

**BOSTON COLLEGE LAW REVIEW and the
INTERNATIONAL & COMPARATIVE LAW REVIEW**

present

**FILLING POWER VACUUMS IN THE
NEW GLOBAL LEGAL ORDER**

Friday, October 12, 2012 | 9:00 a.m. – 5:15 p.m. | East Wing room 200

Keynote Address: Anne-Marie Slaughter

*Bert G. Kerstetter '66 University Professor of Politics
and International Affairs at Princeton University*

East Wing room 120 | 1:00 p.m.

Panel Discussions

*Globalization, Deregulation, Power and Agency
Legal Practice and the Legal Profession in the Global World
Combat Strategies and the Law of War in the Age of Terrorism*

For more information, please visit us online: www.bc.edu/newgloballegalorder

With support from the Clough Center for the Study of Constitutional Democracy



**BOSTON
COLLEGE | LAW**

SCHEDULE OF EVENTS

9:00 am: **Welcome**

9:05 am: **Introduction to Symposium Themes** (Frank Garcia, Boston College Law School)

9:15 am – 11:00 am: **Panel 1: Globalization, Deregulation, Power, and Agency**

Moderator: Paulo Barrozo, Boston College Law School

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.

Panelists:

Daniel Bradlow, American University Washington College of Law

Sara Dillon, Suffolk University Law School

Fiona Smith, University College London

Upendra Acharya, Gonzaga University School of Law

Mathias Risse, Harvard University Kennedy School of Government

11:00 am: **Coffee Break**

11:10 am – 12:15 pm: **Panel 2: Legal Practice and the Legal Profession in the Global World**

Moderator: Gail Hupper, Boston College Law School

How the devolution of power to other spheres affects legal practice internationally, and how legal practitioners create structures that supplement or replace state power.

Panelists:

David Wilkins & Mihaela Papa, Harvard Law School

John Flood, University of Westminster

Stephen Meili, University of Minnesota Law School

Newcomb Stillwell, Ropes & Gray

12:15 pm: **Lunch Break**

1:00 pm – 2:15 pm: **Keynote Presentation**

Keynote Speaker:

Anne-Marie Slaughter, Bert G. Kerstetter '66 University Professor of Politics and International Affairs, Princeton University

2:15 pm: **Coffee Break**

2:25 pm – 4:30 pm: **Panel 3: Combat Strategies and the Law of War in the Age of Terrorism**

Moderator: David Wirth, Boston College Law School

Analysis of the need for new rules of engagement and a modified understanding of the law of war as a result of the war on terror.

Panelists:

Gregory Teran, Wilmer Cutler Pickering Hale and Dorr

Phillip Weiner, Court of Bosnia & Herzegovina

Rich DiMeglio, Judge Advocate General's Legal Center and School

David Benjamin, Former Israeli Military Advocate General

Gabor Rona, Human Rights First

4:30 pm: **Plenary Discussion Session**

5:15 pm: **Closing Remarks & Adjournment**

ABOUT THE SYMPOSIUM

Globalization is a complex social process with many descriptions, definitions, critics, proponents, causes, and implications. This symposium will focus on the consequences of one salient and nearly universally-acknowledged feature of globalization—the devolution of power from the state. The symposium will examine a question that so far has received little attention in scholarly legal literature: after power has been decentralized from a state-centric monopoly, where does it flow, and what forms does it take?

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ABOUT THE *BOSTON COLLEGE LAW REVIEW*

The *Boston College Law Review* is the oldest scholarly publication at Boston College Law School. It publishes five books (as well as an electronic supplement) each year concerning legal issues of national interest. In recent years, the *Review* has published articles and essays written by prominent outside authors such as Professor Benjamin Spencer, Professor Martha Minow, and Richard Cordray, former Attorney General of Ohio. In addition to articles written by outside academics, the *Review* prints the work of its student staff writers, roughly one-third of whom publish their notes during their third year. Recent editions have contained student notes examining such diverse issues as First Amendment protection of videogames, plea bargains struck by enemy combatants under the threat of detention, trademark disputes between high school and college athletic teams, and sunset provisions of renewable energy tax credits.

* * *

ABOUT THE *BOSTON COLLEGE INTERNATIONAL & COMPARATIVE LAW REVIEW*

Founded in 1975, the *Boston College International & Comparative Law Review* is one of approximately thirty law reviews in the United States that focus on international legal issues. Published twice annually (plus an annual electronic supplement), the *Review* features articles by outside authors and notes by students. The *Review's* scope is expansive, and it pursues articles that address a variety of international and comparative law issues including human rights, cross-border environmental disputes, arms control, covert action, international investment, International Court of Justice jurisdiction, and terrorism. Because a growing number of domestic policy issues have international implications, these areas of International Law are becoming increasingly important to U.S. practitioners. The *Review's* thirty-member staff (fifteen second-year and fifteen third-year students) comprises individuals with diverse backgrounds and interests. It is a group dedicated to offering insightful treatment of contemporary legal issues that are at the forefront of the international arena.

