have always existed relations of all types which took place across the borders of human communities, the extensity, intensity, velocity and impact achieved at the present day, as recalled by this definition, must be considered as features which make a qualitative difference in respect to previous historical processes. How to establish the nature of this qualitative difference is another question: for some it consists in the massive presence of private actors, for others in the means of communication used. Be that as it may, what it really entails is that the interactions of those actors and the states of affairs they bring about have a rapid and evident repercussion even in distant regions and generate a strong interdependence both between states and between different segments of civil societies, however remote they may be.

I do not think it necessary to enter into the discussion of the details of the globalization/antiglobalization debate (see Held & MacGrew 2002a). I will nevertheless assume that globalization is, to a great extent, an irreversible process. As it has been said, we are not going to find any way to stuff the genie back into the bottle. As in the classic tale of the Sorcerer's Apprentice, the creature we have delivered will go on making its more or less clumsy experiments, whatever their outcome. In addition, I feel tempted to say that, to a great and worrying extent, what we have before

us obeys now and will obey in the future a logic of collective action of immense proportions which determines a high degree of anonymity and impersonality in global actions and reactions and, as a consequence, an important rate of impredictability in the results. I think that the mere idea of "conducting" or "reconducting" the complex processes that globalization carries with it will be extremely difficult, if not impossible.

Regarding the other component of the title, I propose to use the expression 'rule of law' in three meanings or senses which represent three degrees or, as it were, scales of *density* of the concept[2]. The first sense – the most immediate of all, but the most unavoidable – refers to the mere existence of effective legal norms as rules that organise violence in society, establish property rights and the forms of economic exchange and are reasonably protected by an agency of coercive application. According to this first sense, rule of law is tantamount to the existence and force of laws to appeal to before judges and courts. It may be said that in this sense any valid and effective legal order – even if unjust according to other considerations – could be seen as an instantiation of the notion of rule of law.

The second degree or scale of density of the notion tries to go a little further. According to it, the ideal of rule of law would require that public powers, and not only private persons, were also subject to laws. The acts performed by the agencies of power must be examined by judicial procedures that control their legality. It is a dimension of the rule of law which, since its formulation in the *Declaration des droits de l'homme et du citoyen*, is transmitted through the German construction of the theory of the *Rechtsstaat* and the English notion of *rule of law.* It is the so-called principle of legality of the conduct of powers, for instance, the principle of legality in criminal law or tax law or the general principle of legality of the Administration. It expresses the idea that law and laws have supremacy over the arbitrary acts of power. As Dicey explained it, it means "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the Government" (Dicey 1982, 120).

And lastly, there is a third sense – the thicker from an ethical point of view – that presupposes the previous two. It ascribes in addition to the

2 I do not intend to assume any position on the theoretical problems of the notion of rule of law, only to stipulate some meanings to confront them with the problems of globalization. For a recent work on the history of the concept of the rule of law, see Tamanaha 2004.

notion of rule of law the complex requirement that the legal order be composed in its more important core by abstract and general rules that administer a formally equal treatment to all their addressees, rules that are reasonably stable and easily accessed by the public, without retroactive effects and apt to be actioned before the courts. This meaning of rule of law is very close to the requirements of formal justice. The author who unavoidably comes here to mind is Lon Fuller (Fuller 1969).

II.

Let us see in broad terms – and for the sake of discussion – how law has been globalised or is being globalised, and if the result of this globalization can be considered suitable enough as to build over this new global law some of the senses or scales of density that we have stipulated for the concept of rule of law. I think that most jurists will share with me the idea that on what concerns the first sense, that is to say, the definition of *Meum* and *Tuum* through coercive rules, and the penal prohibition of damage to the others, the national State is the place wherein law resides for the moment. Here globalization is non-existent or almost non-existent. Property rights and criminal law have not yet started their flight across the borders to be regulated by a norm of a global nature. They happen to be still regulated and enforced within the confines of the so-called Westphalian States. That is to say, no supranational and global legal ruling exists under which property rights are recognised and coercively protected, and neither does there exist (or, as we will see later, it only exists in a precarious form) any coercive legal rule of global nature about the definition and punishment of crimes. Nor is there any global judge, court or tribunal to appeal to in search of this recognition and protection. Financial capital can fly over the borders, but legal entitlement to the property of this capital remains under the wing of domestic law. Pollution or acid rains are transnational but the rules that permit their production or fail to limit them are still national. And I think this claim can be generalised, for the sake of debate, to affirm that, despite the complex phenomenon of globalization and the impact that transnational activities have on many parts of the globe, many of the most crucial aspects of the life and economic activities of the immense majority of particulars and corporations which inhabit the globalized planet happen to be still regulated by domestic legal norms. Communicative, economic and social globalization have not been accompanied by a parallel legal globalization. Global actions are not sufficiently ruled or subjected to norms and,

although this could have been considered as a virtue in the last years, nowadays a clear denouncement of this situation and a strong demand for regulation of the process of globalization as a whole can be detected in global literature (Gilpin 2000, Held 2004, Stiglitz 2002).

I deliberately want to emphasize this asymmetry between socio-economic globalization and juridical globalization in order to introduce what seems to me the most important source of questions and perplexities raised by the global process. The disconnection between the undeniably global nature of many actions and economic activities, and the prevailing domestic nature of the legal norms which support them produces many perverse consequences which are at the basis of much of the discontent globalization has created. This great paradox of global actions resting in domestic legal norms while these domestic legal norms are nevertheless impotent to regulate many of the dimensions and effects that those global actions have is what I now want to bring to reflection.

