

6-13-2005

# Globalization and the Theory of International Law

Frank J. Garcia

*Boston College Law School*, [garciafr@bc.edu](mailto:garciafr@bc.edu)

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/lspf>

 Part of the [Civil Law Commons](#), [Civil Rights and Discrimination Commons](#), [Human Rights Law Commons](#), [International Law Commons](#), [Law and Society Commons](#), [Legal Writing and Research Commons](#), [Politics Commons](#), and the [Social Welfare Law Commons](#)

---

## Recommended Citation

Frank J. Garcia. "Globalization and the Theory of International Law." *International Legal Theory* 11, (2005): 9-26.

This Article is brought to you for free and open access by Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law School Faculty Papers by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact [nick.szydowski@bc.edu](mailto:nick.szydowski@bc.edu).

# “Globalization and the Theory of International Law”

Frank J. Garcia\*

Boston College Law School

## I. Intro

Contemporary globalization both requires, *and permits*, the re-casting of international law away from a “society of states” model and towards a model of global society and even global community. By effectively eliminating both time and space as factors in social interaction, globalization is changing the nature of global social relations, intensifying the obsolescence of the “society of states” model, and demanding a fundamental change in the social theory of international law towards a global society of persons. Because of these changes, globalization requires that we re-cast international law into a global public law, and expand the domain of justice from the domestic into the global, as the fundamental normative criterion for international law. Through a profound re-examination of core international legal doctrines and institutions such as boundaries, sovereignty, legitimacy, citizenship, and the territorial control of resources, the international law of a society of states can be re-fashioned into the global public law of a global society.

## II. From States to Persons: Re-conceptualizing Global Legal Regulation

The dominant contemporary account of the social basis of international law has been the “society of states” model.<sup>1</sup> In this view, to the extent that international law

---

\* This essay is drawn from a larger work-in-progress delivered as a working paper at MIT, Brandeis, and Boston College. The author would like to thank those audiences for their helpful input, and Mark Toews for his able research assistance. This essay was prepared with the support of the Boston College Law School Fr. Francis Nicholson Fund.

<sup>1</sup> See generally CHARLES BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* 67-123 (1979) (overview of the society of states model of international relations, superseding earlier Realist paradigm).

constructs an ordered social space (a claim which has been contested since Hobbes if not before), it is a social space in which states are the subjects. In other words, international law exists to order a community in which states are the members.

This view of international law as regulating a society of states has two important normative implications, both flowing from the core analogy of states to persons underlying the model. First, it asserts a strong view of state autonomy: like persons in domestic society, states in international society are viewed as autonomous sources of moral ends, immune from external interference.<sup>2</sup> Second, there is no principle of distributive justice to which states are subject; they are presumed to be entitled to the resources they control.<sup>3</sup> Taken together, this approach can be called the “morality of states” model of international justice.<sup>4</sup>

We can see this approach played out doctrinally in many key areas. For example, the core doctrines of non-intervention, self-determination and state responsibility treat the state as the primary locus of autonomy, self-realization, and rights, and are framed largely in view of the interests and needs of territorial states. International harms to individuals are understood within a framework of harm to a state’s rights. In all cases, the analogy between states and persons controls, and it is the state’s liberty and rights which are defined as primary subjects of the law.<sup>5</sup>

---

<sup>2</sup> Beitz, *supra* note 1 at 65-66.

<sup>3</sup> Beitz has analogized this to 19<sup>th</sup> century liberalism at the international level: “a belief in the liberty of individual agents, with an indifference to the distributive outcomes of their economic interaction.” *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> To cite just one example of the doctrinal pre-eminence of this view, the society of states model underlies the entire approach to international law taken in the Restatement of Foreign Relations Law. The Restatement asserts that “international law is the law of the international community of states,” and “states are the principal persons in international law.” All other entities with any personality (international organizations and natural persons themselves) derive their personhood, and the extent of their legal rights in international law, from grants flowing from the primary persons: states. Restatement p. 16-17, 70-1.

Pressure to shift away from this model began in earnest in the mid-20<sup>th</sup> century, through human rights, international economic law, and the emergence of international civil society, all of which render the “society of states” model increasingly deficient both empirically and normatively. Criticisms of current international law and institutions point to the lack of democratic participation and legitimacy, lack of distributive justice, lack of basic welfare rights and security, etc. – the usual suspects in conferences and symposia such as this one. From a theoretical viewpoint, I would argue that these are not problems in the “society of states” model - instead, they point to the *limits* of this model, signaling that we have reached those limits. What is the next step?

