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INTRODUCTION: GLOBALIZATION, POWER, STATES, AND THE ROLE OF LAW

FRANK J. GARCIA*

Abstract: On October 12, 2012 the *Boston College Law Review* and the *Boston College International and Comparative Law Review* held a joint Symposium entitled, “Filling Power Vacuums in the New Global Legal Order.” In three panel discussions and a keynote address by Anne-Marie Slaughter, a lively discourse on the impact of globalization on state power, the law, and the law’s ability to both reallocate and effectively restrain power ensued. This Introduction, and the works that follow in this symposium issue, document that discourse.

INTRODUCTION

Welcome to this Symposium, “Filling Power Vacuums in the New Global Legal Order,” a joint issue (and effort) of the *Boston College Law Review* and the *Boston College International and Comparative Law Review*.¹ The underlying premise of the Symposium is that globalization is reallocating power—political power, economic power, and military power—among global actors. Each of these developments has important implications for law.

Globalization affects power in several distinct ways, all of which raise basic questions for law. Has globalization shifted power away from well-regulated actors to less regulated actors? How is globalization affecting the relationship between power and legitimacy that is central to our tradition of constitutional democracy? And what are the powerful *doing* with their power?

Of course, political scientists also study power, as do philosophers. Both perspectives are represented in this issue.² Law, however, has a

* © 2013, Frank J. Garcia, Professor of Law, Boston College Law School. I would like to thank Sean Wall for his able research assistance.

¹ This symposium issue publishes the papers of a conference on this topic held at Boston College Law School on October 12, 2012. In addition to the authors included in this issue, David Benjamin, Gabor Rona, Newcomb Stillwell, and Gregory Teran also actively participated in the discussion.

² See generally Mathias Risse, *A Précis of On Global Justice, with Emphasis on Implications for International Institutions*, 54 B.C. L. REV. 1037 (2013); 36 B.C. INT’L & COMP. L. REV. 1037 (2013) (presenting a philosopher’s perspective on globalization and justice); Anne-

particularly complex relationship to power. Its role is not only to constrain power and to protect the vulnerable, but also to serve power, to channel power into socially productive forms, to accomplish the aims of the powerful, and to determine who has power, and who does not.

I. REFLECTIONS ON GLOBALIZATION AND ITS CHALLENGES

Before introducing the substantive contributions of our symposium participants, I want to offer a few preliminary reflections on the nature of globalization and the opportunities and challenges it creates for us.

A. *What Is Globalization?*

One truth of the global era is that the role of the state is changing. How it is changing, however, is not always so clear. In some respects, globalization has arguably made states weaker or more vulnerable to global forces.³ Certainly the global financial crisis has shown us that no country or region, no matter how wealthy or powerful, can insulate itself from the effects of the global economy, and that no single country or region can effectively regulate the global economy.⁴ When it comes to matters of security, no country or region is immune from the globalized reach of criminality and terror, or from the destabilizing effects of regional conflicts, that the shifting global winds of ideology, power, and socioeconomic inequality inflame and intensify.⁵ Yet, in other respects,

Marie Slaughter, Keynote Address, *Filling Power Vacuums in the New Global Legal Order*, 54 B.C. L. REV. 919 (2013); 36 B.C. INT'L & COMP. L. REV. 919 (2013) (presenting a political scientist's analysis of globalization). Other works also offer interdisciplinary approaches. See generally GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW: OPPORTUNITIES AND CHALLENGES (Chios Carmody, Frank J. Garcia, and John Linarelli eds., 2012) (compiling interdisciplinary essays on globalization, law, and justice).

³ See Anthony McGrew, *Globalization and Global Politics*, in THE GLOBALIZATION OF WORLD POLITICS: AN INTRODUCTION TO INTERNATIONAL RELATIONS 14, 16 (John Baylis et al. eds., 5th ed. 2011) ("Some—the hyperglobalists—argue that [globalization] is bringing about the demise of the sovereign nation-state as global forces undermine the ability of governments to control their own economies and societies.").

⁴ Domenico Giannone et al., *Market Freedom and the Global Recession*, 59 IMF ECON. REV. 111, 128–29 (2011) (noting that deregulation of integrated credit markets made economies vulnerable to financial shocks); see also David A. Wirth, *A World of Choices*, 10 N.Z. J. PUB. & INT'L L. 1, 2–9 (2012) (evaluating the consequences of decentralization of power from states to other actors). See generally Frank J. Garcia, *Between Cosmopolis and Community: Globalization and Global Justice*, N.Y.U. J. INT'L L. & POL. (forthcoming 2013) (reviewing changes to global governance stemming from increased interdependence).