An important consequence of this paradox is that those communities (national or otherwise) that do not have an effective and suitable domestic law simply do not take part in the process of globalization, or if they do, they do it only as affected parties, in a mere passive role. Given the evident deficit of global law, many of the global activities of the actors in the process need two bases of support: the domestic law from which they emanate and the domestic law on which they operate. But if the latter is defective or inexistent then the global action is not possible. Big multinational corporations simply do not perform economic activities in those countries that have not met the Hobbesian program to a reasonable degree. For example, one of the most important and evident benefits of economic globalization, the flow of direct foreign investments into places and economies where it is needed, does not take place where an articulated and effective State does not exist. All legally unarticulated societies are, therefore, excluded of the potential benefits of the globalization process.

That same paradox produces some effects that work in the reverse direction and lead us to an unexpected conclusion. One of the prominent characters of the global process, as has been mentioned, is the potential impact which an action or state of affairs produced everywhere can have on the rest of the countries around the globe. The consequences of deforestation, acid rain, infectious diseases, the tremendous problems of refugee populations, human migrations unregulated, etc. may have their origin in any country and, nevertheless, produce a big impact on the rest. In a legally unarticulated community many things may happen

that are then transported towards remote places by the formal and informal networks of the global world. This evidence has brought about an abrupt turn in the perception of the importance that this deficit of state and local legal articulation can have *for everyone*. Understood as products of this deficit, these disastrous consequences may, in fact, demand the construction or reconstruction of legal and political institutions in those communities that lack them. For example, the assumption that the so-called 'international terrorism' is a product of the institutional weakness of some countries where it originates and from which it can expand has caused some segments of the American neo-conservative thought to propose now, after 9/11, an important program of "state-building" whilst in the past they insisted in a severe slimming diet for the state (Fukuyama 2004). Milton Friedman's confession that some years ago he advocated privatisation at all costs but has now realised that perhaps rule of law is more important (quoted in Fukuyama 2004, 38) is just a surprising anecdote in this new journey. But however one interprets the event of the 9/11, the truth is that, as a sort of cunning of reason, it has been shown that some of the incidental negative effects of the globalization process cannot be prevented or combated without the existence of a strong legal and political articulation in all human communities. And here comes another aspect of the paradox I mentioned before. Whether we want all human communities to enjoy the potential benefits of globalization or pretend that these human communities do not suffer the negative consequences thereof, the solution that seems to prevail is the same: that they endow themselves with an effective and well articulated legal order, i.e. with a rigorous and well implanted State. Those politically and legally non-articulated spaces are the places where the damages of the globalization process can be produced and the benefits prevented. In brief: in the middle of this historic moment of globalization the need to reconstruct the Westphalian State suddenly appears.

III.

If we clearly lack a global law in what concerns property rights, criminal law and the like, then we could present the landscape we have before us with this image: a variegated and close-woven net of global actors (multinational corporations, non-governmental organizations, groups and human associations, even individuals…) whose actions and activities transcend the limits of the state borders and, therefore, fly over a territory that is however defined in terms of borders, as an enormous mosaic of

juxtaposed legal and political orders. I know this is an exaggeration that requires many caveats, but let me now look at the reality exclusively from this double level of the persistence of the Westphalian state, below, and the existence, above, of the present web of global activities. It is necessary for the argument I now want to present.

Contemplated from above, the panorama is presented to the global actor as a varied political and legal menu for the action – economic or other – he wants to perform. It is what has been called "polygamy of place" or "multilocalism", a condition according to which the possibility of starting up diversified relations with different legal places is offered to the actor: "the diverse rules in force in the different places can be a matter of selection. The subjects, changing place, can, despite a statute of citizenship that still marks them, get into contact with normative universes different from their own" (Ferrarese 2000, 46). So, the legal and political map that lies below the global actor's view appears as an enormous offer from which one can choose according to his or her preferences and interests. It is law "*a la cartè*". It has appeared many times before us in the economic discussions on the so-called "delocalization", i.e. the strategy of big corporations of dislocating the productive process, placing each phase under a different legal order and changing from one legal order to other when this satisfies their interest. But, moreover, it is an inherent predicament in the present moment of globalization. Global actors "are equipped with mobility and can allow themselves a "shopping trip" between different national legal orders" (Cassese 2002, 57). From the irreproachable Mr. So-and-so who enjoys sexual tourism to indulge in practices which would be criminal in his State, to corporations that locate themselves in places where, for instance, labour conditions are not protected by laws. The mighty scope of globalization allows us to choose legal norms in this manner, a predicament that, if not new in history, is now extremely common. Along with it, a practice of novel consequences is intensified: the competence between legal orders to attract the consumer of norms, be it big multinational corporations, tourists or any other global actor. As it were, legal orders smarten up to be attractive to the economic agent, turning out to configure themselves in the shape that best satisfies the interests of those they want to attract. Those more competent to present themselves with the character of "legal paradises" for the activity in which the global actor is interested will be preferred. This competence paradoxically brings about a convergence of legal orders that could be a first step towards the uniformity of normative contents, but it also presents the dark side of being determined by

the dominant interests in the global market. Those orders that manage to offer the lowest costs of transaction will be the orders selected.

