


## SYMPOSIUM ARTICLE

# *Global Environmental Law: Context and Theory, Challenge and Promise*<sup>†</sup>

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### Abstract

Few issue areas exemplify the centrifugal forces that have prompted the emergence of global law scholarship better than the environment. With its propensity to blur or transcend conventional distinctions between national and international, public and private, and formal and informal, environmental governance offers a consummate case study to test the promise and perils of global law. In this article we situate global environmental law in the broader debate about lawmaking and application beyond the nation state, tracing the evolution and elusive boundaries of this nascent field. Our survey allows us to identify conceptual ambiguities and missed opportunities in the literature on global environmental law, including challenges to its normativity and legitimacy. From there, however, we proceed to outline a twofold opportunity for the global environmental law project: (i) an opportunity to enrich environmental law with more diverse and inclusive practices; and (ii) an opportunity for collaborative self-reflexivity by the scholars and practitioners of environmental law as these not only interpret and apply but, through their work, actively shape the content of the law.

**Keywords:** Global law, Global environmental law, Normativity, Legitimacy, Self-reflexivity

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## 1. INTRODUCTION

This article was inspired by discussions on global environmental law between three scholars who approached the topic from different perspectives, with different degrees of scepticism and enthusiasm. The starting point of these discussions was our curiosity to better understand what global environmental law is, why this scholarship has emerged, and how it relates to the ongoing rich discussions on global law, as well as on law and globalization more generally. A second motivation for this article was our desire to better understand and articulate our concerns with regard to global (environmental) law – that is, with regard to what we see as a transformative agenda and a project that seeks to change in fundamental ways how we understand law, lawmaking, the validity of legal sources, and the nature of legitimacy. We acknowledge and emphasize the need to engage with these issues in greater depth than past global environmental law scholarship has done. At the same time, we are optimistic about the transformative potential of global environmental law, and the opportunities it provides to better integrate into our academic thinking the varied changes we are witnessing across the landscape of international environmental law, all the while ensuring that the numerous affected actors and their voices and concerns are better reflected in the processes related to the formulation, expansion, and implementation of global environmental law. Our third motivation therefore was the desire to explore and identify further opportunities for ourselves and other scholars to engage with the global environmental law research and teaching agendas, and identify openings to feed these insights into the ongoing broader discussions on global and transnational law.

The structure of the article reflects these three aspirations, and our divergent starting points with regard to global (environmental) law are undoubtedly reflected in the contents. The article begins by situating global environmental law scholarship in the broader landscape of global law and transnational law scholarship. It argues that international environmental lawyers have thus far not fully exploited the opportunities to engage with these broader debates. The article then turns towards examining the several important challenges that arise from the idea of global (environmental) law and the transformative agenda it inevitably entails. It argues that, while global (environmental) law scholars have not put forward a strong and explicit argument to support the idea of global environmental law as a body of norms that would apply universally across legal systems and jurisdictions regardless of their formal pedigree, global environmental law scholarship nevertheless reaches beyond merely observing and recording empirical transformations in the legal landscape. On the contrary, we see global (environmental) law as a consciously transformative agenda that is driven partly by academic activism towards a paradigm change that ultimately challenges received notions of the meaning of law, lawmaking, legitimacy, and the validity of legal sources. Still, we also observe an urgent need to better integrate the study of such jurisgenerative and normative categories into global environmental law scholarship. We see also an opportunity to brandish the transformative potential of global law against a perennial challenge of traditional lawmaking beyond the domestic realm: its persistent legitimacy gap, which expanded participation in a process of inclusive deliberation – allowed by the more fluid

demarcation lines of global law – could at long last help to alleviate. The final section of this article will turn to opportunities for international environmental lawyers to contribute to the global law debate. Here, the article identifies the need to take a collaborative approach in that endeavour with a view to building connections with debates on global justice.

## 2. GLOBAL ENVIRONMENTAL LAW SCHOLARSHIP IN CONTEXT

What has driven the emergence of global environmental law scholarship? Looking from a broader perspective, this growing body of literature forms part of a much larger ongoing debate in law and other fields of social science.<sup>1</sup> Within legal scholarship, this debate can be situated under the broad umbrella of scholarship addressing law and globalization;<sup>2</sup> thus it forms part of efforts to rethink and reorganize the legal worldview to reflect and capture the many changes and upheavals that scholars and practitioners are witnessing on the ground as a result of the forces of globalization.

A common definition of globalization highlights increasing interconnectedness between societies in terms of political, economic, social and cultural events. Political, social, and economic activities stretch across borders, regions, and continents.<sup>3</sup> Global networks and flows of trade, investment, finance, culture and so on are growing in magnitude.<sup>4</sup> Global interactions and processes are speeding up as the development of worldwide transport and communications systems accelerates the diffusion of ideas, goods, information, capital, and people.<sup>5</sup> Global interactions and processes are also deepening in the sense that local events can come to have sweeping global consequences.<sup>6</sup> Globalization remains, however, a highly complex, contested, and multi-dimensional phenomenon. Thus, fundamental questions have been raised in the literature on, inter alia, how ‘new’ globalization is, whether it is a positive or negative development, how it will affect the respective roles of states and democracy, and other related matters.

In the legal sphere, globalization has been defined as consisting ‘of processes by which different organized large-scale normativities become increasingly interconnected and interdependent, crossing the traditional borders of nation states, intergovernmental organisations, and non-governmental organisations’.<sup>7</sup> Forces that drive legal globalization include economic globalization, which increases incentives towards regulatory harmonization and the creation of transnational institutions, such as the European

<sup>1</sup> These developments have been described by several scholars, including D. Kennedy, ‘The Mystery of Global Governance’, in J.L. Dunoff & J.P. Trachtman (eds), *Ruling the World: Constitutionalism, International Law and Global Governance* (Cambridge University Press, 2009), pp. 37–68, at 38.

<sup>2</sup> J. Husa, *Law and Globalisation* (Edward Elgar, 2018).

<sup>3</sup> D. Held & P. Maffettone, ‘Introduction: Globalization, Global Politics and the Cosmopolitan Plateau’, in D. Held & P. Maffettone (eds), *Global Political Theory* (Polity Press, 2016), pp. 14–33, at 14–5.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Husa, n. 2 above, p. 5.

Union (EU) and the World Trade Organization (WTO).<sup>8</sup> More closely related to the focus of this article, the ascent of global environmental risks – such as climate change, ozone depletion, and biodiversity loss – is also playing a role in the globalization of law.<sup>9</sup>

Together, the forces of globalization are seen as weakening the ‘great divide’ between international and national law.<sup>10</sup> The traditional and still very much prevailing vision of the legal world dates back to the creation of the Westphalian system in the 17<sup>th</sup> century, dominated by the concept of sovereign states and the dichotomy of national and international law. While this image includes transnational legal activity in the sense of public and private international law crossing state boundaries, both of these concepts remain highly state-centric<sup>11</sup> as their focus is on relationships among sovereign states and national legal orders respectively.<sup>12</sup> This traditional vision of the legal world has been fittingly labelled the ‘black box model’.<sup>13</sup> However, with globalization, neat organizations of the legal universe have come to face multiple challenges.<sup>14</sup> Sovereign states remain crucial, but their role is rapidly changing. Various actors in globalization – such as non-governmental organizations (NGOs), law firms, financial markets, and multinational corporations – are taking part in the creation of new kinds of normativity, and new border-crossing realities are evolving and transforming.<sup>15</sup> As Husa indicates, ‘the need for a non-nation-state-bound understanding of overlapping legal sources is growing and the necessity of knowledge of how to deal with polycentrism and pluralism of laws has grown intensely’.<sup>16</sup> However, the ongoing scholarly debates are far from conclusive: there is no consensus on how much globalization has influenced law or whether this influence has been beneficial or detrimental.<sup>17</sup>

In legal scholarship, different theories and approaches are therefore under construction, seeking to accommodate law that does not fit into the traditional categories of

<sup>8</sup> V. Heyvaert, *Transnational Environmental Regulation and Governance: Purpose, Strategies and Principles* (Cambridge University Press, 2018), pp. 6–7.

<sup>9</sup> *Ibid.*, p. 7.

<sup>10</sup> N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, 2010), pp. 14–5.

<sup>11</sup> G.C. Shaffer, ‘Transnational Legal Ordering and State Change’, in G.C. Shaffer (ed.), *Transnational Legal Ordering and State Change* (Cambridge University Press, 2012), pp. 1–22, at 3.

<sup>12</sup> K. Tuori, ‘Transnational Law: On Legal Hybrids and Legal Perspectivism’, in M. Maduro, K. Tuori & S. Sankari (eds), *Transnational Law: Rethinking European Law and Legal Thinking* (Cambridge University Press, 2014), pp. 11–57, at 11–2.

<sup>13</sup> *Ibid.*, pp. 12–3. Tuori refers to W. Twining, *Globalisation and Legal Theory* (Northwestern University Press, 2000).

<sup>14</sup> T.C. Halliday & G.C. Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press, 2015); Maduro, Tuori & Sankari, n. 12 above; C. Scott, ‘“Transnational Law” as Proto-Concept: Three Conceptions’ (2009) 10(7) *German Law Journal*, pp. 859–76; G.C. Shaffer, ‘Theorizing Transnational Legal Ordering’ (2016) 12 *Annual Review of Law and Social Science*, pp. 231–53; P. Zumbansen, ‘Transnational Law’, in J. Smits (ed.), *Elgar Encyclopedia of Comparative Law* (Edward Elgar, 2006), pp. 738–54.

<sup>15</sup> Husa, n. 2 above, p. 6.

<sup>16</sup> *Ibid.*, p. 8.

<sup>17</sup> *Ibid.*, p. 4.

national law and international law. The key ones include global legal pluralism,<sup>18</sup> transnational law,<sup>19</sup> and global law.<sup>20</sup> Scholarship on global legal pluralism builds on anthropological research on colonial and neo-colonial law, and historical work on medieval law,<sup>21</sup> to better understand the role of multiple non-state actors in influencing the development of law at different levels and sites,<sup>22</sup> including on the basis of values and knowledge systems that have been historically left at the margins of negotiations or public/private-driven action.<sup>23</sup> One of the focus areas is the interplay of international law and the customary law of indigenous peoples.<sup>24</sup>

The concept of ‘transnational law’ was coined by Jessup in the 1950s, at a time when hope in public international law and public international institutions had withered as a result of the Cold War.<sup>25</sup> Jessup was particularly interested in the ability of private international law to resolve transnational problems through its decentralized system of allocating jurisdictional ‘power’ among national courts, which then used choice of law techniques to decide the applicable law.<sup>26</sup> The relationship between private and public international law has continued to attract scholarly attention until today, including with regard to the delimitation (and potentially strategic use) of states’ regulatory authority and (barriers to) the protection of fundamental rights.<sup>27</sup> While a wealth of literature on transnational law has subsequently emerged – including more than 50

<sup>18</sup> G. Teubner, ‘Global Bukowina: Legal Pluralism in the World Society’, in G. Teubner (ed.), *Global Law without a State* (Dartmouth, 1997), pp. 3–28; P.S. Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press, 2012); Krisch, n. 10 above.

<sup>19</sup> P. Jessup, *Transnational Law* (Yale University Press, 1956). On recent scholarship, see Halliday & Shaffer, n. 14 above; Maduro, Tuori & Sankari, n. 12 above.

<sup>20</sup> N. Walker, *Intimations of Global Law* (Cambridge University Press, 2015); see also G.Z. Capaldo, *The Pillars of Global Law* (Ashgate, 2008); R. Domingo, *The New Global Law* (Cambridge University Press, 2010); S. Musa & E. de Volder (eds), *Reflections on Global Law* (Brill, 2013).

<sup>21</sup> T.C. Halliday & G. Shaffer, ‘Transnational Legal Orders’, in Halliday & Shaffer, n. 14 above, pp. 3–72, at 26.

<sup>22</sup> N. Affolder, ‘Non-State Actors’, in E. Morgera & J. Razzaque (eds), *Encyclopedia of Environmental Law: Biodiversity and Nature Protection Law* (Edward Elgar, 2017), pp. 387–98, at 387.