⁵ S. Brock Blomberg & Gregory D. Hess, *The Lexus and the Olive Branch: Globalization, Democratization, and Terrorism*, in TERRORISM, ECONOMIC DEVELOPMENT, AND POLITICAL

globalization may have strengthened the state. When we look at how difficult it continues to be for people to cross national boundaries, or how impervious many states remain to external human rights monitoring and redress, we see that rumors of the death of the state have been greatly exaggerated.⁶

At the heart of these changes is the fundamental technological transformation characteristic of contemporary globalization. Many commentators argue that the most distinctive aspect of globalization today is the revolution in telecommunications, computing, and the Internet that has essentially *eliminated* time and space as significant factors in many areas of human social interaction.⁷

The nature of our relationship to space and time is essential to questions of law and justice. As early as the eighteenth century, Immanuel Kant referenced the normative implications of time and space when he argued for cosmopolitanism on the basis that human beings live on a spherical planet.⁸ In making this observation, Kant was prefiguring globalization by reflecting on what it means to live on the surface of a globe.

If we consider globalization from the vantage point of time and space, then each phase in technological innovation—starting with the wheel and leading to the telephone, telegraph, and jet airplane—have steadily reduced the impact of time and space on human social interac-

OPENNESS 116, 125 (Philip Keefer & Norman Loayza eds., 2008) (tracing the differential impact of increased trade and economic liberalization on the likelihood of terrorist activity). *See generally* THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION* (1999) (arguing that economic and ideological globalization results in winners and losers, with the losers having easier access to resources used for retaliation against the winners).

⁶ DANIEL KANSTROOM, *AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA*, at x (2012) (“Reports of the death of the nation-state, in short, have been exaggerated, as have reports of the irrelevance of national borders. The importance of geographic space may have diminished somewhat . . . [b]ut the poor and the oppressed of the world encounter a tighter regime of state regulation—with fewer migration possibilities—than many would have found in the past.”).

⁷ *See, e.g.*, ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* 63–64 (1990) (describing globalization as interdependence without differentiation of time and space); DAVID HARVEY, *THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE* 240 (1989) (describing the “time-space compression,” where capitalism has brought people closer together and increased the pace at which things occur); Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 & n.496 (2002) (describing Anthony Giddens’ analysis of globalization, time, and space).

⁸ *See* Immanuel Kant, *Eternal Peace*, in *THE PHILOSOPHY OF KANT* 430, 446 (Carl J. Friedrich ed. & trans., 1977). Kant argued in part for the universal right of decent treatment for all persons on the basis of the curved nature of the planet’s surface: “Since it is a globe, they cannot disperse indefinitely, but must tolerate each other.” *Id.*

tion.⁹ Globalization today has taken this even further. Kant no longer has to walk around the planet—he can, in a sense, walk straight through it, instantly. The elimination of time and space as barriers has massive consequences. If we consider everything from the global financial crisis¹⁰ to the Arab Spring¹¹ to the “Innocence of Muslims” debacle¹² to the growing urbanization crisis in China,¹³ we see everywhere the effects of flows—human flows, information flows, capital flows, ideological flows—that are dramatically shaping the world and what is possible in it.¹⁴

All of this, from the perspective of the state’s traditional role as residual guarantor of peace, security, and welfare, can be overwhelming. How can any single state cope with this barrage of interconnected, rapidly evolving, and highly volatile challenges? States must nevertheless try to regulate meta-territorial phenomena, such as cyberspace and the global financial market, through traditionally territorial tools, such as law. That is one reason why governance through international organizations and multilateralism—the traditional state response to collective problems transcending the regulatory power of any one state—has become so important in the global age.¹⁵

And yet it is also why we see the emergence of the “network state,” which Anne-Marie Slaughter, Manuel Castells, and others have

⁹ See DAVID HELD ET AL., *GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE* 58 (1999) (noting that the globalization and telecommunications revolutions have brought people into social realities they otherwise would not have known).

¹⁰ See, e.g., Brian J.M. Quinn, *The Failure of Private Ordering and the Financial Crisis of 2008*, 5 N.Y.U. J. L. & BUS. 549, 550–55 (2009) (discussing the global reach and causes of the financial crisis of 2008).

¹¹ See, e.g., Sarah Joseph, *Social Media, Political Change, and Human Rights*, 35 B.C. INT’L & COMP. L. REV. 145, 145–46 (2012) (discussing the use of social media in the context of the Arab Spring uprisings).

¹² See, e.g., Frank J. Garcia, *Yelling ‘Fire’ in a Crowded Planet*, HUFFINGTON POST (Sept. 25, 2012, 11:23 AM), http://www.huffingtonpost.com/frank-j-garcia/innocence-of-muslims-protests_b_1912834.html (discussing the protection of speech amid global protests stemming from the posting of an anti-Islamic video entitled “Innocence of Muslims” on the Internet, as well as the regulatory challenges posed by the global reach of media).

¹³ See, e.g., Nigel Harris, *Immigration and State Power*, DEV. ISSUES, Nov. 2009, at 1, 5.

¹⁴ See FRANK J. GARCIA, *GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW: THREE TAKES* 137–99 (2013) (arguing that intensified global flows are transforming society, governance, and regulation).