One of the most worrying aspects of this new predicament of the market of legal orders that globalization as a process implies is that the global actor's main interest concerning the legal norms under which he prefers to take shelter is only that these norms be effective and in force. He does not question their legitimacy. If they are appropriate he will resort to them in order to protect his activity under them. From this perspective, globalization can be a means of consolidation and support of political regimes lacking any legitimacy. And as a matter of course, it is a process in which the existence of the two further degrees of rule of law is not needed. Global economy only needs the first sense of rule of law. It does not demand that the normative acts of the authority of the country where it arrives be subject to any legal control or be checked by independent courts. The most uncontrolled dictatorships have been able to offer attractive niches of activity to global actors. It does not either demand that the formal requirements of the concept of 'right' be complied with. Maybe it is worried about the stability of laws, but not about their retroactive effect, their generality or even their publicity. Studies in international political corruption (cfr. Malem 2000) have detected systematic practices of buying and selling the validity of legal norms by the big multinational corporations. And it is not only that they judge legitimate any powerful agency that has managed to impose an effective ruling, they even deem acceptable that some of these agencies decide on the most important natural resources of the people they rule, whatever the origin of their legitimacy may be, and do not question the nature of the legal norms under which they develop their business provided these legal norms are suitable to their activity.

IV.

We have just seen how global actors are able to choose legal norms according to their preferences. This is valid for criminal law too. It will be appropriate now to bring to mind some features concerning the criminal law of globalization, because the idea of the legality of punishment has always been one of the basic ingredients of rule of law. Indeed, the subjection of the use of force to legality is the core of the second degree of intensity of the notion of rule of law as has been expounded earlier. And it is moreover something that may be predicated of the two great legal traditions, from the Magna Carta (§ 39) to the French Declara-

tion of the Righs of Man and Citizen (art. 7). In addition, it has a very explicit recognition in the Universal Declaration of Human Rights of the United Nations:

> "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed" (art. 11).

The rule of law becomes here condensed in the principle of penal legality: *nullum crimen sine lege, nulla poena sine lege.* And it is diversified in a set of requirements on the nature of criminal laws: *sine lege stricta* (prohibition of analogy and extensive interpretation), *sine lege scripta* (rejection of the fluctuating and changing customary law), *sine lege praevia* (no retroactive effects), *sine lege certa* (no vagueness in the description of the crime, the "penal type"). Thus, our question is: is there a penal global law? And the answer cannot be but negative. One only has to remember the limitations of the International Criminal Court, which, nevertheless, has been considered a great success of diplomacy. It deals with a very limited list of crimes: genocide, crimes against humanity, crimes of war; it is still based on the principle of territoriality because States have to accept its jurisdiction; it works according to the principle of complementarity: it is only put in operation if national courts do not act; it does not have the power to require a State to obey its decisions, and so on. As it is well known, two of the biggest actors in the global process, USA and China, have not signed this international instrument and therefore it can be assumed that its financial support will be insufficient and its independence will remain threatened. I do not think it would be an exaggeration to affirm that its labour to the present day may be deemed as irrelevant.

Criminal law remains firmly anchored in the principle of territoriality, and global law boasts to have overcome such a principle. Criminal law, as a regulation of the use of force, is intimately connected with the idea of territorial sovereignty, and its validity as law is basically defined by territory. In the territory of the State the criminal law of the State is applied; in the territory of the State the application of the foreign penal law is rejected. Global law, by its very nature, should have to aspire to an overcoming of borders in the description of offences, the processes of investigation and the criminal jurisdiction, but this is not the case. It rather happens otherwise. What has appeared with globalization has been a new international delinquency which is very hard to fight because it makes use of the changes in criminal jurisdiction, the national differences

in the typification of offences and the changing principles of extradition law (denial for extradition of nationals, etc.) to form certain sorts of "penal paradises", which, as it happens with "tax paradises", are very useful to avoid the rule of law. Moreover, those who, as the George W. Bush Administration, intend to develop procedures in which the guarantees of a civilised penal law do not exist, proceed to "deterritorialize" prisoners (in Guantánamo or other countries) in order to operate on the fringes of law. This use of the territory of penal law denotes in itself the poverty of global law with reference to criminal offences. And just like it, the appearance of a new transnational delinquency is based on this evident asymmetry between the economic and social aspects of globalization and their legal counterpart. This asymmetry is, in legal terms, of extreme importance because it questions the very conception of law that the process of globalization may imply. The idea of law as a normative social practice to rule the use of force (Bobbio 1965) seems to remain within the margins of territoriality; therefore, the transnational legal order of globalization has to work without any apparent support of coercion. Does this force us to think of other types of law and legal order? We will later see if this can be done.

I do not want to end the subject of the penal law of globalization without calling attention to some further problems. They are certain questions of principle that arise when we submerge some important ingredients of the legal theory of crime in the environment of globalization. The German elaboration of a general theory of crime as an *action, typic, antijuridic and guilty* is considered as one of the most important contributions of European continental legal science to the construction of a modern penal law full of guarantees. In what concerns 'antijuridicness' as an expression of the principle of legality, we have reached the conclusion that global law seems not to have an answer of its own. As a consequence, on regarding 'typicity' as the precise and outlined legal description of punishable type-offences, global law also remains silent. Let us now see briefly what problems the other members of the famous doctrinal equation must face.

If it is true, as is claimed, that one of the dimensions that globalization calls into question is the spatial dimension, then the very idea of crime as an "action" that takes place within a space may be surrounded by problems. By virtue of the new technologies and of the global nets of communication, the very notion of human action and the idea of the result or outcome of this action become perfectly dislocated. The problem of the so-called *locus comissi delicti* appears before us with all its vigour,

for in this cancelled space of globalization we cannot know where the action originates and where its results are produced. The old problem of those crimes that initiate with an action on this side of the border and finish with a result on the other side becomes now exponentially multiplied to such a point that we could claim that the very idea of human action becomes so blurred that it runs the risk of not being able to present itself as a reality subject to common methods of proof.