ABOUT THE CLOUGH CENTER FOR THE STUDY OF CONSTITUTIONAL DEMOCRACY

The Gloria L. and Charles I. Clough Center for the Study of Constitutional Democracy at Boston College is dedicated to interdisciplinary reflection on the promise and problems of constitutional government in the United States and throughout the world. The center sponsors scholarly lectures, conferences, and colloquia; provides financial support for faculty, graduate and undergraduate research; offers internship and junior fellowship programs for Boston College undergraduates; and hosts the Boston Area Public Law Workshop, which brings together a community of scholars from colleges and universities around the Boston area to discuss important works in progress dealing with questions of constitutional government. Through these and other initiatives, the Clough Center serves as a hub for reflection upon some of the most significant questions concerning self-government under the rule of law.

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Requests for further information regarding the symposium articles that will appear in a joint issue of the *Boston College Law Review* and the *International & Comparative Law Review* (to be published in May 2013) may be directed to John Gordon at gordonjo@bc.edu.

BOSTON COLLEGE LAW REVIEW

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PANEL 1: GLOBALIZATION, DEREGULATION, POWER AND AGENCY

9:15 – 11:00

OVERVIEW:

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.

Paulo Barrozo, Boston College Law School, Moderator

PANELISTS:

Daniel Bradlow, American University Law School

Daniel Bradlow is a Professor of Law at American University's Washington College of Law, as well as the SARCHI Professor of International Development Law and African Economic Relations at the University of Pretoria, South Africa. He is the co-coordinator of the Global Economic Governance Africa project, a joint project of the Centre for Human Rights, the University of Pretoria, and the South African Institute for International Affairs. Professor Bradlow has published numerous articles on a range of topics related to global economic governance. In addition to his academic activities, Professor Bradlow is an expert member of the African Commission on Human and People's Rights Working Group on Extractive Industries, the Environment, and Human Rights. He is the Chair of the Roster of Experts for the Independent Review Mechanism at the African Development Bank. He is a member of the Board of Directors for both New Rules for Global Finance and the Executive Council of the American Society of International Law. He is also currently the Co-Rapporteur of the International Law Association study group on the Responsibility of International Organizations. He received an LL.D. from the University of Pretoria, an LL.M. from Georgetown University Law Center, a J.D. from Northeastern University Law School, and a B.A. from the University of Witwatersrand in South Africa.

Abstract: *International Law and the Assessment of Global Economic Governance*

This presentation proposes a framework for critically assessing the current arrangements for global economic governance. Its premise is that because the decisions and actions of the current institutions and actors affect all stakeholders in the global economy, they should be subject to some form of accountability. While the international legal principles that are applicable to global governance give rise to two useful tests for assessing global economic governance, they are not sufficient for a meaningful evaluation of global economic governance activities and policies. The presentation dis-

cusses three additional non-legal factors for assessing global economic governance, and concludes by proposing a five-part test for evaluating global economic governing actors and activities.

Sara Dillon, Suffolk University Law School

Sara Dillon is a Professor of Law at Suffolk University Law School, where she teaches courses focusing on various areas of International Law. Professor Dillon has written widely on such topics as international sex trafficking, children's rights, and international trade law from an environmental and developmental perspective. She is currently working on a book on international children's rights for Oxford University Press. Prior to joining the Suffolk faculty in 2001, Professor Dillon was a member of the law faculty at University College Dublin. She received her J.D. from Columbia University, and a Ph.D. in Japanese from Stanford University.

Abstract: *Opportunism and Trade Law Revisited: The Pseudo-Constitutionalism of the World Trade Organization (WTO)*

In this presentation, I expand upon my earlier theory of "opportunism" in the WTO, as set out in an essay from 2008.¹ This opportunism operates on several levels: first, in the motives of multinational corporations in seeking to "constitutionalize" free trade doctrines in the form of trade agreements; second, among trade law scholars, who have failed to interest themselves in the desirability of these agreements (measured in terms of their real-world effects); and finally, national governments, who have scored points by defending the "national" interest in WTO litigation, while privileging certain actors within their own socio-economic environments. From the point of view of populations adversely affected by the working-out of free trade agreements (such as labor interests within the United States), none of these opportunistic actors serve the urgent public need for information and understanding.