### III Globalization, Global Society and Global Community

Efforts to reconfigure international law at the theoretical level often center around the fundamental moral status of individual persons, drawing on the work of Kant and others, and going by the name “cosmopolitanism.”<sup>6</sup> Such efforts, however, run into a variety of theoretical problems, including important communitarian objections to the possibility of global justice, on the ground that justice is a virtue *within* political communities, not *between* them.<sup>7</sup> This objection fits well with the “society of states” model, and helps keep justice out of international law.

However, by effectively eliminating both time and space as factors in social interaction,<sup>8</sup> globalization is changing the nature of global social relations, and creating the basis for both society and community at the global level. Viewed from the

---

<sup>6</sup> See generally Charles Beitz, “Cosmopolitan Liberalism and the State System,” in POLITICAL RESTRUCTURING IN EUROPE (BROWN ED. 1994) (surveying contemporary cosmopolitanism).

<sup>7</sup> See generally DAVID MILLER, ON NATIONALITY (1995), MICHAEL WALZER, SPHERES OF JUSTICE (1983) (raising general communitarian objections to global justice).

<sup>8</sup> For a comprehensive overview of globalization as a phenomenon, emphasizing changes in the perception of time and space, see Heba Shams, “Law in the Context of ‘Globalisation:’ A Framework of Analysis,” 35 INT’L LAWYER 1589 (2001).

perspective of political theory, globalization is lifting relationships out of the strictly territorial into the “global” or meta-territorial.<sup>9</sup> The political and legal significance of this change is immediate and fundamental: as the space in which we conduct our social relations changes, our manner of regulating those relations must change as well. To be effective, regulatory decisions must increasingly involve the meta-state level. Globalization thus requires a fundamental re-examination of social regulation and governance at the global level, leading to a system in which states may still have a preeminent role, but not the only role.<sup>10</sup>

For our purpose here, we need to understand how globalization is changing the nature of social relations, at the national and at the “global” levels, and paving the way for global community, and for global justice, even on stringent communitarian terms.<sup>11</sup> This change has a fundamental impact on the possibilities open to international law.

First, globalization is bringing about at the global level the conditions which make justice both possible, and necessary, at the domestic level, which Rawls calls the circumstances of justice.<sup>12</sup> Rawls lists five circumstances: a moderate scarcity of resources, a shared geographical territory, a capacity to help or harm each other, and, subjectively, that people are both non-altruistic, and hold conflicting claims.<sup>13</sup>

The key point is that globalization is bringing about the same circumstances of justice at the global level, which Rawls described at the domestic level. To begin with,

---

<sup>9</sup> Id.; see generally GLOBAL TRANSFORMATIONS (HELD, ET AL. EDS 1999) (reviewing evolution of meta-state institutions).

<sup>10</sup> See, e.g., ANNE MARIE SLAUGHTER, A NEW WORLD ORDER (2004); MANUEL CASTELLS, THE RISE OF THE NETWORK SOCIETY (1996).

<sup>11</sup> My treatment here draws on a fuller exposition of these issues, in “Globalization, Global Community, and the Possibility of Global Justice,” available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=661564](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=661564).

<sup>12</sup> JOHN RAWLS, A THEORY OF JUSTICE 126-130 (1971) (overview of circumstances of justice).

<sup>13</sup> Id.

there is of course the same basic scarcity of resources at the global level. Through globalization, people are increasingly competing for the same resources on a global scale in a shared territory: our planet. That they are non-altruistic and assert conflicting claims over these resources does not need to be argued.

Because of globalization, we also now have the capacity to help and to harm each other at the global level as well, to an unprecedented degree. Through globalization, we increasingly find that we have a capacity to effectively respond to the needs and concerns of others beyond our boundaries, through the transnational mobilization of information, power, capital, or public opinion.<sup>14</sup> Because of globalization, we also increasingly find that our state's policies, and our own political and consumer choices, are influencing the life prospects of others in direct and dramatic ways. The globalization of markets means that in many cases we are directly profiting from the economic and social conditions in other parts of the world. Thus, completing Rawls' basic conditions, we have the capacity to harm each other as well.

Together, these global circumstances of justice offer one kind of argument for global society, making justice both possible and necessary at the global level. A second, more ambitious argument is that globalization is going farther than creating merely global society, and is creating global community, at least to a limited degree.