¹⁵ See, e.g., *id.* at 173–80 (analyzing the shift toward meta-state governance in the global context); David A. Wirth, *Globalizing the Environment*, 22 WM. & MARY ENVTL. L. & POL’Y REV. 353, 364–74 (1998) (evaluating the effectiveness of multilateral institutions concerned with the environment).

written of so eloquently.¹⁶ In a world in which individuals and organizations can connect directly with their counterparts around the globe instantly, cheaply, and without the mediation of the state's apparatus for diplomacy and foreign relations, we have a fundamentally new regulatory environment. States will increasingly be judged by how successfully they surf and manage this web of networks.¹⁷

We also, however, see a disturbing rise in unilateralism, retrenchment, and the hardening of boundaries—perhaps an even more traditional state response to perceived external threats and a pervasive sense of insecurity.¹⁸ Needless to say, each move has its consequences, and law is deeply implicated in all of them.

B. *How Globalization Affects Law*

Globalization affects law in at least four specific ways. First, globalization is changing the needs of clients. This distinguishes the legal academic inquiry into globalization from that of any other discipline. Lawyers have clients. Our clients—be they corporations, states, international organizations, military decisionmakers, or private individuals—exist and work in a globalizing environment, and need their lawyers and their regulators to understand and respond to the demands of that environment. Lawyers are still performing traditional legal functions—advising, planning, structuring transactions, and resolving disputes—but in a radically new setting. In this new legal order, who is engaging our services and toward what ends?¹⁹ Do we have the right tools as lawyers to con-

¹⁶ See generally MANUEL CASTELLS, *THE RISE OF THE NETWORK SOCIETY* (2d ed. 2000) (describing the growth of networks in society); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004) (detailing Professor Slaughter's network theory); Giles Scott-Smith & Moritz Baumagärtel, *New Paradigms, Old Hierarchies? Problems and Possibilities of US Supremacy in a Networked World*, 48 INT'L POL. 271 (2011) (describing a shift of power from nation-states to networks).

¹⁷ To be effective, regulatory decisions must increasingly involve the meta-state level, leading to a system in which states may still have a preeminent role, but not the only role. See, e.g., CASTELLS, *supra* note 16, at 500–09; SLAUGHTER, *supra* note 16, at 14, 36–64.

¹⁸ See KANSTROOM, *supra* note 6, at x; Stephen Meili, *U.K. Refugee Lawyers: Pushing the Boundaries of Domestic Court Acceptance of International Human Rights Law*, 54 B.C. L. REV. 1123, 1123, 1124–25 (2013); 36 B.C. INT'L & COMP. L. REV. 1123, 1123, 1124–25 (2013).

¹⁹ See Sara Dillon, *Opportunism and Trade Law Revisited: The Pseudo-Constitution of the World Trade Organization*, 54 B.C. L. REV. 1005, 1022–32 (2013); 36 B.C. INT'L & COMP. L. REV. 1005, 1022–32 (2013) (discussing the opportunistic use of lawyers and trade law by corporations and nation-states).

tinue to channel and constrain power toward socially beneficial forms? How are we as lawyers doing with this solemn responsibility?²⁰

Second, the changing needs of clients are in turn changing the substance of the law. Law is inherently conservative and reactive. It responds to changes more than it initiates change.²¹ Insofar as globalization and its associated technologies are changing what people do and how they do it, law itself is adapting and responding through new rules, institutions, practices, and procedures. Understanding and evaluating these changes—and our own role in them as policymakers and reform advocates—is part of our core responsibility as legal scholars.²²

²⁰ Not well in some cases, suggest Professors Upendra Acharya and Sara Dillon, but better in others suggests Professor Stephen Meili. Compare generally Upendra D. Acharya, *Globalization and Hegemony Shift: Are States Merely Agents of Corporate Capitalism?*, 54 B.C. L. REV. 937 (2013); 36 B.C. INT'L & COMP. L. REV. 937 (2013) (discussing lawyers' roles in obtaining sovereign consent critical to the development of international law and noting that these lawyers typically represent only Western education and ideologies), and Dillon, *supra* note 19 (critiquing trade lawyers for failing to adequately explain and evaluate the normative effects of trade laws), with Meili, *supra* note 18, at 1125–26 (noting that “lawyers play a critical role in shaping state power over refugee matters in the wake of globalization” and arguing that U.K. refugee lawyers have been effective at getting international human rights norms applied to refugee law). Regardless of how one answers this question, there are certainly clear paths toward improvement. See David Wilkins & Mihaela Papa, *The Rise of the Corporate Legal Elite in the BRICS: Implications for Global Governance*, 54 B.C. L. REV. 1149, 1155, 1179 (2013); 36 B.C. INT'L & COMP. L. REV. 1149, 1155, 1179 (2013) (citing the increase in professional self-regulation among corporate lawyers).

²¹ Professor John Flood reminds us of this conservatism, but also of how much power actors such as globally engaged firms have to shape law and legal practice. See John Flood, *Institutional Bridging: How Large Law Firms Engage in Globalization*, 54 B.C. L. REV. 1087, 1087, 1119–21 (2013); 36 B.C. INT'L & COMP. L. REV. 1087, 1087, 1119–21 (2013).