And there are no lesser problems with reference to "culpability". The big crimes of globalization, offences against environment or economic crimes, are seldom crimes of individual persons. They are often committed by big corporations, i.e. legal persons, and the issue of the criminal responsibility of corporations and legal persons is extremely complex. There is a recommendation of the Council of Europe dated the 20th October 1988 that reflects this difficulty:

> "1. Enterprises should be able to be made liable for offences committed in the exercise of their activities, even when the offence is alien to the purposes of the enterprise. 2. The enterprise should be so liable, whether a natural person who committed the acts or omissions constituting the offence can be identified or not".

This recommendation has been scarcely effective because it cannot be extended beyond the scope of the Council's countries. But, besides civil liability – which is, by the way, seldom assumed – a criminal responsibility should be articulated for the great actors of globalization, because some important public goods are often threatened by the activities of these actors. The problem is that it necessarily questions a legal theory that had tied culpability with personal psychological processes that do not take place in legal persons. The activity of a big global corporation can be so dislocated and anonymous that it could be claimed that "nobody" in fact realised these punishable actions.

V.

In this paper, an implicit scepticism on the possibilities of global law for the realisation of the ideal of rule of law is maintained. I think there is a general acceptance of the conviction that the core of this ideal rests on a view of law as is lived in the States called Westphalian. That is to say, it rests on an experience of law as a normative order of a coercive character with a claim to bindingness in certain territorial confines, more or less extended but defined within space. This, of course, does not mean that one persists in a merely spatial and 'statist' view of legal reality, as

if the legal map of the world were just a sort of mosaic of legal spaces insulated and impenetrable. If legal reality appears today as a global or transnational flow it is because law exceeds with agility the limits of borders and legal norms as economic actions and environmental issues produce impacts that go very far from the confines where they are in force. Nevertheless, what this underlying scepticism pretends is to transmit that such a demanding ideal has still not been able to take the necessary steps towards these forms of global or transnational law. Where it has acquired a real transnational dimension it has done so on the basis of the classic instruments of international law: norms of conflict and treaties. The facts that norms of conflict have shown themselves to be insufficient in solving transnational litigations and that treaties have multiplied in the last twenty years (informers speak of the existence of more than 50.000 international treaties in force) only illustrates, once again, the complexity and intensity of the relations beyond borders, but it does not affect the core of the question: both norms of conflicts and the Vienna Convention on the law of treaties appeal to internal law to support the bindingness of norms and thereby to carry out the rule of law.

I am not going to enter into that territory, neither do I want to increase the extensive literature on international organizations as United Nations, or regional, as European Union, because it seems to be accepted by most jurists that globalization in its new legal dimension aspires to go beyond the features that define international law, that is to say, it is accepted that global law tries to go beyond, to be something more than a mere international law that has evolved. Therefore, I prefer to observe a little closer three institutional and normative instances of this new type of law and reflect on what they can provide in order to satisfy the requirements of the rule of law. These instances are *lex mercatoria*, the World Trade Organization and the so-called "soft law". As a conclusion, I will reflect on the differences between types of global legal norms and their possibilities concerning the rule of law.

VI.

An important segment of the literature on globalization likes to propose as an example or model of the new type of law that this transnational process brings about the new *lex mercatoria*, a sort of regulation of international acts of commerce that is thought to emerge beyond the States and to be binding without resorting to State coercion. This new law is worth a brief visit from the point of view of legal theory.

The denomination "lex mercatoria" that has prevailed in the literature about globalization to refer to this new development of law is not capricious. It explicitly refers to the phenomenon produced in the Middle Ages with the law of trade. Beyond the local legal norms and jurisdictions, the medieval merchants developed a spontaneous law, i.e. not produced by any local authority, a law based on the conventions and commercial usages with a claim to universal application and having as its addressees not acts defined by territorial co-ordinates but the merchants themselves as spatially delocalised subjects under a special jurisdiction (the so-called "Consulates") (Fernández Rozas 2003, c. I). In the present process of globalization, one of the most characteristic legal novelties is precisely an international commercial law whose general features are approximately the same: alleged spontaneity, conventional development, independence and overcoming of State borders, and the establishment of a kind of agency to solve conflicts through arbitration: "The development of this new *lex mercatoria* with an universal projection constitutes one of the most important structural aspects in the mutations that the denominated private law of economy experiments as a way of superseding the failures of the "clinic method" of conflicts of laws and the modest achievements of the "preventive method"of elaboration of a uniform merchant law. It has a customary basis and its adjudication rests in the frequent resort to arbitration" (Fernández Rozas 2003, 79-80).

What does this law consist of? There are many discussions on its characteristic components. We are not dealing with an international merchant legislation originating from treaties, nor a product of the so-called "uniform law", but "a set of rules of behaviour and uniform and typical clauses of interpretation that are generated in a constant and repeated way in international commerce and are assumed by privates due to the existence of a common conviction of their binding character". They are accompanied moreover by the existence of an International Chamber of Commerce with authority to establish rules and procedures, and to which is joined the International Court of Arbitration which enjoys a great reputation (Fernández Rozas 2003, 89,99). The rules it establishes are followed by thousands of international merchant transactions and they concern uniform usage of documentary credits, contract-types or standardised contracts, general conditions of purchasing and selling, standard agreements (transport, construction, etc.), type-clauses (sale and purchase, limited responsibility, etc.). All this appears to have the profile of a law created beyond the State, and although it is common opinion that it does not float in the air but has some important points of

support in the internal law of States (corporations are constituted and registered in the inner law, and litigations are often solved in national jurisdictions), it is nevertheless a very extended law and at first sight has some very surprising features. Let us try to examine these aspects a little more thoroughly.