The presentation explores the manner in which the law of the WTO has been presented to the general public as something other than what it is, and as something self-evidently beneficial. Along with the glorification of the idea of unrestricted free trade, the agreements have been associated with dynamism, globalization, and other intellectual trappings of modernity and progress. By placing the insatiable need of multinational corporations for inexpensive and compliant labor under the mantle of "public international law," free trade agreements have successfully eliminated a wide range of political choices from sovereign governments. At the same time, trade scholars have focused largely on the techniques of trade disputes, which

¹ See Sara Dillon, *Opportunism and the WTO: Corporations, Academics and "Member States,"* in INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE (Colin Picker et al. eds., 2008).

are of far less significance than the underlying imperative contained within the rules themselves. By reference to a burgeoning (non-legal) literature on inequality within the United States, I situate these international trade laws within a general trend towards greater corporate influence over governments, and a reordering of the capital-labor relationship over the last two decades. I go on to suggest that most of the voluminous “trade and labor” scholarship of the past fifteen years has been all but meaningless, and at best distracting, if assessed in terms of its ability to address the concerns of labor interests in a globalizing world. The endless debates over how the WTO bodies ruling on trade disputes might or should react to trade-labor intersectional questions have taken place in a manner that seems oblivious to the rapid process of shifting manufacturing jobs to the most “efficient” locales. Much of the writing on WTO law has been based on the myth that the trade bodies act as referees in the free and fair exchange of goods that supposedly retain a “national” identity.

Fiona Smith, University College London

Fiona Smith is a senior lecturer at University College London. She has written widely on WTO law and international agricultural trade. She is currently working on a two-year project on *Food Security, Foreign Direct Investment, and Multilevel Governance in Weak States*, funded by the Swiss National Fund at the World Trade Institute in Switzerland. She is also the founder and now co-director of the WTO Scholars’ Forum. In March 2012 she was appointed as expert on International Economic Law to the funding body Research Foundation Flanders. She is a member of the editorial board of the journal *Jurisprudence*. Prior to accepting a teaching post at UCL, Professor Smith held posts at the University of Sheffield and the University of Leicester. She received her LL.B. from the University of Wales, an LL.M. from Leicester University, and a Ph.D. from Leicester University.

Abstract: *Locating Power in the WTO*

In a globalized world, power inevitably devolves to structures existing beyond the nation-state. Sophisticated, highly complex international organizations like the World Trade Organization (WTO) are often thought to be a logical new locus for some of this devolved power. The state may still retain some power in such a structure, but that power is inevitably diluted among the plethora of other states (and states within regional trading groupings) that are members of the organization. Likewise, new entities within the international organization also gain power, for example, in the WTO’s case, the Secretariat, the committees, and the dispute settlement bodies (the panels and the Appellate Body).

In all these cases, the focus in the literature remains on charting the activities of entities that actually *act* as a way of identifying where the power is and how it is exercised. It is assumed that power must be located in *something* that is dependent on human actors at one level or another for its destiny. If the extent of the human activity within the entity is understood, then it can be changed and ultimately controlled. But what if that is not the case? What if power is located in a much more nebulous place that controls the human activity in a more tangible way than it at first appears? In my presentation, I challenge the traditional positivist conception of power, which is given particularly erudite expression in Koskienniemi's account of the political nature of public international law in *From Apology to Utopia*.² I argue that the law, specifically the language of the rules in the treaty establishing the WTO, is an important global actor in its own right. I show how the WTO treaty language shapes the debate in subtle and yet profound ways, often outside the control of trade negotiators and other institutional actors.

Upendra Acharya, Gonzaga School of Law

Upendra D. Acharya is a Professor of Law at Gonzaga University School of Law. Professor Acharya has written numerous articles on International Law, constitutional law, administrative law, and comparative law, and has presented papers and delivered lectures at national and international conferences throughout the world. Prior to joining the faculty at Gonzaga, Professor Acharya taught for five years at Tribhuvan University Law School in Kathmandu, Nepal. While in Nepal, he also represented several landmark cases in the Supreme Court of Nepal, including daughters' right to inherent property and the Godabary Marble Case that resulted in the enactment of a comprehensive environmental protection scheme in Nepal. He also has worked toward eradicating bonded labor systems in far western areas of Nepal. He received an S.J.D. from the University of Wisconsin Law School, an LL.M. from the University of Utah College of Law, an M.C.L. from the University of Delhi, India, and an LL.B. from Tribhuvan University, Kathmandu, Nepal.

Abstract: Globalization and Hegemony Shift: Are States Merely Agents of Corporate Capitalism?

Globalization has played a vital role in limiting and delimiting our imagination, understanding, expectation, and practice of International Law, and its role in today's world. Globalization has affected modern rights movements everywhere and has become an instrument to reduce faith in the traditional notion of sovereign authority and rule of International Law. Never-

² See generally MARTTI KOSKIENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (Cambridge Univ. Press 2005) (reissue with new epilogue).

theless, the tentacles of globalization—free movements of goods, services, capital, and technology—have insinuated the modernist epistemology of one-dimensional western morality, civilization, and its values that all societies in the world without reference to social or cultural pluralism must adhere to. The unique method of globalizing such values is economically rational and organizationally structured in such a way that the scope of human sentiments and alternative imaginative capacity is nonexistent.