<sup>23</sup> L. Tuhiwai Smith, *Decolonizing Methodologies* (Zed Books, 2012); J. Hendry et al. (eds), *Indigenous Justice: New Tools, Approaches and Spaces* (Palgrave Macmillan, 2018). For examples see Forest Peoples Programme, International Indigenous Forum on Biodiversity and Secretariat of the Convention on Biological Diversity, ‘Local Biodiversity Outlooks: Indigenous Peoples’ and Local Communities’ Contributions to the Implementation of the Strategic Plan for Biodiversity 2011–2020: A Complement for the Fourth Edition of the Global Biodiversity Outlook’, Dec. 2016, available at: <https://www.cbd.int/gbo/gbo4/publication/lbo-en.pdf>; Indigenous Circle of Experts, ‘We Rise Together: Achieving Pathway to Canada Target 1 through the Creation of Indigenous Protected and Conserved Areas in the Spirit and Practice of Reconciliation’, Mar. 2018, available at: <https://www.iccaconsortium.org/index.php/2018/03/28/launch-of-indigenous-circle-of-experts-report-we-rise-together>.

<sup>24</sup> E.g., generally, G.A. Sarfaty, ‘International Norm Diffusion in the Pimicikamak Cree Nation: A Model of Legal Mediation’ (2007) 48(2) *Harvard International Law Journal*, pp. 441–82.

<sup>25</sup> G.C. Shaffer & C. Coyle, ‘From International Law to Jessup’s Transnational Law: From International Law to Transnational Legal Ordering’, *School of Law University of California Legal Studies Research Paper Series*, No. 2017-02, p. 1, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2895159](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2895159).

<sup>26</sup> Ibid.

<sup>27</sup> E.g., A. Mills, *The Confluence of Public and Private International Law* (Cambridge University Press, 2009); V. Ruiz Abou-Nigm, K. McCall-Smith & D. French (eds), *Linkages and Boundaries in Private and Public International Law* (Hart, 2018).

journals with the terms ‘transnational law’ or ‘transnational legal’ in their title<sup>28</sup> – the notion is often used ‘without adequate conceptual work on what the term covers’.<sup>29</sup> A broad conception of transnational law, also reflected in Jessup’s work, includes both public and private international law, as well as law governing transnational activities not traditionally included within these areas.<sup>30</sup> A narrow conception sees transnational law as composed only of norms that cross national borders and do not fit the traditional categories of public and private international law.<sup>31</sup> Teubner’s work, for example, has drawn inspiration from a scholarly debate on *lex mercatoria* and the highly controversial arguments that ‘merely “private” orders (contracts and associations) produce valid law without authorization from and control by the state’ and that ‘*lex mercatoria* is valid outside the nation state and even outside international relations’.<sup>32</sup> According to Teubner, such views have broken some taboos about the necessary connections between law and the state.<sup>33</sup>

Also, the discussion on global law is characterized by fluid conceptual boundaries. Shaffer, for instance, has argued that transnational law and global law are partly overlapping notions in the sense that, under each, ‘law is being denationalized, to varying degrees’ because the legal norms may not be part of international and national law as conventionally construed.<sup>34</sup> Halliday and Shaffer have, in fact, argued that the ‘terminology of “global” law is misleading because much legal ordering today is not global in its geographic reach, but it nonetheless involves variation in legal ordering beyond the nation state’.<sup>35</sup> In their view, the concepts of transnational legal orders and transnational legal ordering best capture this reality as ‘the geographic, substantive, and organizational scope of such legal ordering varies, and because it involves both public and private actors’.<sup>36</sup>

In turn, Walker has pointed out that ‘there has been little serious discussion – and little agreement where there has been discussion – on what is meant by “global law”’.<sup>37</sup> He characterizes global law as a ‘pattern of heavily overlapping, mutually connected and openly extended institutions, norms and processes’.<sup>38</sup> He then distinguishes global law as a particular subset of transnational law, in that global law is characterized by a ‘practical endorsement of, or commitment to the universal or otherwise global-in-general warrant of some laws or some dimensions of law’.<sup>39</sup> Thus, according

<sup>28</sup> Shaffer, n. 14 above.

<sup>29</sup> Shaffer, n. 11 above, p. 4.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Teubner, n. 18 above, p. 7. As other scholars have observed, of course, such private arrangements – unlike state-based law – are not generally able to create legal obligations for third parties: see, e.g., O. Dilling & T. Markus, ‘The Transnationalisation of Environmental Law’ (2018) 30(2) *Journal of Environmental Law*, pp. 179–206.

<sup>33</sup> Teubner, n. 18 above, p. 7.

<sup>34</sup> Shaffer, n. 11 above.

<sup>35</sup> Halliday & Shaffer, n. 21 above, p. 4.

<sup>36</sup> Ibid.

<sup>37</sup> Walker, n. 20 above, p. 1.

<sup>38</sup> Ibid., pp. 11–12, 14, 18.

<sup>39</sup> Ibid., p. 55.

to Walker's extensive review of different species of global law reflected in existing scholarship:

Global law ... may or may not be sourced and institutionalised at the planetary level. It can be more or less actively endorsed and fully realised, and more or less concrete and positivised in its normative claim or orientation. It can also be either universal or merely planetary in scope or ambition, provided it meets a threshold requirement of not being confined by and to any particular sub-global territorial jurisdiction.<sup>40</sup>

Global law seeks to bring some coherence to the 'disorder of normative orders' that is seen to define the contemporary post-national constellation of legal authority.<sup>41</sup> For Dias Varella:

[This] new global law is continually self-reproduced by networks of authors and highly specialized norms, both public and private ... It is distinguished from classic national law in that it is not limited by national boundaries and by the lack of territorial bases, oftentimes by networks of invisible actors, such as markets, professional communities, or social networks.<sup>42</sup>

Walker has placed the various divergent theories of global law into two main categories: *convergence-promoting* or *divergence-accommodating* approaches. The first category focuses on encouraging a general dynamic of legal convergence, while the second seeks to accommodate a general dynamic of legal divergence.<sup>43</sup> According to Walker:

[what binds the two categories together] is that both acknowledge and seek to address the increasing complexity of the post-national legal landscape – its diversity and fluidity of form, its multiplication of new forms of legally coded identity and difference, its congestion, its cross-systemic overlapping claims and focal concerns, its mechanisms of mutual recognition and interlock; and, it follows, its irreducibility to a state-sovereigntist logic of mutually exclusive jurisdictional allocation.<sup>44</sup>

What remains unclear in Walker's contribution, however, is the relationship between his vision of global law and classic elements of international law (such as a treaty objective) or potentially novel elements (global goals such as the Sustainable Development Goals<sup>45</sup>) as the kind of 'universal or otherwise global-in-general warrant' that would distinguish global law from transnational law. This gap in Walker's reflection offers an opportunity for international (environmental) lawyers to contribute to the global law debate more generally.

<sup>40</sup> Ibid., p. 55.

<sup>41</sup> N. Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Disorder of Normative Orders' (2008) 6(3–4) *International Journal of Constitutional Law*, pp. 373–96.

<sup>42</sup> M. Dias Varella, *Internationalization of Law: Globalization, International Law and Complexity* (Springer, 2014), p. 318.

<sup>43</sup> Walker, n. 20 above, p. 55.

<sup>44</sup> Ibid., p. 56.

<sup>45</sup> D. French & L. Kotzé (eds), *Sustainable Development Goals: Law, Theory and Implementation* (Edward Elgar, 2018).



This is the broader context and background for our discussion of global environmental law. Despite conceptual ambiguity and overlap, the foregoing visions of global law have something in common: a sense that the legal world and scholarship are in need of rethinking; yet new visions and concepts are still in the process of being formed, and basic ideas and indeed approaches are anything but settled. There is clearly scope for environmental lawyers to contribute to these debates, as several global law scholars have singled out global law phenomena in international environmental law.<sup>46</sup>

### 3. GLOBAL ENVIRONMENTAL LAW SCHOLARSHIP: WHERE ARE WE?

What is global environmental law and where does global environmental law scholarship stand today? Also, in the environmental field a number of scholars have awakened to the need to change the way in which we think about (and research<sup>47</sup>) environmental law. This realization is reflected in the growing body of scholarship on transnational environmental law<sup>48</sup> and global environmental law.<sup>49</sup> As this section will highlight, however, scholarship on global environmental law to date has assimilated the broader debate on law and globalization, and global law, to a limited degree only. Likewise, we assess the extent to which global environmental legal scholarship so far has missed an opportunity to make original contributions to the debate on global law.

While the idea of global environmental law has made increasingly frequent appearances in environmental law scholarship since the 1990s,<sup>50</sup> there seems to be no uniform and detailed definition of what global environmental law is or what the concept means.<sup>51</sup> Developing such an understanding also falls outside the scope of this article, which focuses on taking stock of the current state of global environmental law scholarship in this regard. In a well-known article published in 2009, Yang and Percival argued that global environmental law is emerging, and defined this new field as ‘an evolving set of substantive principles, tools, and concepts derived from elements of national and international environmental law’.<sup>52</sup> In their view it is ‘no longer possible to see the national environmental law systems as distinct or separate from international

<sup>46</sup> E. Morgera, ‘Global Environmental Law and the Comparative Legal Method(s)’ (2015) 24(3) *Review of European, Comparative and International Environmental Law*, pp. 254–63, at 256.

<sup>47</sup> E. Morgera, L. Parks & M. Schroeder, ‘Methodological Challenges of Transnational Environmental Law’ (SSRN, 2019), to appear in V. Heyvaert & L.-A. Duvic-Paoli (eds), *Research Handbook of Transnational Environmental Law* (Edward Elgar, 2019 forthcoming).

<sup>48</sup> For recent in-depth discussion, see Heyvaert, n. 8 above, especially pp. 1–24.

<sup>49</sup> See text between nn. 49 and 86 for detailed discussion and references.

<sup>50</sup> R.V. Percival, ‘Global Law and the Environment’ (2011) 86(3) *Washington Law Review*, pp. 578–634, at 582–4 (with figures compiled using Google’s Ngram search tool illustrating the appearance of the term ‘global environmental law’ in journals and books from 1940 to 2009).

<sup>51</sup> See, e.g., E. Hey, ‘Global Environmental Law’ (2008) 19 *Finnish Yearbook of International Law*, pp. 5–28, at 6 (defining what she considers global environmental law *not to be* and indicating that the concept requires further characterization).

<sup>52</sup> T. Yang & R.V. Percival, ‘The Emergence of Global Environmental Law’ (2009) 36(3) *Ecology Law Quarterly*, pp. 615–64, at 664.



environmental law or from each other'.<sup>53</sup> Instead, global environmental law is 'an amalgam of national and international environmental law and their interactions'.<sup>54</sup> Yang subsequently specified that global environmental law is 'a common set of environmental legal principles and norms in national, international, and transnational law that are utilized to protect the environment and public health as well as to manage and conserve natural resources'.<sup>55</sup> One of the examples he mentioned is environmental impact assessment, which is found in most national legal systems as well as in various international environmental instruments, 'and even as a transboundary norm'.<sup>56</sup> Subsequent work by Percival highlights that global law is 'not a set of globally harmonized regulatory standards but rather a term to describe the more complex set of phenomena that are occurring in several fields of law, in particular environmental law'.<sup>57</sup> According to Percival, the term 'global environmental law' is used as it 'appears to better capture the current complex realities of developments in the environmental field because transdisciplinary distinctions between domestic and international law, and between public and private law continue to erode'.<sup>58</sup>

Some areas of international environmental law arguably are more reflective than others of the trends and drivers underlying the emergence of global law scholarship more generally. More than any other area, perhaps, this can be said of the continuously evolving and highly differentiated global regime on climate change mitigation and adaptation, which traverses planes of governance, recruits public and private actors, draws on traditional regulation and enforcement as well as facilitation and flexible market approaches, and encompasses difficult questions of global justice and responsibility. Still, most environmental problems are inherently transboundary and cross-cutting in nature, and require action at all levels and by multiple actors for an effective resolution. It should therefore be no surprise that global environmental law has been one of the earliest thematic areas to see a proliferation of global law scholarship, and that trend is likely to continue.