²² Professor Daniel Bradlow notes that although the governance tools may be new, our responsibility to assess them by both traditional and new criteria is not. See Daniel D. Bradlow, *A Framework for Assessing Global Economic Governance*, 54 B.C. L. REV. 971, 972–73, 1003 (2013); 36 B.C. INT'L & COMP. L. REV. 971, 972–73, 1003 (2013); see also FRANK J. GARCIA, TRADE, INEQUALITY, AND JUSTICE: TOWARD A LIBERAL THEORY OF JUST TRADE, 147–92 (2003) (critically evaluating WTO special and differential treatment law as a failed response—in its current form—to distributive problems in contemporary trade relations).

Third, globalization is changing the nature of regulation.²³ Not only is the role of the state—the traditional source of regulation—evolving, but new sources of legal regulation are emerging. Globalization is calling for new kinds of governance—sometimes, governance without government, at least without state governments in their traditional capacities—as new institutions are created or strengthened. This often raises serious questions of legitimacy and voice.²⁴

Finally, I would return to law's role as the protector of the weak.²⁵ If we accept the premise that the natural order is one in which the strong do what they will, and the weak suffer what they must,²⁶ then law's role is particularly complex, and particularly challenging. In our modern legalized era, the strong often do what they will *through* law, and do what they can to *change* law in their favor, whereas the weak must look to the same law to protect them and to give them avenues for development and contestation.²⁷ As lawyers we are right in the middle

²³ See Franz Nuscheler, *Global Governance, Development, and Peace*, in GLOBAL TRENDS AND GLOBAL GOVERNANCE 156, 170–81 (Paul Kennedy et al. eds., 2002). This can also be called regulatory globalization, emphasizing the regulation of markets for goods, labor, capital, and services at new levels that require formalized interstate cooperation through new and powerful institutions, such as the World Trade Organization, and that may, in certain cases, transcend nation-state control to a significant degree, as with the European Union. See Alfred C. Aman, Jr., *The Limits of Globalization and the Future of Administrative Law: From Government to Governance*, 8 IND. J. GLOBAL LEGAL STUD. 379, 379–85 (2001) (emphasizing the change in dynamics of law formation wrought by globalization); Jost Delbrück, *Globalization of Law, Politics, and Markets—Implications for Domestic Law—A European Perspective*, 1 IND. J. GLOBAL LEGAL STUD. 9, 10–11, 17 (1993) (illustrating globalization as a change in the locus of regulation). This aspect of globalization often leads to complaints about globalization as insufficiently democratic. See Aman, *supra*, at 380–82, 390–92, 392–96.

²⁴ This is at the heart of Professor Bradlow's reform proposals. See Bradlow, *supra* note 22, at 972–73, 984, 991; see also Garcia, *supra* note 14, at 194–99 (suggesting that the protection of the right to voice is one of the weakest elements in emerging global public law); cf. David A. Wirth, *The International Organization for Standardization: Private Voluntary Standards as Swords and Shields*, 36 B.C. ENVTL. AFF. L. REV. 79, 87–93 (2009) (evaluating public policy implications of private voluntary standards as potential alternatives to governmental regulation).

²⁵ None are more in need of protection than populations vulnerable to rape in times of war, and as Judge Phillip Weiner reminds us, the work of the law in this area is evolving but far from finished. See generally Phillip Weiner, *The Evolving Jurisprudence of the Crime of Rape in International Criminal Law*, 54 B.C. L. REV. 1207 (2013); 36 B.C. INT'L & COMP. L. REV. 1207 (2013) (discussing the evolution of the crime of rape internationally).

²⁶ This famous dictum comes from Thucydides' account of an ultimatum that Athens issued to the people of Melos. See THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR 360 (E.V. Rieu ed., Rex Warner trans., Penguin Books 1954) (431 BC).

²⁷ The accounts of the roles of corporate and refugee lawyers by Professors Flood and Meili, respectively, aptly illustrate this dual role. See generally Flood, *supra* note 21 (discuss-

of this, and globalization has only intensified our role.²⁸ Globalization creates a larger space—a global space—in which this oldest of stories plays out, and in which issues of fundamental rights and distributive justice must be addressed on a planetary level.²⁹

II. THE SYMPOSIUM

The papers and keynote address comprising this issue explore each of these themes and relationships in greater depth. The Sections below provide brief summaries of the keynote address and each panel and highlight the contributions contained in this issue.

A. *Keynote Address: State Power in the New Global Order*

There is perhaps no other U.S. scholar (and policy actor) more suited to open this discussion than Professor Anne-Marie Slaughter, formerly Assistant Secretary of State for Policy Planning and a long-time student of the role of power in law and international relations. We were fortunate to have her deliver the keynote address, which discussed fundamental themes and built on her considerable contribution to the literature.