During the pre-globalized era, transnationalization of capital and laws to protect the capital and its agents were used to maintain or demonstrate the hegemony of powerful states. During the globalized era at present, states seem to act as agents of corporate capitalism while borrowing (but ignoring) their legal and legitimate sovereign authority from people and the system of governance. This change in dynamics of states' functions due to globalization has pronouncedly shifted hegemony from states to corporate capitalism, and this shift has challenged the meaning and modus operandi of the existing system of International Law. Not only states, but also international organizations, including international financial and trade organizations and non-governmental organizations, have become instrumental in serving the purpose of corporate capitalism. It appears that all legitimate authorities and actors, national and international, are bandwagoning after corporate capitalism in the name of human rights, democracy, regime change, humanitarian intervention, war as an instrument for peace, and manufacturing business of internal conflict.

Mathias Risse, Harvard Kennedy School of Government

Mathias Risse is Professor of Philosophy and Public Policy at the Kennedy School of Government at Harvard University. He works mostly in social and political philosophy and in ethics. His articles have appeared in journals such as *Ethics*, *Philosophy and Public Affairs*, *Nous*, the *Journal of Political Philosophy*, and *Social Choice and Welfare*. He studied philosophy, mathematics, and mathematical economics at the University of Bielefeld, the University of Pittsburgh, the Hebrew University of Jerusalem, and Princeton University. Before coming to Harvard, he taught in the Department of Philosophy and the Program in Ethics, Politics and Economics at Yale. His book *On Global Justice* was published by Princeton University Press, and *Global Political Philosophy* was published by Palgrave Macmillan, both in the fall of 2012. The former sets out a comprehensive theory of how to think about justice at the global level. The latter is an introduction to political philosophy that starts with normative questions that arise at the global level (rather than with questions that arise at the level of individual countries).

Abstract: Grounds for Global Justice and Implications for International Institutions

Traditional modes of thought about justice at the global level tend either to dis-apply justice to states or else extend it to all people in addition to states. The view I defend rejects both of these approaches and instead recognizes different considerations or conditions, based on which individuals are in the scope of different principles of justice. My view acknowledges the existence of multiple grounds of justice. This presentation seeks to present my foundational theory³ that views as plausible the existence of multiple grounds of justice, and defends a specific view of the grounds that I call pluralist internationalism. Pluralist Internationalism qualifies the state's relevance by embedding the state into other grounds that are associated with their own principles of justice. The grounds that I discuss 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. (It is probably in the conceptualization of common ownership as a ground of justice that my view seems strangest.) Within this theory, one must explore what obligations of justice pertain to states and other institutions. International institutions must be understood as agents of justice (rather than as entities that merely advance particular state interests). Moreover, it is international organizations or other entities of global administrative law that most plausibly create the context in which states give account to noncitizens for their contributions to justice.

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³ See MATHIAS RISSE, *ON GLOBAL JUSTICE*, at ix-x (2012).

**PANEL 2: LEGAL PRACTICE AND THE LEGAL PROFESSION
IN THE GLOBAL WORLD**

11:10 – 12:15

OVERVIEW:

How the devolution of power to other spheres affects legal practice internationally, and how legal practitioners create structures that supplement or replace state power.

Gail Hupper, Boston College Law School, Moderator

PANELISTS:

David Wilkins & Mihaela Papa, Harvard Law School

David Wilkins is the Lester Kissel Professor of Law, the Vice Dean for Global Initiatives on the Legal Profession, and the Faculty Director of the Program on the Legal Profession and the Center for Lawyers and the Professional Services Industry at Harvard Law School. Professor Wilkins is also a Senior Research Fellow at the American Bar Foundation and a Faculty Associate of the Harvard University Edmond J. Safra Foundation Center for Ethics. He was recently elected to the American Academy of Arts & Sciences. The legal profession has been the focus of Professor Wilkins's scholarship and he is the co-author of one of the leading casebooks on the subject. His other research interests include legal ethics, diversity, and globalization.

Mihaela Papa is a postdoctoral research fellow at Harvard Law School where her focus has been on conceptualizing and managing research on the Globalization, Lawyers, and Emerging Economies project, as well as pursuing research interests in the globalization of the legal profession, the politics of lawyering in international dispute settlement, and questions of level playing field and reciprocity of law practice between the United States and emerging economies. She is currently working on a comparative study of India's, Brazil's, and China's efforts to develop legal capacity and strategize in the context of trade and investment regimes. Ms. Papa has also taught Global Governance and International Organization at Boston University, and published a book on the reform of global environmental governance. Before her graduate studies, Ms. Papa worked at the Ministry of Foreign Affairs of the Republic of Croatia. She received her Ph.D. in International Relations as well as her M.A. in Law and Diplomacy from the Fletcher School at Tufts University, and a B.A. in Economics-Trade from the University of Zagreb, Croatia.