In line with broader literature on global and transnational law, global environmental law scholarship has called attention to common themes that challenge our traditional understandings of environmental law, the most notable of which is the growing importance of non-state actors. Hey highlights the role of non-state actors in actively interacting with states and global institutions involved in environmental decision making, as well as participating in standard setting, for example, through voluntary codes of conduct.<sup>59</sup> Percival emphasizes that 'private parties are now playing a major role in the emergence of global environmental law'.<sup>60</sup> While the relevance of non-state actors

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> T. Yang, 'The Emerging Practice of Global Environmental Law' (2012) 1(1) *Transnational Environmental Law*, pp. 53–65, at 54.

<sup>56</sup> Ibid.

<sup>57</sup> Percival, n. 50 above, p. 633.

<sup>58</sup> Ibid., p. 584.

<sup>59</sup> Hey, n. 51 above, pp. 6–7.

<sup>60</sup> Percival, n. 50 above, p. 624.

in international environmental law has already been described in the abundant literature on environmental governance and soft law, the question of whether the cumulative effect of these complex changes signals an existential crisis of international and national environmental law has been posed but not exhaustively addressed in the incipient global environmental law scholarship.

Even if the notion of ‘global law’ may instinctively bring to mind the idea of a distinct body of law that applies universally or globally, no strong and explicit argument has been made of global environmental law as a separate body of law in the sense that some environmental norms would or should apply globally across legal systems and jurisdictions regardless of their formal pedigree. This aligns with Walker’s argument that the notion of ‘global law’ does not refer to the law’s pedigree, but to its global destination.<sup>61</sup> Hey, for example, has described various substantive and procedural environmental principles in order to provide an overview of the discourse of global environmental law, while at the same time noting that most, if not all, of the principles she discusses ‘are part of treaty law, while many also qualify as customary law’.<sup>62</sup> This implies that she does not consider these principles to be universally applicable merely by virtue of them being part of global environmental law. Morgera, in turn, has rather underscored the need to engage with global environmental law as a research and teaching agenda:

A perspective informed by global environmental law, understood as the promotion of environmental protection through a plurality of legal mechanisms relying on a plurality of legal orders, thus prompts the study of environmental law at the international, regional, national and sub-national levels as inter-related and mutually influencing systems.<sup>63</sup>

Yet this does not obviate the need to explore whether:

the practice of global environmental law can lead to innovative forms of law, be that the result of an increasingly conscious and strategic reliance on the mutual influences between different legal orders, or of the jurisgenerative role of global scholars and practitioners.<sup>64</sup>

Most of global environmental law scholarship seems to be empirically based, highlighting various rapid and groundbreaking changes that scholars and practitioners are witnessing on the ground. To that end, its main contribution to date has been methodological. According to Morgera:

[global environmental law] further calls for an analysis of the practice of non-State actors, particularly international organizations, international networks of experts providing advice on environmental legislation across the globe, international civil society, bilateral donors, indigenous peoples and local communities and the private sector.<sup>65</sup>

<sup>61</sup> Walker, n. 20 above.

<sup>62</sup> Hey, n. 51 above, p. 10.

<sup>63</sup> E. Morgera, ‘Bilateralism at the Service of Community Interests? Non-Judicial Enforcement of Global Public Goods in the Context of Global Environmental Law’ (2012) 23(3) *European Journal of International Law*, pp. 743–67, at 746.

<sup>64</sup> Morgera, n. 46 above, p. 263 (footnotes omitted: the reference to the jurisgenerative role of global scholars is to N. Walker, ‘The Jurist in a Global Age’, in R van Gestel et al. (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press, 2017), pp. 84–111).

<sup>65</sup> Morgera, n. 46 above, p. 255.

Along similar lines, an important part of global environmental law scholarship highlights the globalization of environmental law practice,<sup>66</sup> and the ensuing demands on environmental law scholars and practitioners. According to Yang, international environmental law used to be seen largely as a specialized area of public international law, outside the expertise of national environmental lawyers.<sup>67</sup> Similarly, those working on international environmental law tended to leave questions of domestic environmental law to national law experts. However, this situation has quickly changed. There is now a greater need for domestic environmental law practice to be informed by international law, and for international environmental lawyers to understand the operation and requirements of national environmental law systems.<sup>68</sup> The emergence of ‘global jurists’ is also a key notion emerging from Walker’s work discussed above.<sup>69</sup>

While there is no explicit argument that global environmental law constitutes an ensemble of universally valid norms, a firmly embedded notion in global environmental law scholarship is the idea that legal concepts travel globally between jurisdictions and other normative systems. According to Yang and Percival, ‘[t]he globalization of environmental law means that regulatory approaches, legal principles, and institutional structures will be similar or have analogues across different national and international systems’.<sup>70</sup> Their spread relates partly to the common physical and technological origins of environmental problems, the common scientific and technological basis for resolving them, and the objective of global environmental law to address common interest problems that cannot be resolved by any state on its own.<sup>71</sup> Transnational environmental litigation is also contributing to this trend;<sup>72</sup> the rise in climate change litigation across the globe, for instance, has been driven partly by efforts to promote the development of climate law in different jurisdictions across the globe.

In terms of methodology, there has been only limited scholarly reflection thus far on what the study of global (environmental) law requires, and how this nascent field differs, for example, from the study of international (environmental) law. While most ‘grand theories’ of law – such as those formulated by Hart and Kelsen – are global in the sense that they argue something universal about the general nature of law,<sup>73</sup> Section 4 below will show that global environmental law implicitly or explicitly challenges key aspects of such theories. With its starting point in complex and observable developments, such as the diverse manifestations of globalization, global law defies the conceptual abstraction and simplicity of such ‘grand theories’. Altogether, its remit is theoretical as much as it is applied, inviting the question of whether ‘a genuinely global

<sup>66</sup> Yang, n. 55 above, p. 56.

<sup>67</sup> Ibid., p. 55.

<sup>68</sup> Ibid., pp. 55–6; E. Morgera, ‘The Future of Law and the Environment: The Emergence of Global Environmental Law’, in S. Muller et al. (ed.), *The Law of the Future and the Future of Law* (Torkel Opsahl Academic, 2012) pp. 39–49.

<sup>69</sup> Walker, n. 41 above.

<sup>70</sup> Yang & Percival, n. 52 above, p. 652.

<sup>71</sup> Hey, n. 51 above.

<sup>72</sup> Percival, n. 50 above, pp. 601 ff.

<sup>73</sup> Husa, n. 2 above, p. 100.

view of law’ is possible if legal cultures are different and ‘harmonization [is] plagued by legal-culture-related difficulties’.<sup>74</sup> According to Husa, therefore, ‘a global way of conceiving law means that also legal theories need to be re-established and denationalized’.<sup>75</sup> He has identified the need for methodological pluralism – i.e. the need for multiple methods to study multiple legalities<sup>76</sup> – and noted that:

Nationally oriented legal doctrine seems poorly equipped to meet pluralist forms of overlapping, interdependent, and sometimes competing non-national normativities ... Other approaches, such as comparative, economic and anthropological methods are needed alongside a more conventional doctrinal approach.<sup>77</sup>

Thus far, only a limited amount of global environmental law scholarship has reflected on legal research methods for global environmental law. The main focus of the limited body of existing literature concerns the relevance of comparative methods. Wiener’s work illustrates the borrowing and travel of ideas and legal concepts (such as emissions trading) from national environmental law to international environmental law,<sup>78</sup> whereas the travel of legal norms and ideas from international to national environmental laws is a well-known phenomenon. Morgera has looked into interrelated dynamics of norm diffusion across different international environmental regimes, between multi-lateral and bilateral treaties and mechanisms, as well as through negotiating practices at different levels.<sup>79</sup> The interest of comparative lawyers in various forms of ‘contact’ between different legal phenomena appears useful to foster in international environmental lawyers an appreciation of diversity in local influence and global patterns.<sup>80</sup> Equally, the acknowledgement by comparatists that various open-ended and self-reflexive methodologies are needed to fully appreciate mutual dependencies between legal phenomena is helpful in recognizing the risks involved in this kind of research and identifying biases, such as the assumption that global environmental law phenomena are desirable or innovative.<sup>81</sup> These considerations had already emerged in Twining’s broader reflections on global law.<sup>82</sup> There are, however, bound to be multiple methodological and conceptual implications of global environmental law that have not yet been identified, let alone adequately captured by existing scholarship. Some of the most obvious of these relate to those aspects of global environmental law that directly challenge our received notions concerning valid law and state monopoly on legitimate lawmaking. As we indicate below in [Section 4](#), there is a need to

<sup>74</sup> Ibid., p. 103.

<sup>75</sup> Ibid., p. 113.

<sup>76</sup> Ibid., p. 130.

<sup>77</sup> Ibid., p. 132.

<sup>78</sup> J.B. Wiener, ‘Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law’ (2001) 27(4) *Ecology Law Quarterly*, pp. 1295–372.

<sup>79</sup> Morgera, n. 63 above; and E. Morgera, ‘The Need for an International Legal Concept of Fair and Equitable Benefit Sharing’ (2016) 27(2) *European Journal of International Law*, pp. 353–83.

<sup>80</sup> Morgera, n. 46 above.

<sup>81</sup> Ibid; see also Morgera, Parks & Schroeder, n. 47 above.

<sup>82</sup> W. Twining, ‘Diffusion of Law: A Global Perspective’ (2004) 36(49) *Journal of Legal Pluralism and Unofficial Law*, pp. 1–45, at 1.

engage with these issues in greater depth and rigour than past global environmental law scholarship has done.

Overall, global environmental law scholarship has focused on developing a more comprehensive and inclusive vision of environmental law that reaches beyond the established categories of international and national law and takes into consideration actors and sources that traditional legal doctrines have deemed irrelevant. It has drawn attention to global travel of legal concepts and mutual influences and interdependencies between different legal systems and levels of regulation. It has also highlighted the increasingly global outlook of environmental law as a profession. In doing so, global environmental law scholarship echoes key themes from the broader discussion of global law. On the whole, however, global environmental law scholarship has only sporadically engaged with the more theoretical academic debate on global law and its deeper reflections on questions of power and influence behind global legal phenomena and unexpected interactions among legal sources at different levels.<sup>83</sup> One exception is Hey, who has invited international environmental lawyers to engage with global administrative law<sup>84</sup> in the face of the growing importance and limited accountability of non-state actors in exercising public powers, and of global institutions<sup>85</sup> that still reflect the legacy of colonialism.<sup>86</sup>

#### 4. GLOBAL (ENVIRONMENTAL) LAW AS ‘LAW’: CHALLENGE AND PROMISE

What are the implications of the global (environmental) law research agenda, and what epistemic and normative challenges does it entail? While emerging conceptions of global law and global environmental law may be characterized by conceptual ambiguity and fluid boundaries, they nonetheless reflect a common perception that traditional notions of law and legal authority are unable to capture the shifting realities of rule-based governance in a fragmented, polycentric world. What unites the different visions and interpretations of global – and thus also global environmental – law is a shared view that contemporary affairs are marked by a rise in normative arrangements that transcend or challenge conventional horizons of domestic and international law, an increased functional differentiation and permeability of public and private authority, and a growing role in rulemaking and implementation of actors beyond the state.

<sup>83</sup> Morgera, n. 46 above.

<sup>84</sup> See, e.g., B. Kingsbury, N. Krisch & R. Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68(3&4) *Law and Contemporary Problems*, pp. 15–62; N. Krisch & B. Kingsbury, ‘Introduction: Global Governance and Global Administrative Law in the International Legal Order’ (2006) 17(1) *European Journal of International Law*, pp. 1–13; B. Kingsbury, ‘Global Environmental Law as Administration: Implications for International Law’, in D. Bodansky, J. Brunnée & E. Hey (eds), *Oxford Handbook of International Environmental Law* (Oxford University Press, 2007), pp. 63–84.

<sup>85</sup> E. Hey, ‘Global Environmental Law and Global Institutions: A System Lacking “Good Process”’, in R. Pierik & W. Werner (eds), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (Cambridge University Press, 2010), pp. 45–72, at 45.