Professor Slaughter distinguishes between two different versions of power: the vertical and the horizontal.³⁰ Vertical power is a hierarchical power—the traditional power of states and statecraft.³¹ Nation-states have traditionally operated on the national level through a vertical power structure, and to the extent possible in their international relations as well. Globalization, however, has brought to the fore another kind of power more suited to the new, flatter, and multi-polar environment: horizontal power. Horizontal power can be thought of as a web—it is the power of interconnectedness.³² The more central you are in the

ing the role of global law firms); Meili, *supra* note 18 (describing the role of refugee lawyers).

²⁸ As Professor Dillon illustrates, scholars are equally in the middle of this volatile space. See generally Dillon, *supra* note 19 (arguing that lawyers are failing adequately to evaluate trade laws).

²⁹ Professor Acharya describes the long history of this process, and of the fundamental questions it raises about justice. See Acharya, *supra* note 20, at 937–38. See generally GARCIA, *supra* note 14, at 273–341 (arguing for a global approach to distributive justice issues in international law); Risse, *supra* note 2, at 1038–39 (arguing for a pluralist approach to international normative theory).

³⁰ See generally Slaughter, *supra* note 2 (describing vertical and horizontal power and her perception of lawyers' roles in the new globalized world).

³¹ *Id.* at 921–23.

³² *Id.*

web, the more connected you are, and the more power you have with others throughout the web.³³ Thus, vertical power and horizontal power, respectively, can be distinguished in terms of “power over” versus “power with.”³⁴

One consequence of globalization is that on an international level, nation-states must increasingly operate through the mode of horizontal power.³⁵ This mode also brings law and lawyers to the fore, as law creates spaces for horizontal power and structures for interconnection and cooperation. Moreover, to be able to achieve desirable outcomes through horizontal power, someone must bring together actors to solve problems and mediate disputes. As lawyers are trained to think in terms of rights and obligations from all sides of an issue, they are ideally placed to exercise power in a globalized world.³⁶

B. Panel I: Globalization, Deregulation, Power, and Agency

Our first group of papers, from the panel that Professor Paulo Barrozo moderated, delves into the exercise of power that Professor Slaughter so trenchantly analyzed. Together, these papers offer a critical exploration of the regulatory *lacunae* in contemporary globalization, and the actors that exploit them to shape our global relations through their opportunistic exercise of power and influence. Put another way, this is the problem of governance in a global age, when states may be losing power, international organizations may not be what they seem or what we wish them to be, and powerful actors stand ready to exploit new opportunities.

Professor Daniel Bradlow situates his contribution in the critical disparity between the effects of global governance decisions and the relative lack of voice of the governed.³⁷ In *A Framework for Assessing Global Economic Governance*, he argues that because the decisions and actions of modern institutions and actors affect all stakeholders in the global economy, they should be subject to some form of accountability.³⁸ Al-

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 919–21.

³⁶ Slaughter, *supra* note 2, at 933–36.

³⁷ See generally Bradlow, *supra* note 22 (critiquing global governance for failing to allow stakeholder participation and proposing a framework to evaluate global governance structures more effectively).

³⁸ See generally David A. Wirth, Essay, *Legitimacy, Accountability, and Partnership: A Model for Advocacy on Third World Environmental Issues*, 100 YALE L.J. 2645 (1991) (proposing an independent accountability mechanism, which matured into the World Bank’s Inspection Panel, through which members of civil society can seek third-party review of Bank loans).

though the international law applicable to global governance gives rise to some useful metrics for assessing global economic governance, they are not adequate for the range and impact of global economic governance activities and policies. Professor Bradlow instead offers a five-part test for evaluating global economic actors and activities, including a critical assessment of institutional goals and legal compliance, observance of best administrative practices, a comprehensive approach to stakeholder interests, and effective coordination with other governance organizations.³⁹ The strength of this approach lies in its inherent plausibility and pragmatic good sense, its grounding in the actual operation and dynamics of global governance institutions, and its radical incrementalism—all hallmarks of careful regulation and regulatory evolution.

Professor Sara Dillon continues this focus on governance through international organizations, but in a dramatically different vein. Building upon her earlier theory of “opportunism” in the World Trade Organization (WTO),⁴⁰ Professor Dillon argues in *Opportunism and Trade Law Revisited: The Pseudo-Constitutionalism of the World Trade Organization*, that the law of the WTO has been presented to the general public as something other than what it is—as something self-evidently beneficial.⁴¹ Dillon charts a powerful and “opportunistic” alliance between corporate and financial interests, trade law scholars, and national governments that together fails to serve the public interest, and in fact obscures the information necessary for us to effectively respond to trade’s negative effects.⁴² Put another way, effective global regulation requires a clear understanding of the nature and movements of power on a global level, which ultimately is the responsibility of the legal academy

³⁹ Bradlow, *supra* note 22, at 983–93.