Abstract: *The Rise of the Corporate Legal Elite in the BRICS: Implications for Global Governance*

Over the last two decades, there has been a proliferation of corporate lawyers in emerging economies. As emerging markets opened up and the demand for corporate legal work increased, law firms and in-house counsel have grown in size and numbers, and started engaging in collective action. The rise of the new corporate legal elite occurs at a time when the role and impact of private actors on global governance is gaining increasing attention in socio-legal scholarship and as international relations scholarship debates the consequences of the economic and political power shift. What are the conceptual issues raised for global governance by the rise of the new corporate legal elite in emerging markets? What are the empirical directions that can explain its impact on global governance trajectories? This presentation seeks to answer these questions by situating the rise of corporate lawyers (top law firms and in-house counsel) in the context of global governance literature and conceptualizing the rise of the corporate legal elite in the BRICS (Brazil, Russia, India, China, and South Africa).

John Flood, University of Westminster

John Flood is a Professor of Law and Sociology at the University of Westminster. Professor Flood's research focuses on the legal profession and the globalization of law. Under the patronage of the German Science Foundation at Bremen University, Professor Flood recently studied cross-border lawmaking in large law firms. He is also currently working on a book project on globalization, law, and lawyers. Professor Flood previously worked at the American Bar Foundation as a research associate, was an Exxon Fellow in Ethics at the Poynter Center at Indiana University, a Jean Monnet Fellow at the European University Institute in Florence, and a Visiting Fellow at the Institute of Advanced Legal Studies. Professor Flood studied law and sociolegal studies at the London School of Economics, Warwick, and Yale Law School, and received a Ph.D. in Sociology from Northwestern University.

Abstract: *Redesigning Large Law Firms in the 21st Century: How the U.K. Is Reshaping the Global Legal Services Market*

Over the last 160 years, British corporate law firms have maintained a deliberate global outlook on their work. There are many reasons for this, including small domestic markets and aggressive, outreaching corporate clients who used the British Empire as their vehicle. In the field of globalization, large U.K. law firms (or corporate law firms as most were quite small until the 1960s) have exported English law as the main means of providing normative structures to transnational work. For example, in the 1970s London law firms explicitly stated that they marketed English law. The result is

that with their strong ties to financial and manufacturing services, English law spread far and wide. Despite the growth of U.S. law firms following World War II with the great surge in internationalization, U.K. firms adopted specific globalization strategies based on mergers and colonization. The competition between New York and English law spilled over into dispute resolution including arbitration. English courts in alliance with law firms actively sought foreign litigants.

A parallel movement took place in the regulatory sphere. The rise of neo-liberalism gave vent to a new wave of competition policy that infected the professions including law. Self-regulation came under attack from the Thatcher government and subsequent governments culminating in the Legal Services Act 2007 (LSA). The LSA permits integrated practices known as “alternative business structures,” which run afoul of U.S. rules and many others. However, the LSA opens up the possibility of external investment for firms, giving a huge competitive advantage in global positioning. The push to external regulation that came out of the LSA (with a new range of legal regulators) has been subverted or redefined by the large law firms. With the adoption of risk-based regulation, law firms have been able to redefine the regulatory compact by creating an array of new structures that accomplish risk management. The result is “Authorized Internal Regulation,” a form of self-audit based on analysis of principles laid down by the regulator. With this, large law firms have been able to escape the grip of external regulation and re-create a new form of self-regulation. The combined effects of U.K. law firms’ globalization strategies, new self-regulation, and release from antiquated restrictive professional constraints have situated U.K. law firms in such a way that they can become powerful agents in the creation of a new global *lex mercatoria*. The presentation borrows from the literature on “born globals” to show how a co-evolutionary approach deploying new forms of knowledge while recreating and reshaping old forms, in this case regulatory theory, enables law firms to adapt and thrive in the new economy.

Stephen Meili, University of Minnesota Law School

Stephen Meili is the Vaughan G. Papke Clinical Professor in Law at the University of Minnesota Law School, where he supervises students in the law school’s Immigration and Human Rights Clinic. Under Professor Meili’s supervision, students represent asylum-seekers and detainees in U.S. Immigration Court and before the Board of Immigration Appeals. Professor Meili’s research complements his teaching activities. Professor Meili received a National Science Foundation grant to support his current research on the impact of human rights treaties on asylum jurisprudence and practice. In addition, Professor Meili has co-authored two recent articles on human rights issues:

“Recent Developments in the Human Rights of Trafficked Persons” in *Human Rights and Migration: Trafficking for Forced Labour* (2012) and “Human Rights and Protection of Non-Citizens: Whither Universality and Indivisibility of Rights?” 28 *Refugee Survey Quarterly* 34 (2010). He received his LL.M. from Georgetown University Law Center, his M.A. and J.D. from New York University, and his B.A. from Dartmouth College.