<sup>86</sup> *Ibid.*, p. 46.

Our argument, however, is that the project of global (environmental) law necessarily extends beyond mere observation and the recording of changes on the ground. Views such as that expressed by Teubner – according to whom the ‘emerging global ... law is a legal order in its own right’<sup>87</sup> – reveal an ambition of the proponents of global law to offer more than the impartial representation of observed facts. Even where scholars have conceded that global law is not a discrete system of norms or legal practice, they have described it in terms of its directionality and thereby invoked a transformative agenda,<sup>88</sup> as described earlier in this article. Inherent in much of the global (environmental) law debate is, in other words, a normative component, an apparent aspiration to revisit questions about the validity of norms and, ultimately, the ontology of law itself. This was also picked up by Walker, who indicated that global law finds itself in between settled doctrine and an aspirational approach<sup>89</sup> in which specialist (professional and academic) communities are not only ‘sources of expertise and learning in matters of the emergent global law and as instruments of its application’, but are also ‘active players in the fashioning and shaping of global law’.<sup>90</sup>

It is that dimension of global law which has elicited discomfort among more traditionally minded legal scholars, prompting questions about whether global law is indeed ‘law’.<sup>91</sup> It is also a dimension that does not seem to be captured adequately in the existing body of global environmental law scholarship and that would merit more careful attention. To the extent that global law narratives espouse a normative component, they transcend the boundary between empirical statements of ‘what is’ and normative yearnings of what ‘ought to be’ and, by extension, challenge received definitions of what constitutes valid law. For mainstream lawyers, the distinction between law and other normative categories lies at the very epicentre of their profession and is, in many ways, constitutive of legal practice.<sup>92</sup> Although views on the exact demarcation between law and other sources of normativity have varied over time across

<sup>87</sup> Teubner, n. 18 above, p. 4.

<sup>88</sup> Global law, according to Walker (n. 20 above, pp. 19–22) is ‘an adjectival rather than a nominal category’ that ‘does not specify any particular source or pedigree, and so may account for itself in many different ways and may claim or assume authority on many different grounds’; yet, at the same time, it ‘modifies law’s canonical forms’ and ‘claims a global warrant and makes a global appeal in the sense of claiming or assuming a universal or globally pervasive justification for its application’; global law, thus, becomes defined by reference to ‘its destination rather than its source’.

<sup>89</sup> See Walker, n. 20 above, pp. 22, 26.

<sup>90</sup> Ibid., p. 31, and more generally pp. 31–8.

<sup>91</sup> See, e.g., R. Collins, ‘The Slipperiness of “Global Law”’ (2017) 37(3) *Oxford Journal of Legal Studies*, pp. 714–39, at 715 (‘Does the accumulation of these globalising trends, and the attempt to accommodate these post-national legal forms, give rise to something that can be coherently described as “global law”?’); M. Loughlin, ‘The Misconceived Search for Global Law’ (2017) 8(3) *Transnational Legal Theory*, pp. 353–59, at 357 (‘Rather than examining these institutions as some new species whose existence might give rise to a new genus of law, the questions become more prosaic ... Are these new regimes derivative institutions or have they been able to acquire an autonomous status?’); see also the three special issues of the *Global Community Yearbook of International Law and Jurisprudence*, dedicated to a forum titled ‘The Case for Global Law – Is Global Law True Law?’ (2005–07) 5–7 *The Global Community Yearbook of International Law and Jurisprudence*.

<sup>92</sup> As, for instance, Weber has argued, a sharp boundary between legal and other social norms is indispensable for the formal rationality of the law: M. Weber, *Economy and Society* (G. Roth & C. Wittich eds, E. Fischhoff trans., University of California Press, 1978), p. 657.

different schools of jurisprudence and moral or political philosophy,<sup>93</sup> contemporary lawyers by and large will tend to premise their recognition of valid law on an accepted doctrine of legal sources, usually expressed by way of a posited social fact.

This view, which has seen its greatest theoretical elaboration in the jurisprudential tradition of legal positivism,<sup>94</sup> assumes the existence of conventions which determine certain facts or events taken to yield established ways for the creation, modification, and annulment of legal norms; these ‘facts are the sources of law conventionally identified as such in each and every modern legal system’.<sup>95</sup> At the domestic level, sources of valid law will commonly be defined in a national constitution and entail adoption by state bodies (such as a legislature) and adjudication through an ordained procedure. At the international level, acknowledgement of a recognized canon of legal sources has similarly become a matter of doctrinal practice,<sup>96</sup> as reflected in Article 38 of the Statute of the International Court of Justice.<sup>97</sup> What both have in common is an innate connection with the state.<sup>98</sup>

In its diverse formulations, global law acknowledges these established sources,<sup>99</sup> but treats them as a mere starting point for its central focus on legal norms beyond the state

<sup>93</sup> Debate has focused, in particular, on whether the legal validity of a norm is purely conditional on its source and form, or also – and even primarily – on its content, with legal positivism as first set forth by scholars such as Jeremy Bentham and John Austin – and rooted in the political philosophy of Thomas Hobbes – typically associated with the former position: see B.H. Bix, ‘Legal Positivism’, in M.P. Golding & W.A. Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell, 2005), pp. 29–49; and various traditions of natural law, including early variations of the concept in Greece and Rome, the Christian scholasticism of St Augustine, Thomas Aquinas, and the School of Salamanca in the Middle Ages and the Renaissance, and the contractual and rational (*Verunftrecht*) variations advanced by Enlightenment scholars such as Hugo Grotius, Immanuel Kant, John Locke, Samuel Pufendorf, Jean-Jacques Rousseau, and Emmerich de Vattel; with the latter, see J. Finnis, ‘Natural Law: The Classical Tradition’, in J.L. Coleman, K.E. Himma & S.J. Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2004), pp. 1–60.

<sup>94</sup> Most recently, notable proponents of this jurisprudential tradition have included Hart and Kelsen. For them, a norm is valid if it derives its validity from another norm; legal orders thus comprise hierarchies of norms, all of which are grounded in a basic norm, which Hart identifies as the Rule of Recognition, a social practice among officials, and Kelsen conceives of as the *Grundnorm*, a transcendental norm the existence of which is presupposed: see H.L.A. Hart, *The Concept of Law* (Clarendon Press, 1961), p. 97; and H. Kelsen, *Reine Rechtslehre* (Deuticke, 1934), p. 66.

<sup>95</sup> A. Marmor & A. Sarch, ‘The Nature of Law’, in E.N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Stanford, 2015), available at: <https://plato.stanford.edu/archives/fall2015/entries/lawphil-nature>. As Raz has highlighted, however, most legal orders allow the content of rules to influence the determination of legal validity, most notably at the adjudication stage: J. Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press, 2009), pp. 78–80.

<sup>96</sup> D. Patterson, ‘Transnational Governance Regimes’, in J. Kammerhofer & J. d’Aspremont (eds), *International Legal Positivism in a Post-Modern World* (Cambridge University Press, 2014), pp. 401–20, at 402.

<sup>97</sup> Statute of the International Court of Justice (ICJ), San Francisco, CA (United States), 26 June 1945, in force 24 Oct. 1945, Annex, available at: <https://treaties.un.org/doc/Publication/CTC/uncharter.pdf>. Art. 38(1) famously lists as the primary sources applicable to disputes brought before it ‘international conventions, whether general or particular’, ‘international custom, as evidence of a general practice accepted as law’, and ‘the general principles of law recognized by civilized nations’.

<sup>98</sup> Describing this mainstream perspective on sources of valid law as ‘theories of the “law-state” ... The nation-state is the source of law, the state is jurisdictionally limited, and nothing can be “law” that is not produced or at least sanctioned by the state’: K.C. Culver & M. Giudice, *Legality’s Borders: An Essay in General Jurisprudence* (Oxford University Press, 2010), p. xxiv.



the regulatory monopoly of which it rejects.<sup>100</sup> Motivated by the hypothesis of a declining role of states,<sup>101</sup> this alternative perspective reaches well outside the traditional canon of accepted sources, embracing a broad variety of public and private norms that ‘overlap or overlay each other in criss-crossing patterns of normativity’.<sup>102</sup> In the resulting paradigm, conventional sources are afforded a diminished role relative to the opinions of academics and international civil society;<sup>103</sup> indeed, as Walker describes it, ‘some of the more powerful instances of global law ... are of the pre-positive or non-positive variety’.<sup>104</sup>

Such propensity to lessen the importance of traditional sources doctrine is but one avenue through which global law softens the dividing line between legal and other norms, challenging the distinctiveness of law and, in so doing, the unity which traditionally defines a legal order.<sup>105</sup> Another is the ready acceptance of norms with varying degrees of normativity and binding effect, including ‘soft law’ – such as the decisions, recommendations or codes of good practice adopted by international and national organizations<sup>106</sup> – and contractual arrangements governed by private law the legal effect of which has traditionally been confined to parties.<sup>107</sup> This fluidity of global law again departs from the more rigid understanding of normativity in much of jurisprudence. Over the course of legal history, the stipulations enshrined in law have been seen commonly as binary in nature rather than a matter of degree: law is either valid, or it is not; it is either binding, or it is not.<sup>108</sup> Concern about the implications of ‘relative normativity’<sup>109</sup> has prompted some scholars to reject altogether notions such as ‘soft

<sup>99</sup> In folding ‘laws’ or ‘dimensions of law’ within its own terms, global law takes for granted existing legal forms and their defining criteria and merely supplements or modifies them as circumstantially appropriate with reference to the notion of a ‘universal or otherwise global-in-general warrant’: Walker, n. 20 above, p. 19.

<sup>100</sup> H. Lindahl, ‘Legal Order and the “Globality” of Global Law’, in S. Musa & E. de Volder (eds), *Reflections on Global Law* (Brill, 2013), pp. 36–44, at 37.

<sup>101</sup> Note, however, that the evidence of such decline is at present still inconclusive: B. Jessop, *The State: Past, Present, Future* (Polity, 2016), Ch. 8.

<sup>102</sup> Lindahl, n. 100 above, p. 36.

<sup>103</sup> Dias Varela, n. 42 above, p. 318 (‘Legislative processes become less important based on the rise and specialization of other sources of norms’); Walker, n. 20 above, p. 129 (‘Court judgments and treaties and their established *dramatis personae* remain important, but other actors ... a wider range of domestic civil society and other transnational non-state actors, and, notably, the academic sponsors themselves, are vital players in the process of reframing’). See also N. Walker, ‘Out of Place and Out of Time: Law’s Fading Co-ordinates’ (2010) 14(1) *Edinburgh Law Review*, pp. 13–46, at 17.

<sup>104</sup> Walker, n. 20 above, p. 23.

<sup>105</sup> Dias Varela, n. 42 above, p. 318 (stating that ‘the idea of the unity of the law breaks down in the face of the multiplicity of sources’).

<sup>106</sup> Tuori, n. 12 above, p. 17; on the normativity of decisions by international organizations, see J. Brunnée, ‘COPing with Consent: Law-Making under Multilateral Environmental Agreements’ (2002) 15(1) *Leiden Journal of International Law*, pp. 1–52; C. Redgwell, ‘Sources of International Environmental Law: Formality and Informality in the Dynamic Evolution of International Environmental Law Norms’, in S. Besson & J. d’Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (Oxford University Press, 2017), pp. 939–59.

<sup>107</sup> Dilling & Markus, n. 32 above.