⁴⁰ See generally Sara Dillon, *Opportunism and the WTO: Corporations, Academics and ‘Member States,’* in INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 53 (Colin B. Picker et al. eds., 2008) (setting forth an opportunism theory of the WTO). According to Professor Dillon, this opportunism operates on several levels: first, in the motives of multinational corporations in seeking for their benefit to “constitutionalize” free trade doctrines in the form of trade agreements; second, among trade law scholars, who have built academic careers out of trade agreements without asking the difficult questions that the real-world effects and failures of these agreements raise; and finally, national governments, who have sought political capital by defending the “national” interest in WTO litigation, while in fact privileging corporate and financial actors within their own socioeconomic environments. *See id.* at 63–68.

⁴¹ Dillon, *supra* note 19, at 1009–10; cf. David A. Wirth, *Government by Trade Agreement*, in JOINING TOGETHER, STANDING APART: NATIONAL IDENTITIES AFTER NAFTA 111, 112–25 (Dorinda G. Dallmeyer ed., 1997) (evaluating the role of the WTO and regional trade agreements in comprehensive global governance).

⁴² Dillon, *supra* note 19, at 1021–31.

and the scholarly community as a whole.⁴³ Professor Dillon reminds us that as scholars we play an important communicative role in the global governance system.⁴⁴

In *Power, Rules, and the WTO*, Professor Fiona Smith argues that trade rules *do* in fact constrain power, but she makes this argument through a radically different avenue: the language of trade rules themselves.⁴⁵ Although noting that in a globalized environment power inevitably devolves to structures existing beyond the nation-state, Professor Smith challenges the conventional view that such power has inevitably lodged in sophisticated, highly complex international organizations like the WTO. In her view, the literature remains focused on the activities of institutions, on the assumption that power must be located in something that is dependent on human agency. But, Professor Smith asks, what if that is not the case? What if, instead, power is located in the semi-autonomous nature of rules themselves? Interrogating the traditional positivist conception of power as expressed in Professor Martti Koskeniemi's canonical work *From Apology to Utopia*,⁴⁶ Professor Smith argues that the law is an important global actor in its own right. She demonstrates how WTO treaty language shapes outcomes in subtle yet profound ways, resisting or slowing down the oscillation between the apologetic and utopian modes Koskeniemi characterized for international law. By doing so, Professor Smith emphasizes that lawyers too easily take for granted the nature of language itself, overlooking its capacity to channel power and to shape outcomes as a function of the words themselves.

In *Globalization and Hegemony Shift: Are States Merely Agents of Corporate Capitalism?*, Professor Upendra Acharya returns us to some of the themes that Professor Dillon sounded and proceeds directly to the heart of the debate over globalization as a servant of multinational corporations.⁴⁷ He argues that multinational corporations, and neither international organizations nor states, are the powerful actors in this new environment. He asserts that “pre-globalized” roles have been re-

⁴³ *Id.* at 1009–10.

⁴⁴ *Id.* at 1035–36.

⁴⁵ See generally Fiona Smith, *Power, Rules, and the WTO*, 54 B.C. L. REV. 1063 (2013); 36 B.C. INT'L & COMP. L. REV. 1063 (2013) (arguing that the language of the WTO and world trade rules are inherently powerful).

⁴⁶ See generally MARTTI KOSKENIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (2005) (using a positivists' conception of power to describe international law, social theory, and political philosophy).

⁴⁷ See generally Acharya, *supra* note 20 (arguing that corporations have an unreasonable amount of influence over states).

versed, with states now seeming to act as agents of corporate capitalism, whereas before corporations had been the agents of states.⁴⁸ Meanwhile, states continue to derive their claims to legitimate sovereign authority from people and the system of international law. Echoing Professor Dillon, Professor Acharya argues that this “hegemony shift” has had repercussions throughout the system, as international organizations, including nongovernmental organizations, have also become instrumental in serving the needs of corporate capitalism. Although Acharya recognizes the positive contributions made by globalization and by corporate and international organization activity, he concludes that it is our responsibility—and, implicitly, law’s responsibility—to resist such shifts in power when they act against fundamental human interests.

Professor Mathias Risse concludes the panel’s examination with an explicitly normative contribution centered on the new possibilities that globalization has opened for traditional social justice concerns. In *A Précis of On Global Justice, with Emphasis on Implications for International Institutions*, Professor Risse argues that traditional modes of thought about justice at the global level tend either to refrain from applying justice to states (contractarian and communitarian views) or else to extend its application to all people in addition to states (cosmopolitan views).⁴⁹ Instead, Professor Risse rejects both of these approaches, acknowledging the existence of multiple grounds of justice⁵⁰ and defending a view he calls “pluralist internationalism.” Pluralist internationalism accepts the centrality of states in the global architecture, but qualifies this acceptance by embedding the state into a broader model with its own principles of justice.⁵¹ Within this theory, one cannot assume a one-size-fits-all approach to answering normative questions. Instead, one must explore which particular obligations of justice apply to states and other institutions in particular normative situations. This has fundamental repercussions for the shape of “inter-national” law as it

⁴⁸ See *id.* at 937–39.