One basis for global community is the globalization of knowledge. Through globalization, we know so much more, immediately and intimately, about the plight of people in other parts of the world. One specific type of shared knowledge important to

---

<sup>14</sup> CHARLES JONES, *GLOBAL JUSTICE* 9 (1999). Even David Miller, a communitarian critic of global justice, acknowledges that the "prosaic observation that the rich countries now have the technical capacity to transfer large quantities of resources to the poorer countries," makes a prima facie case that such transfers have become morally obligatory. "The Limits of Cosmopolitan Justice," in *INTERNATIONAL SOCIETY* 164 (MAPEL AND NARDIN EDS. 1998).

globalization is the growing recognition of the risks we share as human beings on this planet, and our shared interest in addressing those risks. In this sense, globalization is creating what has been called a “community of risk.”<sup>15</sup>

Such knowledge satisfies a basic requirement for community – that we have the capacity to know another’s needs, concerns and preferences. This kind of knowledge is the basis for creating solidarity, that leap of the moral imagination which says that your concerns are my concerns.

This community of knowledge and risk is also, increasingly, becoming a community of shared traditions, practices and understandings. These grow, both spontaneously and institutionally, out of our perception of shared needs and interests, of our capacity to help and to harm, and our awareness of each other’s plight – in short, our understanding of globalization as interlocking our fates. Despite the reality of conflict over social practices and values, we are increasingly a part of many sorts of global social networks.<sup>16</sup> Moreover, commentators suggest that at least at the political level, there is an emerging consensus, or shared understanding, around the importance of markets, democracy and human rights.<sup>17</sup>

I would like to focus on two particular aspects of contemporary globalization, markets and meta-state institutions, as particularly indicative of the emergence of global community, at least in their respective realms.

---

<sup>15</sup> Dirk Messner, “World Society – Structures and Trends,” in *GLOBAL TRENDS & GLOBAL GOVERNANCE* 24 (KENNEDY, ET AL. EDS. 2002).

<sup>16</sup> Examples include multi-national corporations, NGO’s and various organs of international scientific cooperation.

<sup>17</sup> This consensus can be seen at the level of positive international law, and also normatively, insofar as the world’s leading religious and philosophical traditions can be said to converge around this triad. David R. Mapel, “Justice Diversity and Law in International Society,” in Mapel and Nardin, *supra* note 14 at 247.

To the extent that globalization is creating a global market society, this in itself constitutes a set of shared practices, and contributes to a community of shared interests. For example, market society has certain attributes – the need for bureaucratic regulation, recognition of private property, civil courts, to name a few – which by virtue of their pronounced spill-over effects contribute to shared interests among participants.<sup>18</sup> Not the least of these is an interest in considering institutions which supplement and mitigate the rigors of capitalism, compensating the “losers” through some form of wealth transfer.

Perhaps the strongest force for, and evidence of, an emerging global community involves our shared need to look to institutions beyond the state in order to frame an adequate social response to many of the problems and challenges we face. Social allocation today is increasingly conducted through a complex partnership, consisting of states and their constituent units; international organizations; and non-state actors - all regulated or established through international law, and forming a “global basic structure” in Rawlsian terms.<sup>19</sup>

This shift towards the meta-state level has profound consequences for global community. First, this shift indicates that national communities of justice are no longer self-sufficient. From a distributive perspective, globalization is revealing domestic society to be an incomplete community, incapable of securing the overall well-being of its members by itself, and requiring a higher level of community – the global - to secure

---

<sup>18</sup> See e.g. DON SLATER AND FRAN TONKISS, MARKET SOCIETY 92-116 (2001) (surveying range of institutions which markets require/are embedded in).

<sup>19</sup> “The institutions and quasi-formal arrangements affecting persons’ life prospects throughout the world are increasingly international ones – IFI’s, MNC’s, the G-8, the WTO...” Jones, *supra* note 8 at 8. Jones also argues that the traditional Rawlsian view, limiting justice to domestic society, “fails to assess the moral character of those institutions.” *Id.*

this well-being.<sup>20</sup> Second, this shift signals the emergence of global polities. The role played by common institutions sharing a common language in building polities out of disparate peoples, has long been recognized in domestic politics as “nation-building.” Similarly, our growing tendency to look to meta-state institutions for responses to global social and environmental problems constitutes a shared understanding that such institutions will increasingly formulate or channel social policy decisions and orchestrate social welfare responses, and that few states can act without them on any important social issue.<sup>21</sup>