Abstract: *U.K. Refugee Lawyers: Pushing the Boundaries of Domestic Court Acceptance of International Human Rights Law*

Over the past two decades, International Law in many parts of the world has been moving in a less state-centric direction and more toward universal protection of human rights through, for example, the creation of the International Criminal Court, the emergence of Universal Jurisdiction (e.g. the Pinochet case), and international ad hoc tribunals (for Rwanda and Yugoslavia). At the same time, the world has witnessed the erosion of state sovereignty as the chief organizing principle of international relations. Much as globalization of commerce has changed the international marketplace, globalization of human rights law has changed the way many countries treat non-citizens within their borders.

Asylum law illustrates vividly the ways that globalization creates tension between state and international power. On the one hand, the global migration of people seeking relief from persecution has—through international treaties like the 1951 Convention relating to the Status of Refugees—created international legal norms that supplant state power to decide which persons can remain within a country and which can be removed/excluded. On the other hand, states have continually attempted to reassert their power over borders by resisting the application of international norms in a variety of ways. This struggle has become more acute over the past ten years in many receiving nations, including the U.K., due to a general anti-immigrant sentiment that is exacerbated by security concerns.

This presentation explores the ways that lawyers representing asylum-seekers in the U.K. navigate the space between diminished, yet still formidable, state authority over refugee status and the continuing emergence of international norms that pose a threat to such authority. It analyzes how lawyers simultaneously support traditional state power over refugee matters through reference to U.K. law (e.g., the Human Rights Act) while putting pressure on courts to accept broader (or more creative, as some lawyers put it) applications of international human rights treaties in individual asylum cases. On the basis of this analysis, it argues that lawyers play a critical role in filling the void created by the diminution of state power over refugee matters created by globalization.

Newcomb Stillwell, Ropes & Gray

Newcomb Stillwell serves as Ropes & Gray's Strategic Development Partner. He represents large private equity firms in mergers and acquisitions. His clients include Bain Capital, TPG, The Blackstone Group, TA Associates, and Huntsman Gay Capital Partners. In addition to his private practice, Mr. Stillwell has served as a lecturer on mergers and acquisitions and related topics at Harvard Law School, and acted as a Negotiations instructor at Harvard Business School. He also serves on the Board of Directors for Volunteers of America of Massachusetts, Inc.; Cradles to Crayons, Inc.; and the Massachusetts Society for the Prevention of Cruelty to Children.

Abstract: Mr. Stillwell will serve as a commentator on the other panelists' presentations.

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KEYNOTE ADDRESS

1:00 – 2:15

INTRODUCTION: **Frank Garcia, Boston College Law School**

KEYNOTE SPEAKER: **Anne-Marie Slaughter, Bert G. Kerstetter '66 University Professor of Politics and International Affairs at Princeton University**

Anne-Marie Slaughter is the Bert G. Kerstetter '66 University Professor of Politics and International Affairs at Princeton University. From 2009 to 2011 she served as Director of Policy Planning for the United States Department of State, the first woman to hold that position. Upon leaving the State Department, she received the Secretary's Distinguished Service Award for her work leading the Quadrennial Diplomacy and Development Review, as well as a Meritorious Honor Award from the U.S. Agency for International Development and a Joint Civilian Service Commendation Award from the Supreme Allied Commander for Europe. Prior to her government service, Dr. Slaughter was the Dean of Princeton's Woodrow Wilson School of Public and International Affairs from 2002 to 2009, where she rebuilt the School's international relations faculty and created a number of new centers and programs.

Dr. Slaughter is a frequent contributor to both mainstream and new media, publishing op-eds in major newspapers, magazines, and blogs around the world. She appears regularly on CNN, the BBC, NPR, and PBS, lectures widely, and has served on boards of organizations ranging from the Council of Foreign Relations and the New America Foundation, to the McDonald's Corporation and the Citigroup Economic and Political Strategies Advisory Group. She is a member of the Aspen Strategy Group. *Foreign Policy* magazine named her to their annual list of the Top 100 Global Thinkers in 2009, 2010, and 2011. She has written or edited over 100 articles and six books, including *A New World Order* (2004) and *The Idea That Is America: Keeping Faith with Our Values in a Dangerous World* (2007).

PANEL 3: COMBAT STRATEGIES AND THE LAW OF WAR IN THE AGE OF TERRORISM

2:25 – 4:30

OVERVIEW:

Analysis of the need for new rules of engagement and a modified understanding of the law of war as a result of the war on terror.

David Wirth, Boston College Law School, Moderator

PANELISTS:

Gregory Teran, Wilmer Cutler Pickering Hale and Dorr

Gregory Teran, a former Air Force officer, is a litigation partner at Wilmer-Hale LLP, whose practice focuses on intellectual property litigation. Mr. Teran was named a “New England Super Lawyer” in 2008. He received his J.D. from Harvard Law School and a B.S. in Electrical Engineering from the Massachusetts Institute of Technology.