⁴⁹ See generally Risse, *supra* note 2 (describing the traditional analysis of justice on the global level and rejecting the traditional view in favor of pluralist internationalism).

⁵⁰ Professor Amartya Sen’s recent book on justice is a passionate call to recognize such a plural approach. See generally AMARTYA SEN, *THE IDEA OF JUSTICE* (2009) (putting forth a pluralistic theory of justice). For another recent call to embrace a plural approach to justice theory, see GARCIA, *supra* note 14.

⁵¹ The grounds that Professor Risse discusses are shared membership in a state, common humanity, shared membership in the global order, shared involvement with the global trading system, and humanity’s collective ownership of the earth. Risse, *supra* note 2, at 1038.

becomes *global* law rather than the law of state relations—a move underway since the end of World War II.

In particular, pluralist internationalism means that international institutions must be recharacterized as agents of justice, rather than as entities that merely advance particular state interests.⁵² Most importantly, in global governance today it falls to international organizations to create the context by which states are accountable to noncitizens for state effects on transboundary justice. Professor Risse argues that for the WTO (and its scholars), this means abandoning the view that the organization is solely about Member States and trade regulation, as it is embedded in a context that includes all persons involved in the global trading system.

C. Panel 2: Legal Practice and the Legal Profession in a Global World

The second group of papers, from the panel that Professor Gail Hupper moderated, casts a critical and scholarly eye on how the new global practice environment is changing lawyers and lawyering, and how lawyers are in turn changing the practice environment and global regulation itself. Among other implications, the papers together vividly demonstrate that in many countries there is no single legal “profession,” but rather a fragmented set of groups that play very different roles in global governance processes. How one should go about regulating lawyers may therefore depend enormously on the particular group and their function both domestically and in the global space.

Professor David Wilkins and Mihaela Papa begin the inquiry by addressing conceptual and empirical concerns that the new global elite of transactional lawyers raise. In *The Rise of the Corporate Legal Elite in the BRICS: Implications for Global Governance*, they note that over the last two decades, there has been a proliferation of corporate lawyers in emerging economies at a time when the role and impact of private actors on global governance—and the power shift this represents—is gaining increasing attention in political, social, and legal scholarship.⁵³ Professor Wilkins and Ms. Papa interrogate the conceptual issues this raises for global governance by situating the rise of corporate lawyers in the context of the global governance literature, and conceptualizing the rise of the corporate legal elite in the BRICS countries—Brazil, Russia, India,

⁵² See *id.* at 1038, 1046–50.

⁵³ See generally Wilkins & Papa, *supra* note 20 (discussing the dramatic increase in the number of corporate lawyers in the BRICS countries (Brazil, Russia, India, China, and South Africa) and the implications it has for globalization and the law).

China, and South Africa. They conclude that the importance of the role of governance—and its challenges—is real, but that there is also some evidence of professional self-regulation and social responsibility among this new class of global actors.⁵⁴

Professor John Flood continues the conversation by focusing on one important subgroup within the corporate legal elite—the “Magic Circle” of U.K.-based global law firms. In *Institutional Bridging: How Large Law Firms Engage in Globalization*, Professor Flood notes that over the last 160 years, British corporate law firms have maintained a deliberately global outlook.⁵⁵ Professor Flood introduces the literature of “Born Globals” into the analysis of law firms and legal practice to show how certain kinds of firms are constituted in a manner that enables them to adapt and thrive in a new global economy. Recent reforms in U.K. professional regulation that allow for “alternative business structures” with external investment in firms reinforce this competitive advantage, situating U.K. corporate law firms as powerful agents in the creation of a new global *lex mercatoria*. Professor Flood reminds us that as lawyers, we play multiple roles—as legal counselors and simultaneously as global actors whose professional and economic ambitions are themselves a global driver—the effects of which we must both study as scholars and regulate as policymakers.⁵⁶

In *U.K. Refugee Lawyers: Pushing the Boundaries of Domestic Court Acceptance of International Human Rights Law*, Professor Stephen Meili refocuses us away from the heady world of the corporate elite and toward the lawyers doing the often thankless, yet essential, work of facilitating the resettlement of the most vulnerable—refugees of global conflicts.⁵⁷ Asylum law vividly illustrates the ways that globalization creates tension between states, as international norms challenge state power by supporting the human rights of refugees and asylum seekers, and states attempt to reassert their power over borders in a variety of ways. Professor Meili explores the ways that lawyers representing asylum-seekers in the United Kingdom navigate this space. He argues that lawyers play a critical role in filling the void that globalization’s diminution of state

⁵⁴ See *id.* at 1179–82.

⁵⁵ See generally Flood, *supra* note 21 (discussing the global impact of U.K.-based law firms). Professor Flood cites many reasons for U.K.-based firms’ global outlook, including a small domestic market, aggressive globally minded corporate clients operating within a framework of empire, and firms’ commitment to English law as a transnational framework for private economic activity. See *id.* at 1092–98.

⁵⁶ See *id.* at 1087–88, 1097–98.