Although it has even been claimed that the new *lex mercatoria* had as its foundation nothing less than natural law (De Ly 2001, 167), the truth is that a careful examination of its main content helps to explain its success. Indeed, despite the high number of transactions that are registered in accordance with the standards of this new type of law, it has been shown that the labours of arbitration are not so hard, but rather scarce; some empirical studies even come to the conclusion that the warrants that use only this law are very few (Dasser 2001) and that conflicts appear very rarely, and when they emerge they are solved by internal jurisdictions, far from the flexibility and adaptability of *lex mercatoria.* But both its origin beyond the State and its diffusion and low level of conflictivity could have an explanation that I want to propose: to a great extent they are legal tools that *facilitate* international commercial transactions by establishing the formal components of the contracts and their interpretation. They do not refer so much to the content of each one of these transactions but to the legal forms whereby they are articulated. And if this is so, then it could be said that all those who take part in the activities of international commerce have a shared interest in the effectiveness of such homogeneous clauses, for this makes commerce easier. Therefore, it is the common and shared interest of the social agents that creates an institutional network designed to satisfy this interest. In economic terms it could be thought that the generalised and shared information on the forms of contracts and their application would facilitate a decrease in transaction costs *for everyone* (North 1990), and this would shape a scenario of coincidence of interests.

If this were so, then we could conceive the new *lex mercatoria* as the solution to a problem of co-ordination through a "convention" (Lewis 1969). The conventional, customary character of this law could be explained by the nature of the problem that it tries to solve, a problem in which the coincidence of interests between agents overcomes the conflictive aspects of commercial traffic. The rules enacted by the ICC would then be accepted as solutions to this problem of coordination, and the decisions of arbitrators would be rather a declaration of a legal rule accepted by all than a solution to a conflict. This would also provide an answer to the supposed self-enforcing character of this law, which

might so ignore the coercive devices of the State. The standards that solve problems of co-ordination are self-enforcing because all agents are interested in complying with them and nobody in infringing them, for this would amount to acting against their own interest. And lastly, this would also provide a satisfactory explanation of the component of "exclusion" that is sometimes ascribed to this type of law. It is said, indeed, that *lex mercatoria* works by reaffirming itself against those who do not follow it and thereby excluding them from the international commerce, but this feature allows for a less aggressive explanation: to the extent that some agent ignores the standards through which the interests of global traffic are co-ordinated, it starts up commercial relations with costs of transaction that exclude it from the competition. It is not, therefore, an exclusion of the market but a suicidal strategy of self-exclusion.

Other interpretations of this type of law have been offered, and some of them are worth of attention: that it is formed along the lines of an iteration of a problem of the prisoner's dilemma -type, or that it is formed by the endeavour of all commercial agents to protect their own reputation (Furger 2001), but I prefer to leave them aside now and to propose a view of it as a complex solution to problems of coordination between commercial agents in the global market. This allows us to arrive to two conclusions that could be interesting and that I submit to discussion. On the one hand, through this type of law some of the aims of the rule of law are obtained: in particular a reasonable degree of predictability, which seems to be a condition of context extremely important in order to carry out economic activities. But, on the other hand, its scope is very limited as a realisation of rule of law, for when those activities abandon the framework of identity of interests and enter the confines of conflict of interests, *lex mercatoria* does not serve to order conducts; it shows its condition of unarmed law, of non-binding law. If, as I think, the solution of problems of justice belongs to the realm of conflicting interests, then the global law of merchants does not serve to do justice.

VII.

If there has been an institution proposed as an example or model of an organization characteristic of globalization, it has been the World Trade Organization (WTO). It has even nourished an interesting debate about its possibilities to be the example for a possible "global governance" or a desirable "constitutionalization" of international law (Zapatero 2003, c. XIII). It will therefore be convenient to visit its premises. Of course I am

not going to describe it in detail (see Jackson 1998) but will only underline some of its characteristic aspects in order to offer an interpretation of the nature of the binding force of its directives. WTO is an organization derived from a great international agreement of a commercial nature whose generic aim is to reach the widest possible degree of liberalization in commercial matters. Its origins in GATT focused basically in custom tariffs and their abolition for a certain range of commercial products. At the present moment its regulation is extensive and includes norms and conditions for all kinds of commercial products, including regulation and liberalization of services. It does not deal only with problems of tariffs reduction but with all those steps taken by States that could harm economic liberalization: imposed quotas, import licences or subsidies of any kind. Obviously, this is not the place to delve into that huge mass of regulations, only to see its way of functioning and its consequences for our reflection. It is a transnational organization that takes decisions through a process of deliberation and consensus, trying to achieve, after exhaustive negotiations, some minimal agreements that have normative force. As has been said, its forum of permanent negotiations and its periodic Rounds form "an authentic *market of rules*" (Zapatero 2003, 538). The members of the Organization negotiate and exchange commercial disciplines for their products and interests, and express the result of these negotiations in transnational legal norms that are binding for the members. In addition, the clause of "most favoured nation", according to which those members that bilaterally arrange an especially beneficial regime for a certain product are obliged to make it available to all the member States, is really applied in the organization. This clause and others permit one to speak of a reasonable degree of generality of the norms of the WTO.

The WTO norms have its member States as immediate addressees. Its principles, rules and decisions prevail over their internal law, compelling them to modify those aspects of their legal orders that contradict them. And, what is more important, WTO has a device to solve conflicts: the Dispute Settlement System can be considered as a set of secondary rules whereby the solution of conflicts and differences, the interpretations of rules and the enactment of decisions are ascribed to a neutral organism. This system is working with reasonable effectiveness and a high degree of compliance on the part of the members. Using Hart's terminology, we can see here that a step from the "prelegal" to the legal world has been taken, as we can identify both primary and secondary rules in the system (Hart 1961, ch. V). And it is, indeed, a legal world that prevails over the

law of states. Hence, in this case international co-operation has produced a true global law, because general and public legal rules are applied by an independent agency free from the limits of state boundaries. This is the reason why the WTO has sometimes been proposed as a model for future global law.

