


1-1-2005

Globalization and the Theory of International Law

Frank J. Garcia

Boston College Law School, garciafr@bc.edu

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

 Part of the [Antitrust and Trade Regulation Commons](#), [International Law Commons](#), [International Trade Commons](#), and the [Law and Economics 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.

Globalization and the Theory of International Law

Frank J. Garcia
Boston College Law School

I. INTRODUCTION

Contemporary globalization both requires *and permits* the re-casting of international law away from a “society of states” model and toward a true model of a global society, or even a global community.¹ By effectively eliminating both time and space as factors in social interaction, globalization is changing the nature of global social relations, which intensifies the obsolescence of the “society of states” model and demands a fundamental change in the social theory of international law, toward a global society of persons. Because of these changes, globalization requires that we refashion inter-

¹ 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.

Frank J. Garcia

national law into a global public law, and expand the domain of justice from the domestic into the global sphere, 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: RECONCEPTUALIZING GLOBAL LEGAL REGULATION

The dominant contemporary account of the social basis of international law has been the “society of states” model.² In this view, to the extent that international law 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 that international law regulates a society of states has two important normative implications, both flowing from the underlying analogy of the model: states to persons. First, it

² See CHARLES BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* 67-123 (1979) (overview of the society of states model of international relations, superseding earlier Realist paradigm).

Globalization and International Law

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.³ Second, there is no principle of distributive justice to which states are subject; they are presumed entitled to the resources they control.⁴ Taken together, this approach can be called the “morality of states” model of international justice.⁵

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 the primary subjects of the law.⁶

³ Beitz, *supra* n. 1, at 65-66.

⁴ Beitz has analogized this to 19th 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.*

⁵ *Id.*

⁶ 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 Third Restatement of Foreign Relations Law of the United States. The Third Restatement asserts that “international law is the law of the international community of states,” and “states are the principal persons in international

Frank J. Garcia

Pressure to shift away from this model began in earnest in the mid 20th 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 and similar attributes of any just society. From a theoretical viewpoint, 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 on the fundamental moral status of individual persons, drawing on the work of Kant and others, and going by the name “cosmopolitanism.”⁷ Such efforts, however, run into a variety of theoretical problems, including

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.

⁷ See generally Charles Beitz, “Cosmopolitan Liberalism and the State System,” in *POLITICAL RESTRUCTURING IN EUROPE* (BROWN ED. 1994) (surveying contemporary cosmopolitanism).

Globalization and International Law

important communitarian objections to the possibility of global justice on the grounds that justice is a virtue *within* political communities, not *between* them.⁸ 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,⁹ 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 perspective of political theory, globalization is lifting relationships out of the strictly territorial into the “global” or meta-territorial.¹⁰ 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 also change. To be effective, regulatory decisions must increasingly involve the meta-state level. Globalization thus requires a fundamental re-examination of social regulation and govern-

⁸ See generally DAVID MILLER, ON NATIONALITY (1995), MICHAEL WALZER, SPHERES OF JUSTICE (1983) (raising general communitarian objections to global justice).

⁹ 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 ‘Globalization:’ A Framework of Analysis,” 35 INT’L LAWYER 1589 (2001).

¹⁰ See generally *Id.* and GLOBAL TRANSFORMATIONS (HELD, ET AL. EDS 1999) (reviewing evolution of meta-state institutions).

Frank J. Garcia

ance at the global level, leading to a system in which states may still have a preeminent role, but not the only role.¹¹

For our purpose here, we need to understand how globalization changes the nature of social relations at national and “global” levels, and paves the way for global community for global justice, even on stringent communitarian terms.¹² This change has a fundamental impact on the possibilities open to international law.

First, globalization brings 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.”¹³ 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.¹⁴

The key point is that globalization brings about the same circumstances of justice at the global level, which Rawls describes at the domestic level.

¹¹ See, e.g. ANNE MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); MANUEL CASTELLS, *THE RISE OF THE NETWORK SOCIETY* (1996).

¹² 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.

¹³ JOHN RAWLS, *A THEORY OF JUSTICE* 126-130 (1971) (overview of circumstances of justice).

¹⁴ *Id.*

Globalization and International Law

To begin with, we find the same basic scarcity of resources at the global level. Through globalization, people increasingly compete 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 to an unprecedented degree. Through globalization, we increasingly find that we have the 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.¹⁵ Because of globalization, we also increasingly find that our state's policies and our own political and consumer choices influence 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.

¹⁵ 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).

Frank J. Garcia

Together, these global circumstances of justice offer one kind of argument for a global society, making justice both possible and necessary. A second, more ambitious argument is that globalization has gone beyond a global society and is creating a global community, at least to a limited degree.

One basis for a 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 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 is called a “community of risk.”¹⁶

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 pronounces that your concerns are my concerns.

¹⁶ DIRK MESSNER, “World Society – Structures and Trends,” in GLOBAL TRENDS & GLOBAL GOVERNANCE 24 (KENNEDY, ET AL. EDS. 2002).

Globalization and International Law

This community of knowledge and risk increasingly becomes a community of shared traditions, practices and understandings. These grow both spontaneously and institutionally out of our perception of shared needs and interests, our capacity to help and to harm, and of our awareness of each other's plight. In short, our understanding of globalization interlocks our fates. Despite the reality of conflict over social practices and values, we are increasingly a part of many sorts of global social networks.¹⁷ Moreover, commentators suggest that (at least at the political level) there is an emerging consensus or shared understanding about the importance of markets, democracy and human rights.¹⁸

I would like to focus on two aspects of contemporary globalization as particularly indicative of the emergence of a global community in each respective realm: markets and meta-state institutions.