Abstract: *Boumediene v. Bush: A Brief Case Study on a High-Profile “Targeting” and Detention Decision in the Post-9/11 Age, and Its Consequences*

In 2008, I represented six Algerian-born men held at Guantanamo Bay in habeas corpus proceedings, culminating in a six-day classified evidentiary hearing concerning the U.S. Government’s case for detention. My clients had been residing in Bosnia when they were arrested for allegedly planning to bomb the U.S. Embassy there.⁴ After being released from Bosnian prison, they were captured and transported to Guantanamo Bay.

On November 20, 2008, Judge Richard J. Leon ruled that the Government’s classified evidence could not justify detention of five of the six men. Judge Leon’s decision that the sixth man was detainable was later reversed and remanded for additional evidentiary proceedings. My presentation will discuss this litigation, and its relevance to modern-day apprehension of combatants.

Phillip Weiner, Court of Bosnia & Herzegovina

The Honorable Phillip Weiner recently completed a four-year appointment as an International Judge at the Court of Bosnia & Herzegovina where he was responsible for war crimes cases. Although serving as an Appellate Judge, he was also assigned to preside over a number of trials. His cases have involved allegations of War Crimes, Crimes against Humanity, and Genocide. From 2001 to 2007, he served in the Office of the Prosecutor at the International Criminal Tribunal for the Former Yugoslavia (Den Haag,

⁴ *Boumediene v. Bush*, 579 F. Supp. 2d 191, 193 (D.D.C. 2008), *rev’d*, *Bensayah v. Obama*, 610 F. 3d 718 (D.C. Cir. 2010).

Netherlands). While there, he was a prosecutor on four trials, serving in a leadership capacity in each case. He returned to the United States as a Visiting Professor of Law at Boston College Law School, where he taught Criminal Law and Criminal Procedure. He served again as a prosecutor in Massachusetts until his appointment in 2008 to the Court of Bosnia & Herzegovina. From 1980 to 2000, he worked primarily as a prosecutor in the Commonwealth of Massachusetts. Judge Weiner holds a J.D. from Boston College Law School, and a B.A. from Northeastern University.

Abstract: Emergence of Rape Doctrine in International War Crimes Litigation

Rape is one of the oldest known crimes. Although it has long been a prohibited act in times of war, its occurrence remains pervasive. Until recently, this age-old crime had not been defined in International Law. In fact, it was only in the late 1990s, in *Prosecutor v. Jean-Paul Akayesu*, that an international court provided a definition of this crime. In the cases that followed in international tribunals, the courts provided varying opinions as to what constituted the elements of rape. In the statute of the International Criminal Court, portions of the various decisions were combined to arrive at a specific definition of rape.

The debate over rape—namely, the elements constituting the crime and the methods of proving those elements—has been ongoing for many years in domestic courts and legislatures. For example, in the United States, the issues for consideration have included: the requirement of corroboration and resistance, the extent of rape shield, mens rea, available defenses, and fresh complaint. Moreover, with our increased awareness of the nature and extent of sexual violence, there have been major changes in these matters over the past forty years.

Rich DiMeglio, Judge Advocate General's Legal Center & School

Lieutenant Colonel Rich DiMeglio, U.S. Army, is currently Professor and Chair of the International and Operational Law Department at the Judge Advocate General's Legal Center and School (TJAGLCS), in Charlottesville, Virginia. He supervises nine joint service field grade officers and oversees international and operational law instruction to over 5,000 attorneys in residence each year, and several thousand more through distributive learning and programs taught at locations around the world.

Lt. Col. DiMeglio has served in a wide variety of assignments around the world as both a military intelligence officer and a Judge Advocate for over nineteen years. He has deployed to Haiti, Bosnia, Iraq, and Afghanistan, including a fourteen-month deployment to Iraq as a Brigade Judge Advocate, where he was the legal advisor to a Brigade Commander and respon-

sible for legal operations for an Airborne Infantry Brigade Combat Team consisting of six battalions, thirty-two company-level commands, and over 3,600 Paratroopers. He holds a J.D. from the University of Virginia School of Law, an LL.M. in Military Law from TJAGLCS, an M.A. in Foreign Affairs from the University of Virginia, and a B.A. in Russian and French Languages from the U.S. Military Academy, West Point.

Abstract: *Training Army Judge Advocates to Advise Commanders as Operational Law Attorneys*

Imagine you are an Army lawyer—a Judge Advocate—who recently deployed to a dusty Forward Operating Base in a remote corner of the earth embroiled in conflict. It is late at night when you receive notification that one of the battalion commanders in the brigade wants to talk to you about a potential target. The battalion commander tells you that his tactical operations center currently has an unmanned aerial vehicle observing three individuals, dressed in local attire, digging with shovels on the side of a road, several kilometers away from the base.