To analyse this more carefully, we must find out what is the reason or ground of this binding capacity of these rules and decisions. There is no agency between the WTO and its member states to impose these decisions. Neither is there any agency above both, as is shown in the difficult problems raised by conflicts between decisions of the Organization and international treaties on environment. Where does it obtain this bindingness? I think this question can be answered with the theory of global public goods, which has been considered a useful tool to understanding some of the problems of the new predicament of economic international relations (Cfr. Kaul, Grunberg, Stern 1999, and Marin Quemada, García Verdugo 2003). If we look at WTO as a club that manages a global public good, it is possible that some of the reasons that explain this undoubted regulatory success appear before us. Public goods are characterised by two features: nonexcludability and nonrivalry in consumption. Nonexcludability amounts to saying that if the good exists it is not possible to impede its consumption by every agent. Non-rivalry in consumption means that the consumption of the good by an agent does not reduce the amount of good available to the rest. Global public goods add to these two features a third one: their benefits have to be quasi-universal in terms of countries, peoples and generations (Kaul &Grunberg & Stern 1999, 10-11). As it is well known, the biggest problem with public goods is that, provided that they exist, they can be enjoyed by everybody without exclusion and there is no competition in their consumption, which leads to no agent having any motivation to produce them and that they are therefore of difficult private provision. In any case, the mechanism of market does not tend to the provision of them. And this is undoubtedly one of the most serious problems that faces the process of globalization, because if this process is a socio-economic phenomenon whose basic motor is market exchange, then it is difficult for it to generate public goods. Nevertheless this does not happen with WTO. Why? Because the public good it administers is not a pure but an impure public good. It is what is technically termed a “club public good”. These kinds of public good have the characteristic that the nonexcludability trait does not fully obtain in them: some economic agents can be partially excluded of consumption. In this case, only those agents that are members of the

club enjoy the good as a public good. And this seems to be the case with WTO. The public good it administrates is the liberalised market of goods and services, that is to say, the state of affairs consisting in the absence of economic, legal and tariff barriers in the international market of goods. And the capacity it has is the capacity of permitting or preventing the access to this market by the citizens and goods of the states. So, the nonexcludability is limited, because any state that pretends to be a part of the club has to carry out a set of legal and tariff reforms that have been called the "entry ticket". To stay outside the WTO amounts to alienating the possibilities of making commercial transactions beyond one's own boundaries, since the tariff restrictions that any state would like to impose would be responded by the member states with equivalent restrictions for it. Only within the club can members benefit from the public good administered by the club. And in order to be within the club it is necessary to comply with its norms. This is the reason for the normative force of its rules. Its effectiveness is unquestionable: it has produced the almost total disappearance of bilateral negotiations in matters of international commerce.

This privileged nature of the WTO causes that its members, which are sovereign States, refuse to leave it and accept the existence of a clear conditioning of their sovereignty and the existence of an "Understanding" to create a system of dispute settlement that works at two levels, a first instance and an appellation, and whose decisions are accepted by all the members even as it can decide upon the expulsion from the club, although a decision like this has not yet come about. This is not the moment, and I am not the competent person, to carry out an analysis of the legal system of the WTO. Here it is only pretended to show the most successful way known to build up a legal set of rules that are binding beyond the national State. But it cannot be said that it is a legal order equivalent to the legal order of the State. The law of WTO is flexible, its norms are enacted by consensus, and there eventually are in the organization temptations of "free-riding" and struggles to find "escape clauses", especially by the most powerful countries. It can be said, however, that reasonable degrees of predictability and generality derive from it. It would be more difficult to affirm that a real subjection of power to law exists in it. Of course, the different agencies of the organisation are subject to their rules, but it cannot be forgotten that, due to some notorious deficits of democracy in the process of elaboration of norms and decisions, the big economic powers (USA and EU) have obtained privileges and exceptional regimes to the detriment of other

countries, also members, which cannot have access in equal conditions to the markets of those countries. Here the norm is unfair, but it cannot be said that the norm does not exist.

VIII.

Making use of the terminology attached to the juridical aspects of globalization, we could say that, as presented here, the notion of rule of law always presupposes "hard law", and globalization seems to show its most characteristic profile through some of the varieties of what has been called "soft law". It is now therefore necessary to make some reflections on the possibilities of this new 'soft' law to transport the requirements of the rule of law. And the first thing that comes to mind is that the 'soft' solutions that globalization proposes are offered for the 'hardest' problems that it raises. Indeed, if we contemplate globalization as a process of extremely intensified transnational relations, carried out above all by *private* actors whose interests are often in *conflict*, then we happen to be in a scenario where situations of the prisoner's dilemma -type become multiplied. They are, in my opinion, the situations most apt to provoke what is typically called the globalization discontent. Beyond conventional self-regulation of problems of coordination, beyond international institutions and common international law, we enter now in the confines of conflicts of interests in an anomic world. Is soft law able to deal with this?