To the extent that globalization creates a global market society, this in itself, constitutes a set of shared practices and contributes to a community

¹⁷ Examples include multi-national corporations, NGO's and various organs of international scientific cooperation.

¹⁸ 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.

Frank J. Garcia

of shared interests. For example, market society has certain attributes: the need for bureaucratic regulation, recognition of private property and civil courts (to name a few), which by virtue of their pronounced spillover effects, contribute to shared interests among participants.¹⁹ Not the least of these is an interest in considering institutions that 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 for an adequate social response to many of the problems and challenges we face. Allocative social decision-making 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.²⁰

¹⁹ See e.g. DON SLATER AND FRAN TONKISS, MARKET SOCIETY 92-116 (2001) (surveying range of institutions which markets require/are embedded in).

²⁰ “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.*

Globalization and International Law

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 reveals domestic society to be an incomplete community: incapable of securing the overall well-being of its members by itself, and requiring a higher (global) level of community to secure this wellbeing.²¹ Second, this shift signals the emergence of global politics. The role played by common institutions sharing a common language in building policies out of disparate peoples, has long been recognized in domestic politics as “nation-building.” Similarly, the growing tendency to look to meta-state institutions for responses to global social and environmental problems *itself* constitutes a shared understanding that such institutions will increasingly formulate or channel social policy decisions and orchestrate social welfare

²¹ Walzer describes the political community of justice as one “capable of arranging [its] own patterns of division and exchange, justly or unjustly.” *supra* n. 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.

Frank J. Garcia

responses, and that few States can act without them on any important social issue.²²

I am not suggesting that global social relations *in toto* form the sort of full-blown political community that communitarians point to in domestic social relations as exemplar. However, globalization creates a third possibility: global society, understood as containing “limited” degrees of community in specific functional areas.²³ If we disaggregate the notion of community, we see that globalization creates certain *elements* of community at the global level, such as knowledge of inter-connectedness and the circumstances of others: creating true community in certain *areas* of global social relations, such as humanitarian relief and trans-boundary economic relations and establish a 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,

²² 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.

²³ 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).

Globalization and International Law

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 emerges, at least in a limited form, then we need a global public law to structure it.²⁴ 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 involves many theoretical and doctrinal tasks. At the 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 that everyone is entitled to as a function of their humanity (and which is safeguarded and delivered at the primary level by the global community). This list can be drawn in a variety of ways, but minimally contains four elements: security, subsistence, liberty, and voice.

²⁴ 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).

Frank J. Garcia

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 already recognizes a core commitment to deliver basic rights, subsistence, food, shelter and minimum levels of security as a function of our basic humanity.²⁵ In reality, this often amounts to very little if anything at all: a food package, a blue helmet in the vicinity, and an occasional visit by an international human rights investigator.²⁶

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.²⁷ This change from international law to global public law

²⁵ These achievements can be seen as representing a high water mark of cosmopolitanism in contemporary international law.

²⁶ 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.

²⁷ 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).

Globalization and International 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 a starting point, that we rethink 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 providing 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 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."²⁸

Citizenship illustrates how the current "society of states" model of international law, permitting territorial boundaries to function at the global level, is one of the main obstacles in delivering a global basic package. If global community is possible and emerging, then we have to rethink

²⁸ Joseph H. Carens, "Aliens and Citizens: The Case for Open Borders," in KYMLICKA, *THE RIGHTS OF MINORITY CULTURES* (1995).

Frank J. Garcia

the discretion given states to use boundaries as primary determinants of global justice.²⁹ We need to develop a model for the international delivery of the basic package: a concept of effective global citizenship, 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 places the question of justice outside the realm of international law. Globalization makes inequality a central problem of global social relations in the same way that it is a central problem of justice at the domestic level.³⁰

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 delivery of basic public

²⁹ 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.

³⁰ See generally FRANK J. GARCIA, *TRADE, INEQUALITY AND JUSTICE: TOWARD A LIBERAL THEORY OF JUST TRADE* (2003) (arguing a central role for inequality and its amelioration in contemporary international economic relations).

Globalization and International Law

goods, but must nevertheless play a central role in their delivery, as the guarantor of last resort.³¹ This does not, however, mean that global institutions must be modeled on domestic institutions to form a world state. Rather, we must see to it that in normative terms, global institutions are justifiable according to the same principles we apply in domestic political theory, whatever their shape.³² 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.

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 today. We are indebted to the anti-globalization protests for building awareness of this problem³³ and for reminding us that the

³¹ 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).

³² See LEA BRILMAYER, *JUSTIFYING INTERNATIONAL ACTS* (1989).

³³ *GLOBALIZATION IN WORLD HISTORY* 23 (A.E. HOPKINS ED. 2002) (though under-theorized, anti-globalization protests maintain public awareness of the

Frank J. Garcia

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 necessarily assured. The task of international legal theory or global legal theory is to draw upon both traditional domestic political theory and innovative studies of global social reality to design the next generation of global institutions and doctrines, capable of delivering global justice for a global community.

inadequacies of under-regulated capitalism and the range of values affected by market-driven globalization).

[26] INTERNATIONAL LEGAL THEORY · *Fall 2005*