<sup>108</sup> See, e.g., D. Hume, ‘A Treatise of Human Nature, Book III, Part II’, in S.D. Warner & D.W. Livingston (eds), *David Hume: Political Writings* (Hackett, 1994), pp. 1–79, at 43–5 (stating that ‘[h]alf rights and obligations, which seem so natural in common life’ are, when it comes to applying the law, nothing else but ‘perfect absurdities’).

law’,<sup>110</sup> whereas attempts to derive broader legal effects from private law activity have been met with their own concerns.<sup>111</sup> Not all legal scholars share this view, however.<sup>112</sup> There are several areas of international practice, including the area of environmental protection, which arguably illustrate the legal significance of soft law.<sup>113</sup>

All this should not suggest that global law ignores traditional or mainstream conceptions of law. Walker concedes that, for global law to have a legal claim and be more than an aspiration, it must retain an ‘element of establishment’.<sup>114</sup> Dilling and Markus contend that informal and private norms still ‘have to be “re-embedded” into well-established political and legal processes’ and ‘complemented, endorsed or limited by formal legal structures’ to have legal effect.<sup>115</sup> As for the question of relative normativity, even proponents of the global law project have shown reluctance to abandon the dichotomy of legal and other norms, opting instead for alternative rationalizations of variable normativity.<sup>116</sup> In what might be described as an ‘ironic circularity’,<sup>117</sup> global law seems to draw its legal pedigree from an initial anchoring in received sources, but simultaneously holds ‘out an additional, independent normative claim that is taken to transcend the boundaries of existing legal categories’.<sup>118</sup>

But for that latter dimension, one could conclude that global law is little more than a labelling exercise, an ‘empirical mapping of scholarly trends and the fluid dynamics of

<sup>109</sup> P. Weil, ‘Towards Relative Normativity in International Law?’ (1983) 77(3) *American Journal of International Law*, pp. 413–42, at 417–8 (‘the threshold does exist: on one side of the line, there is born a legal obligation that can be relied on before a court or arbitrator, the flouting of which constitutes an internationally wrongful act giving rise to international responsibility; on the other side, there is nothing of the kind’).

<sup>110</sup> J. Klabbers, ‘The Redundancy of Soft Law’ (1996) 65(2) *Nordic Journal of International Law*, pp. 167–82.

<sup>111</sup> Dilling & Markus, n. 32 above.

<sup>112</sup> J. Pauwelyn, ‘Is It International Law or Not, and Does It Even Matter?’, in J. Pauwelyn, R. Wessel & J. Wouters (eds), *Informal International Lawmaking* (Oxford University Press, 2012), pp. 125–61, at 128–9. Given the divergent views, d’Aspremont has suggested that the ‘impression is nowadays rife that the international legal scholarship has become a cluster of different scholarly communities, each using their different criteria for the ascertainment of international legal rules’: J. d’Aspremont, *Formalism and the Sources of International Law* (Oxford University Press, 2011), p. 3.

<sup>113</sup> See, e.g., A. Boyle & C. Chinkin, *The Making of International Law* (Oxford University Press, 2007), pp. 210–29.

<sup>114</sup> Walker, n. 20 above, p. 171 (‘Vitaly, there must and there does remain an element of establishment in global law. Without some claim as to its current applicability – to its already possessing a rule-like quality – global law could simply not satisfy any meaningful operative definition of law. That is to say, the claim of global law would not be a *legal* claim, but simply an aspiration – a hope or prediction of what law might become’ (emphasis in the original)). His taxonomy of global law, in fact, incorporates the ‘formal’ manifestation of global legal relations and the ‘pedigree’ of international norms as one of the seven ‘species’ of global law: *ibid.*, pp. 63–70.

<sup>115</sup> Dilling & Markus, n. 32 above.

<sup>116</sup> G. Teubner, *Law as an Autopoietic System* (Blackwell, 1993), p. 90 (noting that whereas the legal validity of a legal norm is an either/or question, its social validity ‘can be a matter of degree. The interference of legal and social norms transforms their validity from a question of “either-or” to one of “more or less”’).

<sup>117</sup> Walker, n. 20 above, p. 162 (‘As we shall see, there is an ironic circularity at work in the combination of these various factors – an irresolution and awareness of the relativity of perspectives and partiality of solutions that breeds further unsettlement’).

<sup>118</sup> Collins, n. 91 above, p. 719; see also Dias Varella, n. 42 above, p. 314 (‘It is a set of rules that draws not only on international law but also on the set of internationalized domestic law norms, as well as the various legal processes among private actors, such as firms and civil society, that unfold independent of nation-states’).

the globalisation of legal study and practice’,<sup>119</sup> which assembles elements of *lex lata* and *lex ferenda* around a connective tissue, their shared ‘global warrant’.<sup>120</sup> Of these elements, some are accepted variants of binding domestic and international law; some reside in a penumbra of contested, but evolving normativity; and some, finally, lie in the realm of aspiration, or, as Walker describes it, are reflections of a presumptive ‘destination’ of the law.<sup>121</sup> Global law would not endeavour to represent a new and separate realm of law – with its own sources, institutions, and doctrines – operating alongside more established areas of law, but rather pursue the – no less modest – epistemic ambition to frame developments across various planes of public and private authority the rapid expansion and complex interactions of which call for a new conceptual paradigm, a ‘unique mode of thinking about law in a global context’.<sup>122</sup>

Yet, as mentioned earlier, such an interpretation of the global law project would be too simple a dismissal of its normative thrust, and would risk underestimating its constitutive power. If nothing else, by calling it global ‘law’, the concept – intentionally or not – implies a claim to legality that goes beyond mere description. For Walker, discourses on global law provide a channel for legal scholars and professionals to effectively reformulate what counts as a valid legal argument under conditions of globalization; these ‘specialists of global law ... become involved in “taking law to the world” through various different but mutually reinforcing modes and gradations of jurisgenerative activity’.<sup>123</sup> It is precisely in that contested space between ‘constructive discovery or creative projection’<sup>124</sup> that the promise and potential pitfalls of global law reside. For wherever global law purports the existence of norms beyond traditional forms and sources, it must also raise questions about the authority to adopt such norms, their legitimacy, and accountability for their implementation.<sup>125</sup>

That is also where global law simultaneously faces its greatest vulnerability and can realize its greatest promise. Law on all levels has endured perennial accusations of a democratic deficit. International law, in particular, has been the target of scathing critique, with its current practice likened to the triumph of an unelected and bureaucratic *Hofmafia* over the true will of international society.<sup>126</sup> However, criticism has also been levelled against domestic law, where the legitimacy of legislators – based on, at best, highly aggregative representation and a thin veneer of accountability through

<sup>119</sup> Collins, n. 91 above, p. 719.

<sup>120</sup> Walker, n. 20 above, p. 22.

<sup>121</sup> Ibid., p. 21.

<sup>122</sup> Collins, n. 91 above, p. 719.

<sup>123</sup> Walker, n. 20 above, pp. 52–3.

<sup>124</sup> Ibid., p. 70.

<sup>125</sup> As Patterson (n. 96 above, p. 414) puts it, ‘[b]y what authority are norms created by non-state actors? In virtue of what are those norms valid? Can those norms be challenged, altered or extinguished, and by whom?’.

<sup>126</sup> See P. Allott, *Eunomia: New Order for a New World* (Oxford University Press, 1990), pp. 243–53; P. Allott, *The Health of Nations: Society and Law Beyond the State* (Cambridge University Press, 2002), pp. 380–98. From a very different starting point, see also A.-M. Slaughter, *A New World Order* (Princeton University Press, 2004), p. 8 (‘the diversity of the peoples to be governed makes it almost impossible to conceive of a global demos’).

infrequent and flawed elections – has been censored as a wanting basis of political authority.<sup>127</sup> Still, in our liquid modernity, where faith in universal truths has been largely replaced by a pluralism of values and ideas,<sup>128</sup> normative frameworks have been unable to offer a lasting alternative to the frail legitimacy of formal, posited law.<sup>129</sup>

Against this persistent tension between flawed facts and unredeemed norms, an alternative foundation for the validity of law could find new traction through the transformative potential of global law: deliberative democracy. Based on different strands of newer social and political theory, yet eminently practical in its aspiration, it seeks to close the legitimacy gap through an observable social fact – namely, strengthened participation in a process of pluralist deliberation. In the place of an ordained and, ultimately, contestable truth, it calls for an inclusive process of collective reasoning and active public debate.<sup>130</sup> Different approaches have been suggested to actualize such a model of deliberative democracy, from the public reasoning process evoked by Rawls<sup>131</sup> to the communicative rationality and ideal discourse outlined by Habermas.<sup>132</sup> What these approaches have in common, however, is inclusive participation and equality of access for free and autonomous individuals, groups, and interests, including those who have been historically marginalized in collective decision making.<sup>133</sup> Anchored in such deliberation, law becomes the medium for transforming communicative power into administrative power, a means for making civic will formation effective in resolving societal challenges.<sup>134</sup> In actual practice, a perfect consensus based on the foregoing ideal of democratic deliberation may remain elusive in a socially complex and morally divided world,<sup>135</sup>

<sup>127</sup> Inequities of wealth and influence, a passive citizenry, and vast information asymmetries among its members have been cited as shortcomings of modern democratic processes, rendering them ‘locations for strategic gamesmanship’ rather than genuine deliberation: see J.F. Bohman, *Public Deliberation: Pluralism, Complexity, and Democracy* (The MIT Press, 2000), pp. 18–24.

<sup>128</sup> See, generally, Z. Bauman, *Liquid Modernity* (Polity, 2000); U. Beck, *Risikogesellschaft: Auf dem Weg in eine andere Moderne* (Suhrkamp, 1986); A.C. MacIntyre, *Whose Justice? Which Rationality?* (University of Notre Dame Press, 1988).

<sup>129</sup> Throughout history, normative claims based on celestial authority, natural justice, or some other foundational premise have sought to provide a moral corrective for the shortfalls of secular law; yet time and again they have also been rejected for their contingency and frequent instrumentalization for factional ends.

<sup>130</sup> See, generally, J.S. Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford University Press, 2000); A. Gutmann & D. Thompson, *Why Deliberative Democracy?* (Princeton University Press, 2004).

<sup>131</sup> J. Rawls, *Political Liberalism* (Columbia University Press, 1993), p. 214 (‘public reason is the reason of equal citizens who, as a collective body, exercise final political and coercive power over one another in enacting laws and in amending their constitution’).

<sup>132</sup> For the theoretical foundations of his approach, see J. Habermas, *Vorstudien und Ergänzungen zu einer Theorie des kommunikativen Handelns* (Suhrkamp, 1984), pp. 177–8.

<sup>133</sup> See, e.g., Rawls, n. 131 above, p. 306; J. Habermas, ‘Reconciliation through the Public Use of Reason: Remarks on John Rawls’s *Political Liberalism*’ (1995) 92(3) *Journal of Philosophy*, pp. 109–31, at 117; on the importance of participation as ‘the right of rights’ see J. Waldron, *Law and Disagreement* (Oxford University Press, 1996), Chs 11 and 13.

<sup>134</sup> J. Habermas, *Faktizität und Geltung* (Suhrkamp, 1992), p. 499.

<sup>135</sup> J. Bohman, ‘Complexity, Pluralism, and the Constitutional State: On Habermas’s *Faktizität and Geltung*’ (1994) 28(4) *Law and Society Review*, pp. 897–930.

but that does not lessen its desirability<sup>136</sup> and may even have its own advantages.<sup>137</sup> Its pursuit, moreover, creates a theoretical entry point for global law to enrich and strengthen legal ordering on multiple levels.

With its responsiveness to the fluidity of public authority in a postnational world, and its proximity to pluralist conceptions of normativity and justice in the international order, global law offers an opportunity for enhanced deliberation and inclusivity. It expands the range of relevant actors to subnational jurisdictions, private corporations, minorities, and civil society more generally, and can thereby help to bridge the spatial and temporal distance between those who generate the law and those whose lives are governed by it. This acquires particular importance in an environmental context<sup>138</sup> in which important stakeholders – including future generations and the natural environment itself – are routinely excluded from existing democratic processes<sup>139</sup> and now may be given a voice by dedicated interest groups. Stronger involvement of technical experts and affected communities can improve the substantive quality of environmental governance, better ground it in local conditions<sup>140</sup> and thereby impart an alternative form of legitimacy.<sup>141</sup> Altogether, greater participation in democratic processes has been linked to improved environmental outcomes by generating public support for relevant policies, enhancing institutional capacities of public agencies, and adding a layer of accountability that state actors alone cannot provide.<sup>142</sup> Baber and Bartlett go so far as to declare that a deliberative approach is therefore vital ‘for environmental law to attain global reach’.<sup>143</sup>

<sup>136</sup> Indeed, deliberative approaches place greater value on the process than on the outcome, seeking ‘models of representation that support the give-and-take of serious and sustained moral argument within legislative bodies, between legislators and citizens, and among citizens themselves’: A. Gutmann & D. Thompson, *Democracy and Disagreement* (Belknap Press, 1996), p. 131.