Although in all branches of international law there always have been soft norms, in the sense of hortatory declarations and great principles, nowadays they have extended widely. This 'soft' normative reality, so difficult to apprehend, has been studied by contrasting it with the traditional law of treaties conceived as "hard law" (Hillgenberg 1999), but I think it is better to try to understand it in an autonomous way and to present it with its own characteristics. These characteristics can be synthesized in the following way: Soft law often emerges of non state actors, i.e. it emanates from agencies which do not have national or international legislative authority; it contains vague and imprecise terms, is articulated as non-binding, and is based on voluntary adherence or on non-legal means of enforcement (Chinkin 2000, 30). That is to say, it is a sort of non-binding law that emanates from the participation of non-governmental actors in the construction and implementation of the standards of the so-called "governance". It is of a predominant, if not full, voluntary nature, "any participant is free to leave at any time,

and to adhere to the regime or not, without invoking the sanctioning power of state authority"(Kirton & Trebilock 2004, 9). It will be perhaps more expressive to mention some examples: the labour standards of International Labour Organization, the codes of responsibility for big multinational corporations, the agreements of sustainable development and the conclusions of the Rio Summit, the standards of anti-corruption in international trade and the directives of transparency for big corporations, the criteria of the International Organization of Standardisation, the recommendations on the conservation of species and biodiversity and so on. They are all formally normative agreements that are not, however, binding, sometimes a product of expert committees, non-governmental organizations or big bank corporations that do not aspire to hard enforcement. Of course they pose a basic problem: the problem of compliance. Many reasons have been offered in their favour: it is a very rapid and experimental method of regulation that does not have to face the habitual problems for the signature and ratification of a treaty, it avoids bureaucratisation, is very flexible, allows the participation of civil society, often avoids the bothersome procedures of incorporation to national law, encourages the co-ordination of legislations, invites to relations and cooperation which are hard to obtain through the usual channels, and so on. And there are indeed many arguments in its favour, perhaps not strictly legal, but worth of attention. Many of the informal instruments in which the "soft law" is contained incorporate moral demands and put on the table of public deliberation important information and ethical options. They are usually invested with "auctoritas" because of its independent and expert elaboration, so that they inadvertently invert the burden of the proof, and those states or agencies or corporations that do not adopt them are forced to publicly justify their disagreement. They can be in this sense an interesting channel of orientation of public debate, and can constitute – as they do in many cases – an appellation for the consumer to punish with his conduct the violation of standards that have been collectively considered as correct.

But nevertheless, and in relation to our argument, "soft law" cannot be a suitable vehicle to carry out the idea of rule of law because it does not present itself before its addressees in the same terms as "hard law": "The rule of law – it has been said – requires compliance in order for law to be effective and makes compliance a matter of general international concern" (Shelton 2000,9). And the norms of "soft law" are of voluntary adherence, and compliance with them is always uncertain. Moreover, this compliance does not come from its normative nature

but from the contingent presence of contextual factors and causes, such as social pressure or the strength of civil society, and is always debated and debatable (Haas 2000). It cannot therefore fulfil the task that the rule of law requires. To allow the actors to decide of their own free will whether or not to accept norms makes impossible to speak with accuracy of "rule of law".

IX.

Conclusion: the possibility of thinking about the rule of law in the complex process of globalization depends on the nature of the legal norms that articulate and govern this process. And both in international law and in the realm of informal global interactions we find norms that cannot do this job and norms that find many difficulties to do it. For a brief and rapid approach to the types of norms we can find in the realm of international relations I make use of two criteria, one of a more material flavour (Goertz & Diehl 1992) and other more inclined to formal aspects (Abbot, Keohane, Moravcsik, Slaughter, Snidal 2000). According to the first, a typology of international norms could be designed making use of three parameters: the degree of conflict between the norm and the interest of the subject; the importance of the sanctions to which it appeals; and its relationship with morality and deontology. With these parameters, three types of norms can be distinguished: *norms of co-operation*, whose content corresponds with the interest of the addressee, and therefore do not need sanctions and have a poor deontological taste. In the second place, *decentralised norms*, norms that conflict with the addressee's interest, have a diffuse sanctioning power based on the willingness of the individual actor to accept these sanctions, and have an important deontological aspect. And in the third place, *hegemonic norms*, which partially conflict with self-interest, leave sanctions in the hands of a central agency, and enjoy a moderate degree of legitimation (Goertz & Diehl 1992, 640). The second criterion makes use of three different parameters: the *obligation*, i.e. degree of bindingness of the norm; the *precision* with which the norm describes the conduct it demands, authorizes or forbids; and *delegation*, which means that the norm includes the existence of a third party on whom the authority to interpret and apply the norm and to solve disputes has been conferred (Abbot, Keohane, Moravcsik, Slaughter, Snidal 2000, 401). In this case, the authors do not present types of norms because the three parameters are conceived as a continuum, with norms explicitly nonbinding, drafted with much

vagueness and left to the diplomacy for their interpretation and application at one of its poles and binding rules (*ius cogens*), very precise and elaborated and entrusted for their application to an international court, an authorised organization or the internal law of States at the other pole. The phenomenon in which international norms approach this pole of the continuum is named, according to the authors, the "legalization" of world politics.

It is obvious that if we are in a world of purely cooperative or non-binding norms, vaguely drafted and written in a hortatory tone and left to the diplomacy and to negotiation, with which one could comply depending on moments and contexts, the ideal of rule of law will be far from being realized. To the extent that we have bodies of "legalized" norms, i.e. the norms called "hegemonic", norms that overcome the interest of their addressees, are binding and are applied by impartial agencies, we would come closer to the realization of that ideal. The complex economic, social, technological and political phenomenon we call globalization walks very slowly in this direction. Sometimes, to the enjoyment of some authors, it seems to place itself in a world more factual than normative, a world more of "networks" than of norms, more of information, contact and negotiation than of governance and prescription of conducts. The norms we have found in its domain seem to be inspired more in coordination and cooperation between coincident interests than in conflict of interests. In the present situation of international relations only legal and political processes like the European Union seem to fulfil the specific requirements to incorporate the ideal of rule of law. But this process is often called "regionalization", and is seen by many economists as a potential threat to globalization for it is just considered as the building up of a sort of multiple State with a clear territorial basis and economic barriers in the borders. Nevertheless it is the normative world that is closest to the legalization we need to carry out the rule of law. Perhaps the global answers to Olson's questions that initiated this paper should be found more in the enterprise of the construction of supranational political and legal unities than in the world of those transnational private networks that claim to live in an anomic environment. Perhaps the pathway is better shown by Europe, with all its difficulties, than by those who dream of a legal world floating above everything but being impotent to solve the deepest conflicts of the present human predicament.