I am not suggesting that at this point in our history global social relations *in toto* form the sort of full-blown political community which communitarians point to in domestic social relations as their exemplar. In my view, however, globalization is creating a third alternative: global society understood as containing “limited” degrees of community in specific functional areas.<sup>22</sup> If we disaggregate the notion of community, we can see that globalization is creating certain *elements* of community at the global level, such as knowledge of inter-connectedness and the circumstances of the other; and creating true community in certain *areas* of global social relations, such as humanitarian

---

<sup>20</sup> Walzer describes the political community of justice as one “capable of arranging [its] own patterns of division and exchange, justly or unjustly.” *Supra* note 7 at 31. When a community is no longer capable of fixing its own patterns of division and exchange, it is no longer sufficient to analyze the justice of that community with sole reference to itself. In other words, unable to fix its own distributions entirely itself, it is not capable of delivering its own justice. We must therefore look to that further level of institutions which is affecting that community’s distributions – the global; and to its justice – global justice.

<sup>21</sup> Indeed, the many anti-globalization protests focused on Bretton Woods institutions indicate a growing awareness both that these institutions increasingly constrain allocative decision-making at the national level, and that they themselves engage (through the allocation of trade benefits, critical currencies and development aid, for example) in positive distributive functions; thus the anti-globalization movement represents the formation of a transboundary polity organized around meta-state institutions, albeit in a critical role.

<sup>22</sup> Moreover, the trend is towards increasing community. Bruno Simma and Andreas L. Paulus list Rwanda and Somalia as examples of a weak solidarity which can suggest that the concept of global community is either half-full, or half-empty. They decide it is half-full, asking “After all, who would have cared - and how - a hundred years ago.” “The ‘International Community:’ Facing the Challenge of Globalization,” 9 *EUR. J. INT’L L.* 266, 276 (1998).

relief and transboundary economic relations, by establishing that degree of social bond necessary to support justice. This means that global society taken as a whole may not rise in all cases to the level of community which communitarians posit, but has *enough* elements of community, and contains enough *pockets* of community, to support an inquiry into justice in at least in some areas of global social relations.

#### IV Global Public Law

If global community is emerging, at least in a limited form, then we need a global public law to structure it.<sup>23</sup> This is the transformative challenge for international law and legal theory today: to move from the public law of inter-state relations, to the public law of a global community of persons. This will involve many theoretical and doctrinal tasks. At their core, these new tasks involve a global system for safeguarding and delivering what can be called the “global basic package,” a basic bundle of political social and economic rights everyone is entitled to as a function of their humanity, and which is safeguarded and delivered, at the primary level, by the global. This list can be drawn in a variety of ways, but involves at a minimum the following four elements: security, subsistence, liberty, voice.

We see the germ of a global basic package today in international human rights law, humanitarian aid, and the notion of humanitarian intervention. International law today already recognizes a core commitment to deliver basic rights, subsistence food and shelter, and some minimum level of security, as a function of our basic humanity.<sup>24</sup> In

---

<sup>23</sup> We can think of global public law as the organization of the macro, the law which sets the structure of powers, duties and limits of the macro and its officers, relations of the macro to the midrange (states) and the micro (individuals), and the definition of and exercise of powers of the macro for the public good. Alternatively, we can think of it as the regulatory system for delivery of global public goods. PROVIDING GLOBAL PUBLIC GOODS (KAUL, ET AL., EDS. 2003).

<sup>24</sup> These achievements can be seen as representing a high water mark of cosmopolitanism in contemporary international law.

reality, this often amounts to very little, when it amounts to anything at all: a food package, a blue helmet in the vicinity, and an occasional visit by an international human rights investigator.<sup>25</sup> This is not much, but I would suggest that in this we see the germ of a global basic package.

What is still missing? There are two fundamental gaps: the absence of effective mechanisms for global wealth transfers at the scale necessary to support the global basic package; and the absence of effective political representation or voice at the global level.<sup>26</sup> How we get there, and in the process go from international law to global public law, will require a profound re-examination of core international legal doctrines and institutions such as boundaries, sovereignty, legitimacy, citizenship, and the territorial control of resources.

Let me suggest as an example and a starting point, that we must re-think the role of territorial political boundaries. Territorial boundaries now serve as the frame on which we hang various concepts of distributive justice such as citizenship and the territorial control of resources, which profoundly influence the life prospects of all affected individuals. By privileging citizens over non-citizens in terms of access to the global basic package, the political boundary of citizenship dramatically affects our life prospects on the basis of one of the most arbitrary aspects of our natural condition – the place we

---

<sup>25</sup> Indeed, the limited nature of this response has lead commentators such as Jean B. Elshtain to argue that in these particulars there is still no equivalent to the state, citing Ahrendt's point that the only meaningful site for citizenship remains the state. "Theorizing Globalization in a Time of War: Challenges and Agendas (panel)," Annual Meeting of the American Political Science Association, September 2, 2004 (on file with author). However, I believed this says more about the limits of current theory and politics, than it does about the intrinsic limits of meta-state institutions. International law is incapable of reaching further cosmopolitan goals under a "society of states model," until it shifts to a model of global community and becomes global public law.