The commander reminds you that a tactic of the local insurgents is to dig holes on the side of the road in the middle of the night to emplace improvised explosive devices, with the goal of targeting U.S. convoys when they pass by. You also know, however, that the local villagers sometimes dig irrigation ditches, which often parallel the roads, in the middle of the night to avoid insurgent harassment. Further, you are keenly aware that the road is highly used by local traffic, and a kinetic strike at that site may not only injure a civilian driving by, but also damage the road, impeding transportation and the movement of daily supplies to some local villages.

The battalion commander does not have ground forces in close proximity to the site, but he tells you he is reasonably certain about the intelligence. He states that he can lethally target the individuals with his organic indirect fire artillery assets. The battalion commander stresses that the three individuals will likely depart the area within a few minutes, so the issue is time sensitive, and he must make a decision quickly.

The commander is talking to you about the Rules of Engagement (ROE) and the legality of killing the individuals. Although he understands that he ultimately makes the decision, he wants your advice. What do you say? Are you prepared to advise the commander on these issues?

How does the Army and its Judge Advocate General's Corps (JAG Corps) prepare its Judge Advocates to operate in these complex legal environments as operational law attorneys? How does the JAG Corps develop officers who can operate in environments where the evolving rules and the shifting operations require them to not only understand both the underlying

law and policy, but also be innovative and nuanced? This talk will highlight several ways the Army JAG Corps trains its Judge Advocates in formal settings at The Judge Advocate General's Legal Center and School, through a responsive lessons-learned process, and through field training at Combat Training Centers to operate and succeed in today's complex environments.

David Benjamin, Former Israeli Military Advocate General

David Benjamin is an Israel-based attorney and international consultant specializing in International Law, the Law of Armed Conflict, and Counter-Terrorism. He is the founder and director of *SILS—Security & International Law Specialists*, an international consulting service providing advice and training in matters of International Law relating to national security and counter-terrorism. He also lectures widely and is a frequent commentator in the Israeli and international media. Previously, Lt. Col. Benjamin was a career-officer in the Israel Defense Forces Military Advocate General's Corps, where he served as Chief Legal Advisor for the Gaza Strip, and as Director of the Strategic and International Branch in the International Law Department. While serving in these positions, Lt. Col. Benjamin was called upon to provide operational legal advice to military commanders and was involved in drafting the State's arguments in response to numerous petitions submitted to the Israel Supreme Court. He holds an LL.M. from Tel-Aviv University and a B.A. in Law and Political Science from the University of Cape Town.

Abstract: The Charge of the Lawyers Brigade: Coping with the Legal Challenges Faced by Israel's Military on the Battlefield

Israel's military, and its military lawyers in particular, are at the forefront of developments in the law of armed conflict. This presentation examines a number of factors that explain why Israel is often the first country to confront these emerging legal issues. First among them is the type of disputes Israel has been engaged in over the last decade: asymmetrical conflicts against non-state terrorist groups with substantial military capabilities (such as Hamas and Hezbollah), featuring heavy civilian presence on the battlefield. Second, legal developments result from the Israeli Supreme Court's close judicial supervision of Israel's military activities. Finally, the public attention focused on Israeli military lawyers results from intense scrutiny by international bodies and NGOs.

Gabor Rona, Human Rights First

Gabor Rona joined Human Rights First in 2005. In his role as International Legal Director, Mr. Rona advises Human Rights First programs on questions of International Law and coordinates international human rights litigation. He also represents Human Rights First with governments, intergovernmental and non-governmental organizations, the media, and the public on matters of international human rights and international humanitarian law. Before joining Human Rights First, Mr. Rona was a Legal Advisor in the Legal Division of the International Committee of the Red Cross (ICRC) in Geneva where he focused on the application of international humanitarian and human rights law in the context of counter-terrorism policies and practices. He also represented the ICRC in connection with the establishment of international and other criminal tribunals, including the International Criminal Court. His written work on the subject has appeared in the *Financial Times*, the *Fletcher Forum on World Affairs*, and the *Chicago Journal of International Law*, among others. Mr. Rona has also taught courses in International Humanitarian Law and International Criminal Law at the International Institute of Human Rights in Strasbourg, France and the University Centre for International Humanitarian Law in Geneva, Switzerland.

Abstract: *International Humanitarian Law and Its Applicability in Novel Theaters of War*

Legal advice in the tactical field is likely to be flawed if the legal advisor's training is flawed. The war on terror is putting terrible pressure on traditional principles of International Humanitarian Law (IHL), including distinction, proportionality, and precautions. This has been the subject of some debate, especially in connection with drones. But less often discussed is an *a priori* question: does the context even constitute armed conflict so as to trigger the application of powers to kill under IHL? This presentation addresses some of the complex questions that arise from that query: What is the consequence of asserting IHL where it does not belong? Do the military and CIA always apply IHL rules, regardless of whether the context is armed conflict? What are the policy considerations in how the scope of application and content of IHL are applied to counter-terrorism?

Acknowledgements

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We could not have held this conference without their myriad contributions, and are grateful for the too-numerous examples of their helpfulness.