GLOBAL CHALLENGES—GLOBAL LAW SYMPOSIUM

FOREWORD

On June 6–7, 2013, Swansea University College of Law in Wales, United Kingdom, convened a major symposium, "Global Challenges—Global Law: A Symposium on the Future of International Law and Global Governance." The symposium brought together a group of preeminent legal scholars, social scientists, and philosophers to discuss themes from Professor Joel Trachtman's recent new book, *The Future of International Law: Global Government*, published by Cambridge University Press in 2013.[1] It also provided an opportunity to welcome Professor Trachtman to Swansea Law as its new Distinguished Research Professor of International Economic Law, joining other first-rank transatlantic legal scholars, including: Professor Dennis Patterson, Board of Governors Professor at Rutgers University School of Law at Camden; Philip Bobbitt, Herbert Wechsler Professor of Federal Jurisprudence and Director of the Center for National Security Law at Columbia Law School; and Anthony Sebok, Professor of Law at Benjamin N. Cardozo School of Law.

Many of the most significant challenges we face now, and will face in the future, disrespect national borders. These challenges defy solution through municipal law alone. International law must adapt and expand to address these challenges. Societies face a number of global hazards today ranging from climate change to systemic financial and other catastrophic risks. International law has to be able to deal with large, complex, and costly problems of coordination and cooperation. Trachtman's book tackles these difficulties head on. He develops new insights on an idea, first developed by Wolfgang Friedmann, that international law is moving, and should move, from an international law

1. JOEL P. TRACHTMAN, THE FUTURE OF INTERNATIONAL LAW: GLOBAL GOVERNMENT (Cambridge Univ. Press 2013).

of co-existence to an international law of cooperation.[2] Deploying the techniques of transaction cost economics and political economy, Trachtman argues that international law will have to be more extensive, broader in scope, more comprehensive, and more effective in the activities it regulates.

The subtitle of the book is provocative: "Global Government." This is bound to confuse lawyers who might unjustifiably assume the book is unrealistically utopian. It certainly is not utopian and, in fact, Trachtman's approach is avowedly non-utopian, looking at how international law actually functions and how it should function. Trachtman wants to avoid the use of the phrase "global governance," a phrase so over-used as to mean just about any form of regulation between or beyond states. The over-use of the phrase is in evidence by my own mistake in including it in the symposium title! (Even law school deans make mistakes.) The point Trachtman is making in using the phrase "global government" is practical: international law and the organizations it creates will have to assume some functions typically associated with governments.

The symposium at Swansea gathered a number of preeminent scholars from around the globe to talk about Trachtman's book. Co-sponsors included Rutgers University School of Law–Camden, the Fletcher School of Law and Diplomacy at Tufts University, and the Finnish University, Turun yIliopisto University of Turku. Swansea Law was delighted to be able to fly over the then Editor-in-Chief of the *Rutgers Law Journal*,[3] Alexandra S. Jacobs, and Associate Managing Editor, Emily Santoro. Panel contributors included Dennis Patterson (Rutger/EUI/Swansea); Jukka Snell (Turku/Swansea); Peter Winship (Southern Methodist); Jan Dalhuisen (King's College London/Berkeley); Fiona Smith (University College London); Tuomas Mylly (Turku); Karen Morrow (Swansea); John Linarelli (Swansea); Baris Soyer (Swansea); Simon Caney (Oxford); Duncan French (Lincoln); Mark Stallworthy (Swansea); Trey Childress (Pepperdine); Chris Drahozal (Kansas); Simon Baughen (Swansea); Alex Mills (University College London); Catherine Rogers (Penn State); Stuart MacDonald (Swansea); Theo Truyfonas (Bristol); and Madeline Carr (Aberystwyth). The panels dealt with subjects covered in various chapters of Trachtman's book, including panels on the future of international law, finance and economics, the

2. *See generally* WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW (1964).

3. At the time of this publication, the *Rutgers Law Journal* in Camden, New Jersey, has since merged with the *Rutgers Law Review* in Newark, New Jersey, to form the *Rutgers University Law Review*.

environment and climate change, and cybersecurity and cyberterrorism. One of the symposium aims was to extend Trachtman's thinking into other areas and, therefore, panels on transnational commercial law and private international law were also added. A very sincere thanks to Trey Childress at Pepperdine for organizing the private international law panel and being a great friend to Swansea Law.

The papers you see published here reflect but a small sample of the ideas circulating during the symposium. They capture well the spirit of the event.

Dennis Patterson's *Cosmopolitanism and Global Legal Regimes*[4] helps us to clarify the relationship between the individual and the state to international law through the concept of sovereignty. Patterson starts with the cosmopolitan idea of the individual as the subject of human rights.[5] He then moves into differing notions of sovereignty, as Phillip Bobbitt has articulated them in his book, *Terror and Consent*.[6] Bobbitt's notions of sovereignty include distinctions between the American (transparent) notion of sovereignty that the individual has rights it delegates to the state, the Westphalian (opaque) notion of sovereignty, which clearly demarcates what is internal from what is external to the state, and the notion of pooled sovereignty (translucent) as in the European Union.[7] From here, Patterson argues that recent humanitarian interventions can be explained as instances in which decisions were taken on the basis of a transparent notion of sovereignty.[8] The changing conception of sovereignty, Patterson argues, connects to the development of international law norms around the responsibility to protect and the duty to prevent.[9] These emerging international law norms are necessary, Patterson argues, if we are to take human rights seriously.[10] Patterson's contribution relates to Trachtman's book in a number of ways. It gets us to think about how an international law of cooperation will have to center around notions of sovereignty and human rights that do not only support co-existence. Co-existence would require only a Westphalian or opaque conception of sovereignty, which Patterson claims is outdated.[11] State

4. Dennis M. Patterson, *Cosmopolitanism and Global Legal Regimes*, 67 RUTGERS U. L. REV. 7 (2015).

5. *Id.*

6. PHILIP BOBBITT, TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY 452–83 (2008).

7. Patterson, *supra* note 4, at 10.

8. *Id.* at 12–17.