X. References

Abbott, K.W.; Keohane, R.O; Moravcsik, A; Slaughter, A.M.; Snidal, D. (2000) "The Concept of Legalization" *International Organization* 54, 3

Appelbaum, R.; Felstiner, W; Gessner, V. (eds.) (2001) *Rules and Networks. The Legal Culture of Global Business Transactions.* Oxford. Portland Oregon. Hart Publishing.

Bobbio, N. (1965) "Law and Force" en *The Monist,* XLIX, 1965.

Buchanan, James M. (1975) *The Limits of Liberty. Between Anarchy and Leviathan.* Chicago/London. The University of Chicago Press.

Cassese, S. (2002) "El espacio jurídico global", in *Investidura como Doctor Honoris Causa del Excmo. Sr. D. Sabino Cassese.* Toledo. Universidad de Castilla-La Mancha.

Chinkin, Ch. (2000) "Normative Development in the International Legal System", in Shelton 2000.

Dasser, F. (2001) "*Lex Mercatoria* – Critical Comments on a Tricky Topic » in Appelbaum, Felstiner, Gessner (2001)

De Ly, F. (2001) "*Lex Mercatoria* (New Law Merchant): Globalization and International Self-regulation" in Appelbaum, Felstiner, Gessner (2001)

Dicey, Albert V. (1985) *Introduction to the Study of the Law of the Constitution.* Indianapolis. Liberty Fund (original de 1885).

Fernández Rozas, J. C. (2003) *Ius Mercatorum. Autorregulación y unificación del Derecho de los negocios transnacionales.* Madrid. Colegios Notariales de España.

Ferrarese, M.R. (2000) *Le instituzioni della globalizzazione.* Bologna. Il Mulino.

Fukuyama F. (2004) *State-Building. Governance and World Order in the Twenty-first Century* (the quotation of Friedmann's comment is in the Spanish translation *La construcción del Estado. Hacia un nuevo orden mundial en el siglo XXI*. Barcelona. Ediciones B)

Fuller, L. (1969) *The Morality of Law.* New Haven and London. Yale University Press. (ed. Revisada)

Furger F. (2001) "Global Markets, New Games, New Rules: The Challenge of International Private Governance", in Applebaum, Felstiner, Gessner (2001)

Gilpin, R. (2000) *The Challenge of Global Capitalism. The World Economy in the 21st Century.* New Jersey. Princeton University Press.

Goertz, G., Diehl, P.F. (1992) "Toward a Theory of International Norms. Some Conceptual and Mesasurement Issues" *Journal of Conflict Resolution* Vol. 36, nº 4, December.

Haas, P. (2000) "Choosing to Comply: Theorizing from International Relations and Comparative Politics", in Shelton 2000.

Hart, H.L.A. (1961) *The Concept of Law.* Clarendon Law Series. Oxford at the Clarendon Press.

Held, D. (2004) *Global Covenant. The Social Democratic Alternative to the Washington Consensus.* Cambridge. Polity Press.

Held, D. & McGrew, A. (2001) *The Global Transformations Reader. An Introduction to the Globalization Debate.* Cambridge. Polity Press.

Held, D. & McGrew, A (2002a) *Globalization/Anti-Globalization.* Oxford. Polity Press and Blackwell Publishers Ltd.

Hillgenberg, H. (1999) "A Fresh Look at Soft Law", in *European Journal of International Law,* vol. 10, nº 3.
Hobbes, T. (1996) *Leviathan.* Edited by Richard Tuck. Cambridge Texts in the History of Political Thought. Cambridge. Cambridge University Press.
Jackson, J.H. (1998) *The World Trade Organization. Constitution and Jurisprudence.* London. The Royal Institute of International Affairs, Chatham House Papers.
Kaul, J., Grunberg I., Stern, M.A. (1999) *Global Public Goods. International Cooperation in the 21st Century.* New York. Oxford. Oxford University Press.
Kirton J.J., Trebilcock, M.J. (2004) *Hard Choices, Soft Law. Voluntary Standards in Global Trade, Environment and Social Governance.* Adershot. Ashgate.
Lewis, D. (1969) *Convention. A Philosophical Study.* Oxford. Basil Blackwell.
Malem, J. (2000) *Globalización, comercio internacional y corrupción.* Barcelona. Gedisa.
Marin Quemada, J.M., García-Verdugo, J. (2003) *Bienes públicos globales, política económica y globalización.* Barcelona. Ariel.
North, D. C. (1990) *Institutions, Institutional Change and Economic Performance.* Cambridge. Cambridge University Press.
Olson, Mancur (2000) *Power and Prosperity. Outgrowing Communist and Capitalist Dictatorships.* New York. Basic Books.
Shelton D. (ed.) (2000) *Commitment and Compliance. The Role of Non-Binding Norms in the International Legal System.* Oxford. Oxford University Press.
Stiglitz, J. (2002) *Globalization and its Discontents.* London. Allen Lane.
Tamanaha, B.Z. (2004) *On The Rule of Law. History, Politics, Theory.* Cambridge. Cambridge University Press.
Zapatero, P. (2003) *Derecho del comercio global.* Madrid. Thompson-Civitas.