<sup>137</sup> See, e.g., Dryzek, n. 130 above, p. 172 (‘The capacity to deliberate can never be fully equalized across individuals, and discursive democracy as the contestation of discourses may even require some degree of inequality as grist for the context’).

<sup>138</sup> Bodansky presciently anticipated this nearly two decades ago, when he observed ‘to the extent that international environmental law is beginning to have significant implications for non- or substate actors (who have not consented to it directly), rather than just for the relations among states, state consent may for them have little legitimating effect. As international environmental law continues to grow more like domestic environmental law, it will be held to the same standards of legitimacy, and its lack of transparency and accountability will become increasingly problematic’: D. Bodansky, ‘The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?’ (1999) 93(3) *American Journal of International Law*, pp. 596–624, at 606.

<sup>139</sup> H. Jonas, *Das Prinzip Verantwortung: Versuch einer Ethik für die technologische Zivilisation* (Suhrkamp Verlag, 1979), p. 55.

<sup>140</sup> See, generally, S. Harding, *Is Science Multicultural? Postcolonialisms, Feminisms, and Epistemologies* (Indiana University Press, 1998); T. Forsyth, *Critical Political Ecology: The Politics of Environmental Science* (Routledge, 2003); D. MacRae & D. Wittington, *Expert Advice for Policy Choice* (Georgetown University Press, 1997).

<sup>141</sup> See Bodansky, n. 138 above, pp. 619–21.

<sup>142</sup> See R. Eckersley, ‘Green Liberal Democracy: The Rights Discourse Revisited’, in B. Doherty & M. d. Geus (eds), *Democracy and Green Political Thought* (Routledge, 1996), pp. 212–36; J. Meadowcroft, ‘Deliberative Democracy’, in R.F. Durant, D.J. Fiorino & R. O’Leary (eds), *Environmental Governance Reconsidered: Challenges, Choices, and Opportunities* (The MIT Press, 2004), pp. 183–217.

<sup>143</sup> W.F. Baber & R.V. Bartlett, *Global Democracy and Sustainable Jurisprudence: Deliberative Environmental Law* (The MIT Press, 2009), p. 18 (they go on to make a strong, albeit implicit, case

Still, for global law to realize this vision and help the democratic processes that precede law formation and implementation to ‘catch up with the forces of a globalized economy’,<sup>144</sup> it must meet certain conditions. Collective choices have to originate in reasoned debate and public justification rather than be made ‘by blind acceptance of the views of established authorities, by deals concluded among vested interests, or by recourse to intimidation’.<sup>145</sup> Discussing the legal quality of global administrative law, Kingsbury has posited a set of principles and practices that, in his view, are constitutive of legality in the public sphere: rationality, proportionality, rule of law, justification, publicity, and transparency.<sup>146</sup> Pauwelyn, Wessel and Wouters, in turn, have highlighted that ‘traditional international law, based as it is on state consent, does not have a monopoly on legitimate cooperation’.<sup>147</sup> Indeed, in addition to formal state consent, legitimacy at the international level can also come from ‘expertise, an open and inclusive process of deliberation, or the implementation of effective outcomes’.<sup>148</sup> As a conclusion from their comprehensive study of informal international lawmaking, they observe that ‘the emerging code of good practice for the development of standards or new forms of cooperation outside international law is normatively thicker’ than the traditional validation requirements for international law in the sense of a more inclusive, transparent and predictable process, the involvement of more diverse and expert actors, and more carefully and coherently elaborated output.<sup>149</sup> They have therefore called for a newly calibrated set of criteria that better reflect evolving circumstances,<sup>150</sup> also likening such criteria to the test of ‘thick stakeholder consensus’.<sup>151</sup> At the same time, they highlight the crucial role of domestic oversight, arguing that ‘to ensure domestic democratic legitimacy, a minimum degree of parliamentary or congressional oversight (not necessarily formal consent) of all international cooperation that affects public policy-making or individual freedom – treaty or not, formal or informal – must be available’.<sup>152</sup> Krisch, in contrast, has argued that legitimacy can be realized in a global legal order by fostering public autonomy – that is, by allowing citizens to choose the conditions of their own association – and deliberating

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for a deliberative approach to global environmental law, stating that ‘humankind must invent a mechanism that allows for the formation of a collective will in the absence of sovereignty as it is conventionally understood’).

<sup>144</sup> J. Habermas, *The Postnational Constellation* (The MIT Press, 2001), p. 53.

<sup>145</sup> Meadowcroft, n. 142 above.

<sup>146</sup> B. Kingsbury, ‘The Concept of “Law” in Global Administrative Law’ (2009) 20(1) *European Journal of International Law*, pp. 23–57, at 33.

<sup>147</sup> J. Pauwelyn, R. Wessel & J. Wouters, ‘When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking’ (2015) 25(3) *European Journal of International Law*, pp. 733–63, at 747.

<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid.*, p. 749.

<sup>150</sup> J. Pauwelyn, R. Wessel & J. Wouters, ‘Informal International Lawmaking: An Assessment and Template’, in J. Pauwelyn, R. Wessel & J. Wouters (eds), *Informal International Lawmaking* (Oxford University Press, 2012), pp. 500–37, at 516–8.

<sup>151</sup> Pauwelyn, Wessel & Wouters, n. 147 above, p. 759.

<sup>152</sup> *Ibid.*, pp. 751–2.



contested issues through a pluralist process in which competing associations exercise mutual toleration.<sup>153</sup>

Compelling arguments have thus been made for a postnational model of democracy, in which the state and its formal processes are neither indispensable nor sufficient for legitimate and accountable governance,<sup>154</sup> and indeed borders and jurisdictions are themselves open to democratic deliberation.<sup>155</sup> For now, however, it remains unclear whether such aspirations are met in practice, and whether the conditions of open and equal deliberation are possible in those new contexts that stand to supplant or complement traditional state authority in a globalizing world. On a conceptual level, for instance, Stewart has expressed concern that global regulatory bodies will give greater regard to the particular interests and concerns of powerful states and well-organized economic actors, while disregarding the often peripheral interests and concerns of less organized and less powerful groups and vulnerable individuals.<sup>156</sup> At a minimum, that cautions against abandoning the electoral processes and procedural guarantees that have generated legitimacy in existing state polities, suggesting that hybrid forms of governance – which combine the legitimizing structures of the state with deliberation and contestation beyond the state – may offer greater hope of closing current legitimacy gaps than either states or non-state actors would alone.<sup>157</sup>

A survey of current postnational activities in the arena of climate cooperation seems to support this assessment. At a time when several national governments are held captive by populist and nationalist political movements and have begun to withdraw from established channels of environmental diplomacy and rulemaking, the sheer scale and reach of such activities across alternative non-state venues is nothing short of remarkable, and is welcome in its own right as a counterpoint to state retrenchment or paralysis.<sup>158</sup> As early evaluations of the underlying initiatives and processes have shown, however, these efforts, by and large, do not meet the foregoing criteria, and are thus unlikely to serve as a corrective to the deficient legitimacy and accountability of traditional environmental law.<sup>159</sup> An empirical survey of climate initiatives involving non-state actors leads Bäckstrand and Kuyper to conclude that ‘transparency and

<sup>153</sup> Krisch, n. 10 above, p. 90.

<sup>154</sup> See, e.g., D. Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Polity Press, 1995); D. Archibugi, *The Global Commonwealth of Citizens: Toward Cosmopolitan Democracy* (Princeton University Press, 2008).

<sup>155</sup> See, e.g., J. Bohman, *Democracy across Borders* (The MIT Press, 2007), p. 17.

<sup>156</sup> R.B. Stewart, ‘Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness’ (2014) 108(2) *American Journal of International Law*, pp. 211–70, at 211.

<sup>157</sup> T. Macdonald, ‘What’s So Special about States? Liberal Legitimacy in a Globalising World’ (2008) 56(3) *Political Studies*, pp. 544–65, at 558–9.

<sup>158</sup> See, e.g., the survey of subnational and private climate action by A. Hsu et al., *Global Climate Action of Regions, States and Businesses* (Data Driven Yale, NewClimate Institute, PBL Netherlands Environmental Assessment Agency, 2018), available at: [https://datadrivenlab.org/wp-content/uploads/2018/08/YALE-NCI-PBL\\_Global\\_climate\\_action.pdf](https://datadrivenlab.org/wp-content/uploads/2018/08/YALE-NCI-PBL_Global_climate_action.pdf).

<sup>159</sup> See, e.g., J.W. Kuyper & K. Bäckstrand, ‘Accountability and Representation: Nonstate Actors in UN Climate Diplomacy’ (2016) 16(2) *Global Environmental Politics*, pp. 61–81; B. Sjäffell, *Why Law Matters: Corporate Social Irresponsibility and the Futility of Voluntary Climate Change Mitigation* (University of Oslo, 2011).



accountability mechanisms are nascent at best, nonexistent at worse',<sup>160</sup> while Widerberg and Pattberg find that shifting patterns of authority in climate governance have 'made it increasingly difficult to understand who should be accountable to whom'.<sup>161</sup> Sheer effectiveness in remedying an environmental threat could compensate for the attested shortfall in procedural legitimacy,<sup>162</sup> but there again the track record of informal climate initiatives has so far been questionable.<sup>163</sup> Overall, the role of non-state actors in the 'promotion of transparency, consultation, evaluation and correction in global regulatory bodies' appears to have 'remained modest, both in absolute terms and relative to the needs'.<sup>164</sup>

While this conclusion, if sustained into the future, would be regrettable, it only reflects an unfulfilled potential and, as such, a missed opportunity. It should then be a void that has yet to be filled. Of greater concern, however, are assertions that global law, far from enhancing the legitimacy of rule-based governance, has actually had the opposite effect. For Collins, the claimed 'globality' of global law risks conveying a false sense of universalism, helping to legitimize what would otherwise be arbitrary local or particular concerns and interests.<sup>165</sup> It is hard to ignore this risk. In his encyclopedic digest of the global law project, Walker repeatedly discusses the important role of 'academic elites' in advancing global law narratives, a cryptic society of 'specialists' operating in 'close-knit ... association' and 'led by narrow elites with privileged access to resources, knowledge and networks' that are possessed of 'convergent world-views and an extensive sphere of influence'.<sup>166</sup> One might then ask what influence marginalized communities will have in defining the material content and 'destination' of global law – a system of norms that affects and purportedly protects them.

For Loughlin, global law manifests a triumph of regulatory technique, a science of the 'administration of things' which asks to replace 'the idea of law as the expression

<sup>160</sup> K. Bäckstrand & J.W. Kuyper, 'The Democratic Legitimacy of Orchestration: The UNFCCC, Non-state Actors, and Transnational Climate Governance' (2017) 26(4) *Environmental Politics*, pp. 764–88, at 785.

<sup>161</sup> O. Widerberg & P. Pattberg, 'Accountability Challenges in the Transnational Regime Complex for Climate Change' (2017) 34(1) *Review of Policy Research*, pp. 68–87, at 83–4.

<sup>162</sup> Bodansky, n. 138 above, p. 622 (referring to 'problem-solving effectiveness' as a source for substantive or 'output-oriented legitimacy').

<sup>163</sup> Michaelowa and Michaelowa evaluate 109 transnational climate policy initiatives based on four indicators: the existence of a mitigation target, the provision of incentives for mitigation, the specification of a baseline from which mitigation is determined, and the existence of provisions for measurement, reporting and verification (MRV) of mitigation. Only one initiative satisfies all four criteria, leading to their conclusions that the evidence 'does not suggest that these initiatives will provide any significant contribution to closing the emissions gap': K. Michaelowa & A. Michaelowa, 'Transnational Climate Governance Initiatives: Designed for Effective Climate Change Mitigation?' (2017) 43(1) *International Interactions*, pp. 129–55, at 151. Decidedly more positive, albeit still qualified, assessments can be found in S. Chan et al., 'Effective and Geographically Balanced? An Output-based Assessment of Non-State Climate Actions' (2018) 18(1) *Climate Policy*, pp. 24–35; H.v.d. Ven, S. Bernstein & M. Hoffmann, 'Valuing the Contributions of Nonstate and Subnational Actors to Climate Governance' (2017) 17(1) *Global Environmental Politics*, pp. 1–20.