9. *Id.*

10. *Id.* at 16.

11. *See id.* at 10, 16.

sovereignty will have to be transparent for a true international law of cooperation to get off the ground.

Jan Dalhuisen's *Globalization and the Transnationalization of Commercial and Financial Law*[12] makes an important contribution on what I shall call the infrastructure of global transacting in commerce and finance. Dalhuisen asks what will be the way in which law will develop to deal with globalization. His work should be understood in the emerging tradition of transnational commercial law. He grapples with difficult jurisprudential questions about the concept of transnational law, the role of the state, and state law in the development of this law. Dalhuisen's contribution relates to Chapters 8 and 9 in *The Future of International Law*. Trachtman starts his discussion of the global regulation of finance with the notion of subsidiarity, which he advises helps us understand whether domestic or international regulation is more efficient in improving welfare. Dalhuisen deals with similar questions. He wants to know what kind of law or norms, official state law in the form of municipal law, international law, customary norms governing private transactions, or a combination of sources, might be best for achieving efficiency in global commerce and finance.[13] With these considerations at hand, we have a comprehensive view of what globalization will entail for law on commerce and finance.

John Linarelli's contribution, *Concept and Contract in the Future of International Law*,[14] explores three aspects of Trachtman's book. First, he deals with methodological issues in the book. He distinguishes Trachtman's economic contractarianism, which Trachtman uses to explain or predict the future of international law, from his own moral contractualism, which he uses to put international law through a procedure of moral justification.[15] Second, Linarelli offers a moral critique of the fragmentation of international law, to be contrasted with Trachtman's approach to understanding fragmentation as a practical, as opposed to a moral, problem for international law.[16] Finally, Linarelli agrees with Trachtman that there will be a supplementary and diminished role for customary international law in an international law of cooperation.[17]

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12. Jan Dalhuisen, *Globalization and the Transnationalization of Commercial and Financial Law*, 67 RUTGERS U. L. REV. 19 (2015)

13. *See generally id.* at 19–59.

14. John Linarelli, *Concept and Contract in the Future of International Law*, 67 RUTGERS U. L. REV. 61 (2015).

15. *See generally id.* at 63–74.

16. *See generally id.* at 75–80.

17. *See generally id.* at 80–86.

Simon Baughen's contribution offers another role for customary international law, that of forming the basis of a cause of action in domestic courts.[18] The potential for this to occur in the United States comes from the Alien Tort Statute, which vests federal district courts with jurisdiction for any civil action brought by an alien "for a tort only, committed in violation of the law of nations or a treaty of the United States."[19] Baughen says he wants to determine whether customary international law causes of action in domestic courts are "purely a U.S. phenomenon,"[20] whether such causes of action have a future despite the decision of the U.S. Supreme Court in *Kiobel v. Royal Dutch Petroleum*,[21] and whether such causes of action form the basis for a "new, universal form of civil liability based on violations of customary international law."[22] Baughen concludes that *Kiobel* will make these cases difficult but, agreeing with Trey Childress,[23] argues that state courts in the United States might pick up the slack. Baughen also discusses the evolution of a cause of action based in customary international law in other common law jurisdictions, in particular, in the UK and Canada. Baughen's contribution informs us of the interdependence and malleability of domestic and international law. That interdependence and malleability tells us something about Trachtman's claims about the growth of international law. As international law takes on increasing functions that were once solely the province of states, states may be asked to take on functions that they have special advantages to handle, such as in the adjudication of complex international law claims in their courts. This interdependence may evolve as the demand for law shifts to accommodate globalization.

The "Global Law—Global Challenges" symposium at Swansea was a wonderful event. I wish to express my sincerest gratitude to the editors and staff of the *Rutgers Law Journal* for their dedication in publishing a selection of papers from the symposium. As an American lawyer serving as a dean of a British law school, I experience every day the mutual commitment Welsh, English, and American lawyers share in the common law tradition and the values it upholds. And we were very gratified to have our Finnish colleagues, whose legal tradition is thoroughly

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18. Simon Baughen, *Customary International Law and its Horizontal Effect? Human Rights Litigation Between Non-State Actors*, 67 RUTGERS U. L. REV. 89 (2015).

19. 28 U.S.C. § 1350 (2004).

20. Baughen, *supra* note 18, at 89.

21. 133 S. Ct. 1659 (2013).

22. Baughen, *supra* note 18, at 89–90.

23. Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709 (2012).

European and cosmopolitan, join us at this conference. It is my earnest hope that Swansea Law will continue to develop the transatlantic and European conversation on the future of international law.

In the ancient language gracing these verdant isles:

Diolch i chi a dymuniadau gorau.

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