<sup>26</sup> Jay Mandle and Louis Ferleger refer to this as the need for institutional mechanisms for compensation and control, two fundamental elements of the regulation of global market society. "Preface: Dimensions of Globalization," 570 ANNALS AM. ACAD. POL. & SOC. SCI. 8, 16 (2000).

are born. In the words of one commentator, “Citizenship in western liberal democracies is the modern equivalent of feudal privilege – an inherited status that greatly enhances one’s life chances.”<sup>27</sup>

Citizenship thus illustrates how the current “society of states” model of international law permits territorial boundaries to function at the global level as one of the main obstacles to delivery of a global basic package. If global community is possible, and emerging, as I have argued, then we have to re-think the discretion given states to use boundaries as primary determinants of global justice.<sup>28</sup> We need to develop a model for the international delivery of the basic package – a concept of effective global citizenship if you will – in which the accident of birthplace, or the vagaries of naturalization law, do not fundamentally affect each person’s life prospects.

In order to do so, global public law needs to tackle distributive issues both between and within states. The “society of states” model put the question of justice outside the realm of international law. Globalization means that the problem of inequality is a central problem of global social relations, in the same way it is a central problem of justice at the domestic level.<sup>29</sup>

What should the role of the state be in a global public order? Global community demands a new view of this role, in which the state no longer holds a monopoly on the

---

<sup>27</sup> Joseph H. Carens, “Aliens and Citizens: The Case for Open Borders,” in KYMLICKA, *THE RIGHTS OF MINORITY CULTURES* (1995).

<sup>28</sup> As things stand, there is a pernicious anomaly: free movement of capital but no free movement of persons, which could be seen as a deliberate attempt to keep labor costs from equalizing. A global economic space demands something approaching the free movement of persons, subject to some notion of carrying capacity or assimilation rate. The very idea conjures images of unsupportable mass migrations, which are not inevitable, nor are they the necessary result of changes in border policies. The primary reason for such shifts would be economic inequality, a subject which poses a central challenge to global public law.

<sup>29</sup> See generally FRANK J. GARCIA, *TRADE, INEQUALITY AND JUSTICE: TOWARD A LIBERAL THEORY OF JUST TRADE* (2003) (arguing a central role for inequality in contemporary international economic relations).

delivery of basic public goods, but must nevertheless play a central role in such delivery, including that of the guarantor of last resort.<sup>30</sup> However, this does not mean that global institutions must be modeled on domestic institutions: a sort of world state. Rather, we must see that, in normative terms, global institutions must be justifiable according to the same principles we apply in domestic political theory, whatever their shape. Their legitimacy can no longer rest entirely on their creation by states along duly authorized treaty lines, but will require some increased form of public participation, reflecting normative principles of political theory in the same way that domestic institutions must.<sup>31</sup>

## V Conclusion

The absence of global institutions capable of giving everyone both the resources reflected in this basic package, and a voice in formulating this basic package, is a fundamental gap in the global basic structure as it stands today. We are indebted to the antiglobalization protests for building awareness of this problem,<sup>32</sup> and for reminding us that the creation of a global market society need not result in a global *laissez faire* market culture. We must recall, however, that the progression towards globalization is not inevitable or linear, nor is the achievement of a *just* globalization. The task of international legal theory, or global legal theory as we now might call it, is to draw upon both traditional domestic political theory, and innovative studies of our new global social reality, to design the next generation of global institutions and doctrines capable of delivering global justice for a global community.

---

<sup>30</sup> Indeed, Manuel Castells has argued that globalization is bringing about a new form of nation-state, the “network state,” whose principle duty is to successfully manage on our behalf this web of networks. THE POWER OF IDENTITY 242-273 (1997).

<sup>31</sup> See LEA BRILMAYER, JUSTIFYING INTERNATIONAL ACTS (1989).

<sup>32</sup> GLOBALIZATION IN WORLD HISTORY 23 (A.E. HOPKINS ED. 2002) (though under-theorized, antiglobalization protests maintain public awareness of the inadequacies of under-regulated capitalism and the range of values affected by market-driven globalization).