<sup>164</sup> J.A. Scholte, 'Conclusion', in J.A. Scholte (ed.), *Building Global Democracy? Civil Society and Accountable Global Governance* (Cambridge University Press, 2011), pp. 306–42, at 341–2.

<sup>165</sup> R. Collins, 'The Rule of Law and the Quest for Constitutional Substitutes in International Law' (2014) 83(2) *Nordic Journal of International Law*, pp. 87–127, at 87.

<sup>166</sup> Walker, n. 20 above, pp. 30, 38, 42, 52, 175.

of will, and especially the will of political majorities'.<sup>167</sup> He sees global law as 'the expression of a type of instrumental reason',<sup>168</sup> yet that invariably begs the question: *whose* instrumental reason?<sup>169</sup> Dias Varella, one of the few developing country scholars working on this topic, has described the challenge of global law as follows:

The challenge would be to maintain the differences that exist among nations without imposing a fusion of national legal rules, much less imposing legal norms inspired by hegemonic powers, while at the same time constructing some type of global order or, at least, an ordered legal space.<sup>170</sup>

It is this risk of instrumental appropriation that has compelled scholars such as Koskenniemi to identify themselves with a formalist, yet politically aware conception of law, which they believe provides a more impartial and, ultimately, more just foundation for the diplomatic relations of states.<sup>171</sup>

This is a powerful critique that merits being taken seriously. In as much as global law aspires to a normative ideal – what Walker describes as 'globally defensible good reasons for its invocation'<sup>172</sup> – it invariably also introduces a measure of contingency; its normative claim cannot be simply substantiated with reference to established source criteria or other constituent rules of legal systems already in force.<sup>173</sup> Walker acknowledges this when he concedes that the attendant projection of global law involves 'a gambit, a calculated risk that its explicit self-sponsorship as a form of law should not be undermined by a lack of prior authorisation'.<sup>174</sup> For some, this gambit strains the limits of acceptability, based on an 'almost maddeningly schizophrenic account of what global law is' and, by extension, what it is not.<sup>175</sup> Yet, while the inherent ambiguities may

<sup>167</sup> Loughlin, n. 91 above, p. 356.

<sup>168</sup> Ibid.; see also P.T. Smith, 'Instrumentalism or Constitutivism: A Dilemma for Accounts of Transnational Political Authority' (2013) 4(3) *Transnational Legal Theory*, pp. 374–95, at 374 (who likewise argues that transnational law favours 'instrumental authority, which treats political institutions as tools', whereas only sovereign states can exercise 'constitutive authority').

<sup>169</sup> This point is implicitly conceded by Walker, n. 103 above, p. 14 ('if we part company with the positivists and decide that pedigree and convention are irrelevant or at least insufficient, what kind of moral or pragmatic standards should we use to replace or supplement pedigree and convention as a test of the validity and authority of legal rules?').

<sup>170</sup> Dias Varella, n. 42 above, p. 318, citing M. Delmas-Marty, *Les forces imaginantes du droit, v. IV: Vers une communauté de valeurs?* (Seuil, 2010), p. 13 ('In any event, we are still a long way from a global law that is able to offer satisfactory systems of governance (coordination between states and actors) or the rule of law (with subordination to a supranational order whatever it may be), which could perhaps be called a "global rule of law," and that is not identified with a state that imposes its values but rather with an ethical dimension referring to shared values that humanize the community on a worldwide scale').

<sup>171</sup> M. Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70(1) *The Modern Law Review*, pp. 1–30.

<sup>172</sup> Walker, n. 20 above, p. 22.

<sup>173</sup> Collins, n. 91 above, p. 728.

<sup>174</sup> Walker, n. 20 above, pp. 151–2.

<sup>175</sup> Collins, n. 91 above, p. 719 ('The concept of global law that results can best be described as "slippery" and, as a result, ends up either empty in its critical application or else susceptible to an almost infinite manipulation and application to support any particular vision of law's re-imagination in its seemingly ineluctable global future').

caution against invoking the ‘inevitability’ of this ‘[p]rojected yet oblique, unsettled yet inexorable’ project,<sup>176</sup> there can also be no question that global law offers an intriguing vision, an as yet dormant promise of greater inclusiveness and legitimacy in the evolving cross-border relations of humankind.

## 5. CONNECTING GLOBAL LAW, JUSTICE AND THE ENVIRONMENT: THE ROLE OF GLOBAL LAW SCHOLARS

Having discussed the challenge and promise of global environmental law, this section shifts the focus towards the role of global legal experts, as well as the collective practice and professional culture surrounding global environmental law. It calls for global environmental law scholars to be conscious and aware of the legitimacy implications of their project, and therefore encourages them to create and nurture intellectual environments whereby deeper reflection of their personal and collective roles and patterns of influence becomes part of global environmental law scholarship. To be sure, such self-reflexivity and heightened awareness of the scholar’s role, influence and potential blind spots<sup>177</sup> can only be supplementary to addressing legitimacy gaps in international and global (environmental) law through the more traditional focus on promoting processes and practices geared towards greater inclusiveness and legitimacy. For trying to imagine – even in good faith – personal blind spots and biases, and the potentially unwanted consequences of one’s professional engagement, seems destined to be less effective than actually engaging and earnestly listening to those whose voices and views tend to be marginalized in the practice of global environmental law.

At the same time, the need for awareness of the considerable but largely hidden – even unconscious – power and influence that lawyers exercise in their expert roles has been highlighted in international legal scholarship in ways that should not be ignored.<sup>178</sup> In his exploration of ‘rule by expertise’, Kennedy laments ‘the lost opportunity to engage expertise as a doorway to responsible decision rather than as a substitute for ethical reflection and political choice’.<sup>179</sup> He also argues:

International lawyers can hardly avoid coming face-to-face with the diversity and analytical porousness of their expertise. Such an experience of legal pluralism might open the way of exploring law’s role in distributive conflict and the responsibility of legal experts for the outcomes of struggle.<sup>180</sup>

<sup>176</sup> Walker, n. 20 above, pp. 150–1.

<sup>177</sup> Biases were underscored as a key finding arising from examining international law as a profession: J. d’Aspremont et al., ‘Introduction’, in J. d’Aspremont et al. (eds), *International Law as a Profession* (Cambridge University Press, 2017), pp. 1–15, at 1.

<sup>178</sup> D. Kennedy, *A World of Struggle: How Power, Law and Expertise Shape Global Political Economy* (Princeton University Press, 2016). See also M. Koskenniemi, ‘The Politics of International Law: 20 Years Later’ (2009) 20(1) *European Journal of International Law*, pp. 7–19, at 12 (discussing, inter alia, specialist vocabularies in international law and how they act ‘as “ideologies” in the technical sense of reifying, making seem necessary or neutral something that is partial and contested’).

<sup>179</sup> *Ibid.*, p. 11.

<sup>180</sup> *Ibid.*, p. 10.

This has resulted in calls for methodological honesty and an explicit, conscious and proactive engagement with national, ideological and structural biases among international lawyers.<sup>181</sup> Elsewhere in the social sciences, calls have been made for ‘new forms of radical reflexivity’ that include ‘the explicit articulation of values, assumptions and normative orientations; and renewed attention to asymmetries in power amongst participants engaging in new approaches, methodologies, and processes of co-production’.<sup>182</sup> Temper and her co-authors have thus explored scholarly archetypes in order ‘to prompt an ongoing conversation, inviting us to consider how we see our scientific practice, our engagement with other agents within the process of research, how values are reflected in the work we do, and how we sense that research leads to social and political change and transformation’.<sup>183</sup>

Confining ourselves here to the legal sphere and global environmental law, we will draw inspiration from Walker and sketch a typology of global (environmental) lawyers to explore their strengths, weaknesses and blind spots.<sup>184</sup> Our argument is that self-identifying with one or more such roles and attitudes may help us to analyze and understand how global environmental law phenomena are influenced by scholars, both individually and collectively, as they operate in different roles of legal expertise, contributing to the making, interpretation, application, enforcement, and diffusion of global environmental law. All too often, environmental law scholars do not explicitly interrogate in their own scholarly work their contributions to international law-making as advisers to governments, legal officers within international organizations, international negotiators, litigators, adjudicators, or consultants in legal advisory projects;<sup>185</sup> nor do they always ask whether the various forms of norm diffusion in which they are involved are inclusive or exclusive of marginalized voices. In other words, one of the missed opportunities for environmental lawyers in not engaging more closely with the global law debate is the ability to contribute to a self-reflexive conversation with other epistemic communities, such as global justice scholars and environmental

<sup>181</sup> R. Collins & A. Bohm, ‘International Law as Professional Practice: Crafting the Autonomy of International Law’, in d’Aspremont et al., n. 177 above, pp. 67–92, at 91; and A. Peters, ‘International Legal Scholarship under Challenge’, in d’Aspremont et al., n. 177 above, pp. 117–59, at 124–5; G. Hernandez, ‘The Responsibility of the International Legal Academic: Situating the Grammarian within the “Invisible College”’, in d’Aspremont et al., n. 177 above, pp. 160–88, at 186–8.

<sup>182</sup> L. Temper, D. McGarry & L. Weber, ‘From Academic to Political Rigour: Insights from the “Tarot” of Transgressive Research’ (2019) 163 *Ecological Economics* (forthcoming), available at: <https://doi.org/10.1016/j.ecolecon.2019.106379>.

<sup>183</sup> Ibid.

<sup>184</sup> N. Walker, ‘The Gap between Global Law and Global Justice: A Preliminary Analysis’, 21 Dec. 2016, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2888557](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2888557). See also M. Koskeniemi, ‘Between Commitment and Cynicism: Outline for a Theory of International Law as Practice’, in *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (United Nations, 1999), pp. 495–523 (in which he describes the roles and attitudes of the judge, the adviser, the activist and the academic in international law to illustrate the presence of a dialectic of commitment and cynicism in each role); and J. d’Aspremont, ‘Three International Lawyers in a Hall of Mirrors’ (2019) 32(3) *Leiden Journal of International Law*, pp. 367–81 (discussing the invincible international lawyer, the vulnerable international lawyer, and the self-reflective international lawyer).

<sup>185</sup> See also various traditions in different legal cultures about the role of international law scholars: A. Roberts, *Is International Law International?* (Oxford University Press, 2017).

justice scholars,<sup>186</sup> as a way to enrich traditional approaches to legal analysis and existing legal theories.

As Hey has argued in her reflection on global environmental law:

Unless more equal participation of developing states, and where relevant nonstate actors from developing states, is attained at the global level of decision-making, there will be fundamental disagreement about the aims of global environmental law, which will not be regarded as a system of law that meets standards of justice, or serves to protect the environment.<sup>187</sup>

According to Walker – who has aptly described three typologies of the inclination of legal scholars towards justice – global law scholars more generally have not sufficiently engaged with global justice scholarship. He speaks of pragmatist legal scholars who are focused on the technicalities of the law and are blind, detached or impatient with ‘wider questions regarding the causes, manifestations and consequences of global justice and injustice’.<sup>188</sup> This approach could be helpful in discovering, through interpretation of the minute details of the law and considerations of mutual supportiveness, implicit choices and opportunities related to justice.<sup>189</sup> However, pragmatist lawyers risk becoming hostage to a ‘narrowly entrenched legalism’<sup>190</sup> and never putting their skills to the service of a justice-driven legal analysis. A second type of lawyer is represented by idealists, who believe that law is or can be a ‘deep and (relatively) autonomous steering mechanism for other global social and economic forces’ and focus their work on imagining new legal approaches or reinterpreting existing legal rules in ways that are geared towards addressing power imbalances and sources of injustice. These lawyers, in turn, run the risk of being caught in ‘naïve or hubristic utopianism’,<sup>191</sup> and of therefore being unable to put forward arguments that can be considered as technically solid as those of the pragmatic law scholars, or defensible from the viewpoint of critical legal scholars. The third type of lawyer he identifies is the radical critic who sees law as an ‘instrument for larger social and economic forces tending towards global injustice’<sup>192</sup> and provides an incredibly helpful critique of the ways in which law comes to be constructed as a result, and to the service, of more powerful actors and interests, which is often overlooked by pragmatist and idealist legal scholars. This third group of lawyers has its own blind spot – namely, the tendency to abandon themselves to, or content themselves with, structural fatalism.<sup>193</sup> In addition, Mattei has highlighted that critical

<sup>186</sup> For an attempt, see E. Morgera, ‘Justice, Equity and Benefit-Sharing under the Nagoya Protocol to the Convention on Biological Diversity’ (2015) 24(1) *Italian Yearbook of International Law*, pp. 113–41. See also, from an international law perspective, Peters, n. 181 above, pp. 155–7; and Hernandez, n. 181 above, p. 173.