⁵⁷ See generally Meili, *supra* note 18 (analyzing the role of international human rights norms in U.K. asylum law).

power over refugee matters has created, and that they may even support a stronger role for national law to the extent that international human rights norms influence such law.⁵⁸

D. *Panel 3: Combat Strategies and the Law of War in the Age of Terrorism*

The final set of papers, from the panel that Professor David Wirth moderated, evaluate power in its most explicit and violent forms: the use of military force in the plethora of armed conflicts that sadly have come to characterize this era of global ferment. The panelists addressed how the global War on Terror, with its new security threats and new technologies of warfare, requires new rules of engagement and a modified understanding of the law of war.

Globalization and the global war on terror may be new, but rape in times of war is sadly one of the oldest known crimes. Although it has long been a prohibited act in wartime, its occurrence remains pervasive, and until recently the elements of the crime had not been defined in international law. In *The Evolving Jurisprudence of the Crime of Rape in International Criminal Law*, Judge Philip Weiner leads us through the International Criminal Tribunal for Rwanda's landmark 1998 decision in *Prosecutor v. Akayesu*, where for the first time an international court defined rape.⁵⁹ In the cases that followed, several international tribunals provided varying opinions as to what constituted the elements of rape. With our increased awareness of the nature and extent of sexual violence in times of armed conflict, there have been major changes in these matters over the past forty years. Lawyers play a vital role in the continuing development of this critical area of global jurisprudence.

Lieutenant Colonel Richard DiMeglio poses a dramatically different, but equally pressing, question: How would you advise a battlefield commander on the use of deadly force under conditions of uncertainty and time-sensitivity? In *Training Judge Advocates to Advise Commanders as Operational Law Attorneys*, Lieutenant Colonel DiMeglio introduces us to the operational environment in which life-or-death decisions on the law of armed conflict are made by military lawyers and the tactical officers they advise.⁶⁰ He outlines the extensive training Judge Advocates re-

⁵⁸ See *id.* at 1125–26, 1145–46.

⁵⁹ See generally Weiner, *supra* note 25 (analyzing the evolution of the crime of rape internationally through landmark tribunal decisions in various international tribunals).

⁶⁰ See generally Lieutenant Colonel Richard P. DiMeglio, *Training Army Judge Advocates to Advise Commanders as Operational Law Attorneys*, 54 B.C. L. REV. 1185 (2013); 36 B.C. INT'L & COMP. L. REV. 1185 (2013) (detailing the training that Judge Advocates receive both for-

ceive as well as the factors that should be considered when advising command personnel in a field situation characteristic of the global War on Terror. Although the execution of these principles may be far from perfect, the professionalism of military lawyers cannot be doubted. Nor can one doubt the importance of training systems in the United States and other countries, which ensure the best possible legal advice under some of the worst possible conditions.

CONCLUSION

Together, our keynote address, authors, and panelists have documented the ways in which globalization is allocating and reallocating power among existing and new actors, as the international community attempts to understand and respond to both new and preexisting challenges—even to ancestral challenges in new guise. To a significant extent, the possibilities and hazards of power may not have changed. Nor have the roles of law and lawyers, even as the specific issues and distributions reflecting the new global order have changed. Institutions still matter, rules still have effect, academic lawyers continue to grapple with this complex mixture, and lawyers are right in the middle of the negotiations, conflicts, structures, and relationships that define this or any age. Whether it is in the exercise of national power, corporate power, or the power of law on behalf of the individual, lawyers ensure that rules are observed, and where necessary modified, as much as they facilitate the elision or circumvention of rules by the powerful. In fact, lawyers play a unique and multifaceted role in globalization—in addition to all of the above, we are *ourselves* global actors, who must both study and regulate our own impact.

Ultimately, it is my view that this is a hopeful message for society, and for the many students of law currently exploring what role law may have in a global future, and what their individual role may be. As our symposium authors collectively remind us, the rule of law means that we will continue to find lawyers at the heart of every defining conflict or relationship in our global society, and even our moments of disappointment over particular shortcomings underscore a positive vision of what lawyers can contribute. Moreover, as Professor Fiona Smith reminds us, so long as we are using language to express and mediate power—the essence of law itself—there is the intrinsic possibility for power to be restrained or channeled into responsible, even progressive

mally and informally before they are placed in the field to advise commanders making life-or-death decisions).

forms. Globalization, and the challenges of a global economy and global security threats may push us into extreme situations where power is least effectively regulated and violence—both physical and economic—seemingly inevitable. But as long as we bring lawyers and language into these situations, there is reason to hope for productive outcomes.

On behalf of the faculty who planned this Symposium—Professors Ault, Barrozo, Hupper, Kanstroom, Perju, McMorrow, Wirth, and myself—I want to recognize the prodigious efforts of our combined law review staff who have labored with love to produce this Symposium issue. We also wish to thank the Clough Center under the leadership of Professor Perju for its support, and our new Dean, Vincent Rougeau, for his encouragement, international vision, and leadership. Welcome to this conversation.