<sup>187</sup> E. Hey, ‘Global Environmental Law’, 22 Nov. 2009, p. 17, available at: <https://ssrn.com/abstract=1511188>.

<sup>188</sup> Walker, n. 184 above, p. 3.

<sup>189</sup> On the opportunities to find different ways to address justice through legal interpretation, see Morgera, n. 186 above.

<sup>190</sup> Walker, n. 184 above, p. 3.

<sup>191</sup> *Ibid.*

<sup>192</sup> *Ibid.*

<sup>193</sup> *Ibid.*

legal scholars can themselves often be ‘powerful academic superstars from elite institutions that reproduce academic hierarchies’, and who risk dissociating themselves from underlying political concerns and overlook ‘the tensions and nuances in mainstream scholars’ work’.<sup>194</sup> According to Mattei, therefore, this may result in a highly theoretically sophisticated caricature that is carried out for its own sake, is ‘dangerously self-indulgent’, and tends to ignore the work of non-affiliated scholars even when it may be fully aligned with a counter-hegemonic agenda.<sup>195</sup>

Self-identifying as a representative of one or more of these attitudes and establishing a collaborative conversation with colleagues who espouse different attitudes can serve to nurture a culture of explicit and accountable discussion of scholars’ biases and blind spots. Such biases and blind spots derive from professional experience, institutional culture and status, and the participation in epistemic networks that are increasingly recognized to be key determinants of international environmental law as a transnational and global legal field,<sup>196</sup> rather than an inherently universal and cosmopolitan one.<sup>197</sup> This exercise can help legal scholars to become more open to acknowledging and engaging with power asymmetries deriving from legal education, professional experiences, and epistemic networks that lead to ‘different patterns of diffusion and knowledge’ as a result of, *inter alia*, the multiple roles that international (environmental) lawyers play (advocates before international or national courts, advisers to governments or NGOs at the national or international level, and so on) and their multiple spheres of influence.<sup>198</sup> This would also serve to acknowledge and make an object of study the ‘distinct insights’ of different legal scholars who are engaged in alternative forms of practice – and competition among themselves – to influence international law-making and interpretation on the basis of their legal diversity.<sup>199</sup> This argument, emerging from Roberts’ research into the national characteristics of international lawyers, is echoed in Walker’s argument about global lawyers as ‘symbolic entrepreneurs of the legal world’ who, through ‘globally resonant legal doctrine and practices’, are involved in ‘persuasive adaptation’ and therefore contribute to the progressive development of global law.<sup>200</sup> It also resonates with the note of caution that global environmental lawyers may also be inadvertent or strategic norm entrepreneurs, and need to reflect carefully on the research ethics dimensions of their work.<sup>201</sup>

This distinction provides a helpful basis not only for individual global environmental law scholars to be more open and accountable in their own work, but also for

<sup>194</sup> U. Mattei, ‘Comparative Law and Critical Legal Studies’, in M. Reimann & R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006), pp. 815–36, at 833–5.

<sup>195</sup> *Ibid.*

<sup>196</sup> A. Roberts, *Is International Law International?* (Oxford University Press, 2017) pp. xxii, 16, 25–6.

<sup>197</sup> *Ibid.*, p. 6.

<sup>198</sup> *Ibid.* These empirical findings corroborate the contributions made from a theoretical perspective by the scholars cited at n. 181 above.

<sup>199</sup> *Ibid.*, p. 128.

<sup>200</sup> Walker, n. 184 above, p. 10.

<sup>201</sup> Morgera, n. 46 above, p. 263. For a reflection from an international law perspective, see Peters, n. 181 above, pp. 155–7; and Hernandez, n. 181 above, p. 163.



developing an argument that through a collaborative approach and open dialogue differently minded and trained scholars are together better able to analyze the current (and speculatively explore the future) capacity of global environmental law to cater for global environmental justice. Such a collaborative approach can also prove to be necessary for discussing normativity and legitimacy of global environmental law phenomena. Each of the three global lawyers is limited in his or her contribution, but working together they can help each other to identify, understand, and overcome their respective blind spots and develop a more solid line of investigation of global (environmental) law and global justice that draws on the strengths of each of the individual approaches.<sup>202</sup> Critical legal scholars can support other lawyers with their ‘systematic attempt to include both the dimension of power and a theory of domination, and the relentless questioning of the “dark sides” of apparently emancipatory and progressive agendas’ in law, as well as ‘empowering alternative voices’.<sup>203</sup> In turn, pragmatic lawyers can support critical lawyers in fully taking into account the actual nuances of the law, and can support idealist lawyers in anchoring their arguments in existing details of the law or actual workings of it. For their part, idealist lawyers can support both critical and pragmatic legal scholars to move beyond a negative critique or technicist analysis towards the development of a constructive proposition that can systematically and self-reflexively consider the dark sides of law and accurately assess opportunities and constraints in its detailed workings.

For one of the authors of this article, the collaborative approach proposed above – informed by Walker’s theoretical distinction, recent reflections on international law as a profession,<sup>204</sup> and Roberts’ empirical research – may provide a way to respond to, for instance, Klabbers’ critique of ‘international law as the law of international lawyers’ as opposed to the law practised by states.<sup>205</sup> A collaborative self-reflexive approach could manage the risk of glossing over the reality and theoretical implications of global (environmental) lawyers playing several roles in the context of state practice, while addressing Klabbers’ concerns about international legal research as highly competitive.<sup>206</sup> For that author, a collaborative self-reflexive process among global environmental lawyers may also provide a way to respond to the criticism of soft law and other deformalization processes<sup>207</sup> as undermining the internal logic and distinctiveness of the legal discipline, and instead harness their capacity to contribute a fresh reflection on the distinctive

<sup>202</sup> E. Morgera, Inaugural Lecture, University of Strathclyde, Glasgow (UK), 2 May 2019 (the lecture video will soon be available on the Strathclyde University YouTube channel, available at: <https://www.youtube.com/user/UniStrathclyde/videos>).

<sup>203</sup> Mattei, n. 194 above, p. 835.

<sup>204</sup> See generally d’Aspremont et al., n. 177 above.

<sup>205</sup> J. Klabbers, ‘On Epistemic Universalism and the Melancholy of International Law’ (2018) 29(4) *European Journal of International Law*, pp. 1057–69.

<sup>206</sup> Morgera is currently testing this hypothesis in the context of the UKRI GCRF One Ocean Hub (Grant Ref. NE/S008950/1), a 5-year global interdisciplinary research collaboration on inclusive and integrated ocean governance, led by and framed through a global environmental law perspective and gradually integrated with research on self-reflexivity from the Transgressive Learning network, available at: <http://transgressivelearning.org>.

<sup>207</sup> J. d’Aspremont, ‘The Politics of Deformalization in International Law’ (2011) 3(2) *Goettingen Journal of International Law*, pp. 503–50.



role of global environmental law in the context of global and environmental justice scholarship.<sup>208</sup> The other two authors remain less convinced of whether global environmental law as a collaborative self-reflexive approach can fully address concerns about normativity and legitimacy, and see the *locus* of such efforts in a process of more inclusive deliberation as well as participatory rights and guarantees. This raises the question whether global environmental law research projects may also need to factor in inclusive deliberation (as part of transdisciplinarity) as well as participatory rights and guarantees.<sup>209</sup> A continued dialogue among the three authors may help to further explore these questions moving forward.

## 6. CONCLUSIONS

With this article, we have sought to offer a survey of global law scholarship, and show how it currently remains a heterogeneous, yet substantively ambitious project to reconcile legal scholarship with the myriad kaleidoscopic phenomena referred to under the label of globalization. Despite conceptual ambiguities, global law is marked by certain common narratives, such as the preoccupation with public authority beyond the state and a shared sense that the forces of globalization are so profound that they are bringing about a fundamental shift in the very idea of law. What that shift will ultimately render, however, remains unclear for now; the global law project, in other words, is an unfinished one, its vision yet to be determined.

Our analysis then proceeded to review the literature on global environmental law, situating it within the broader context of global law scholarship. Here, too, we affirm a lack of terminological consistency and a concern with the limitations of traditional categories of lawmaking and application, in this case in the area of environmental protection. Like the global law project, it remains unfinished; yet we go further and identify an unfulfilled potential: to engage more fully with the foundational questions raised by global law scholars from a theoretical perspective, and also to explore and deploy advances in environmental law methodology – for instance, by drawing on comparative approaches to environmental law and harnessing empirical research methods.

Our analysis also confirms that global law remains, to some extent, a descriptive endeavour, focused on recording observed trends in global governance and offering causal explanations. Much of Walker's elegant systematization of global law is, for instance, a mapping exercise that traces patterns in evolving discourses about global normative activity. But Walker's work, as well as our analysis, also shows that the diverse landscape of global law harbours various strands that amount to a more activist agenda, aspiring to a jurisgenerative and transformational role of global law

<sup>208</sup> Morgera is collaborating with environmental justice scholars in the context of the UKRI GCRF One Ocean Hub (n. 206 above). For a reflection from an international law perspective, see S. Besson, 'International Legal Theory *qua* Practice of International Law', in d'Aspremont et al., n. 177 above, pp. 268–84.

<sup>209</sup> The UKRI GCRF One Ocean Hub (n. 206 above) is also seeking to integrate transdisciplinarity (research codevelopment with holders of different knowledge systems and value systems) and a human rights-based approach to externally funded research.

scholarship. We have thus discussed both considerable risk and considerable promise in global environmental law scholarship: a risk of enabling or strengthening channels of authority that lack legitimacy and accountability, or reflect elitist and hegemonic worldviews; and a promise to expand the breadth and depth of voices reflected in the creation and application of environmental norms, strengthening rather than undermining their legitimacy.

Returning from the transformational potential of global environmental law in the external world to its impact on environmental law scholarship and discourse, we concluded by arguing that the most immediate benefit it offers may be the mirror it holds up to us as a scholarly community, forcing us to consider – and potentially revise – how we approach the subject matter of our profession; shining a new light on our biases and blind spots, and casting in greater relief how our own work shapes and influences the ongoing evolution of environmental law. We drew on a proposed typology of scholarly identities and attitudes within global (environmental) law to encourage greater dialogue and collaboration among differently minded scholars to support one another in identifying, understanding and overcoming respective blind spots, and drawing on the strengths of one another to develop a more solid line of investigation at the intersection of global (environmental) law and global justice. We also underscored the need for global environmental law scholars to engage with altogether different epistemic communities, something that we believe can enable a more inclusive and self-reflexive approach to the evolving project of global environmental law.

Vibrant and, at times, perplexing global environmental law stands to remain an intriguing area of continued research. The centrifugal forces which prompted the emergence of global law scholarship in the first place show no signs of abating, and hence lawyers – including environmental lawyers – will continue to face questions that traditional understandings of lawmaking and application struggle to answer. We can be hopeful that global environmental law, as an unfinished project, will both enrich our understanding of environmental law and our role therein, helping to close, rather than expand, the legitimacy gap from which environmental governance has often suffered. However, any project of this scope also carries some risk. It is our collective responsibility as scholars of environmental law to ensure that we leverage the positive potential of the global law project without inviting new biases or supplanting the law with our own contingent interests and values.