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The Relationship Between Global Law and the Individual: Symbiosis, Oscillation, and Strategic Subjectification†

This Article analyzes the relationship between the individual and global law adopting as a point of entry the concept of jurisgenesis, understood as the process of creating legal meaning. The Article explores this relationship through three patterns: symbiosis, oscillation, and strategic subjectification. After an overview of the notion of global law, the Article first examines symbiosis, showing that the notion of “individual,” as it emerged in legal modernity, constitutes a necessary infrastructure of global law. In parallel, global law opens possibilities to the individual that would otherwise be out of reach under conditions of globalization. Second, the Article examines oscillation, describing how global law triggers a dynamic of expansion and restriction of the individual’s legal relevance. This dynamic, in turn, propels a further abstraction of the notion of individual and makes the interplay between social individualization, legal personification, and specific legal entitlements more visible. Third, the Article examines how global law helps imagine strategies of legal subjectification, some of which may be used to counter problematic features of sociolegal globalization. It then

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highlights three relevant strategies: elaboration of new legal concepts and regimes, selective consolidation of certain collective actors' legal position, and attribution of legal relevance to claims based on so-called "counter-rights."

INTRODUCTION

Since January 28, 2021, the Oversight Board (OB), the independent body established by Meta¹ to review its content moderation practices, has adopted decisions that are binding upon the social media company. Significantly, the review can be activated either by Meta via direct referral or by individual users who disagree with Meta's decisions. The first decisions of the OB not only overturned content removals but also issued policy recommendations. Despite the overall scarcity of references to international human rights law (HRL) in Meta's Community Standards and in the OB's own bylaws, the OB referred to HRL in two ways. First, with an act of self-regulation,² the OB expanded the "legal" basis of its review by referencing the UN Guiding Principles on Business and Human Rights (UNGPR). Second, the OB developed a critique of Meta's decision-making process on content moderation, based on both binding and non-binding sources of HRL³ such as the International Covenant on Civil and Political Rights (ICCPR) and the Rabat Plan of Action.⁴

A few months later, on May 25, 2021, the District Court of The Hague rendered a judgment in *Milieudefensie v. Royal Dutch Shell*, holding a transnational corporation (TNC) for the first time responsible for its contribution to climate change.⁵ The non-governmental organization (NGO) Milieudefensie brought the case on its behalf and on that of 17,379 individual claimants and six other NGOs. The court found that plaintiffs could bring a class action in the common interest of preventing dangerous climate change, since the interests

1. In October 2021, the company Facebook, Inc. announced that it was changing its name to Meta Platforms, Inc.

2. OVERSIGHT BOARD, THE RULEBOOK FOR CASE REVIEW AND POLICY GUIDANCE (2024), www.oversightboard.com/wp-content/uploads/2024/03/OB_Rulebook_March_2024-1.pdf.

3. See Lorenzo Gradoni, *Constitutional Review via Facebook's Oversight Board: How Platform Governance Had Its Marbury v Madison*, VERFASSUNGSBLOG (Feb. 10, 2021), <https://verfassungsblog.de/fob-marbury-v-madison>.

4. *Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence*, in ANNUAL REPORT OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, UN Doc. No. A/HRC/22/17/Add.4, at 6 (Jan. 11, 2013), <https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/HRC/22/17/Add.4&Lang=E>.

5. Rb. Den Haag 26 mei 2021 (Milieudefensie/Royal Dutch Shell) (Neth.), <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339>. See also André Nollkaemper, *Shell's Responsibility for Climate Change. An International Law Perspective on a Groundbreaking Judgment*, VERFASSUNGSBLOG (May 28, 2021), <https://verfassungsblog.de/shells-responsibility-for-climate-change>.

of present and future generations of Dutch residents “are suitable for bundling so as to safeguard an efficient and effective legal protection of the stakeholders.”⁶ On the merits, Shell’s responsibility was based on a tort law provision establishing that a tortious or unlawful act includes “an act or omission in violation of what is societally accepted according to unwritten law.”⁷ Under such an “unwritten standard of care,” Shell has an obligation to contribute to mitigating climate change by reducing its CO₂ emissions in line with the targets set in the 2015 Paris Agreement.⁸ Significantly, the court held that HRL does not apply to corporations directly. However, in interpreting the domestic tort provision, it gave prominence to both binding and non-binding instruments as well as climate science documents, including: the European Convention on Human Rights (ECHR), the ICCPR,⁹ the Paris Agreement,¹⁰ the UNGP,¹¹ the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises,¹² and the Assessment Reports of the Intergovernmental Panel on Climate Change (IPCC).¹³ Accordingly, the court held that Shell has an “individual responsibility” to reduce the emissions over which it has control and influence,¹⁴ ensuing an “obligation of result” concerning the activities of the Shell group. At the same time, the court concluded that there is a “significant best-efforts obligation” regarding the business relations over which the Shell group has no immediate control, including end users.¹⁵ In other words, the target of the decision was not (only) Shell as a legal person incorporated under Dutch law but also as a global, unitary economic actor.

On September 9, 2021, an International Centre for Settlement of Investment Disputes (ICSID) arbitral tribunal, applying the 2008 Canada–Colombia Free Trade Agreement (FTA),¹⁶ issued a decision in *Eco Oro Minerals Corp. v. Republic of Colombia* and found Colombia in breach of Article 805 of the FTA concerning the standard of treatment of foreign investors.¹⁷ Eco Oro, a Canada-based mining company, brought claims after a decision of Colombia’s Mining Agency resulted in the deprivation of some rights over a concession area falling within an environmental conservation zone. The Agency, in turn, followed a

6. See Rb. Den Haag 26 mei 2021 ¶ 4.2.4 (applying the test under art. 3:305a BW (Dutch Civil Code)).

7. Art. 6:162 BW.

8. Paris Agreement, Dec. 12, 2015, T.I.A.S. No. 16-1104.

9. See Rb. Den Haag 26 mei 2021, ¶¶ 4.4.9–4.4.10.

10. *Id.* ¶¶ 4.4.26–4.4.28, 4.4.42.

11. *Id.* ¶¶ 4.4.2, 4.4.11–4.4.21.

12. *Id.* ¶¶ 4.4.11, 4.4.14.

13. *Id.* ¶¶ 2.3.5.4, 4.4.26–4.4.34.

14. *Id.* ¶¶ 4.4.13, 4.4.52.

15. *Id.* ¶ 4.1.4.

16. Free Trade Agreement, Can.–Colom., Nov. 21, 2008, Can. T.S. No. 2011/11.

17. *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability, and Directions on Quantum, ¶ 920(3) (Sept. 9, 2021), www.italaw.com/sites/default/files/case-documents/italaw16212.pdf.

decision of the Colombian Constitutional Court that had broadened restrictions on mining in high-mountain ecosystems, striking down legal provisions stabilizing the rights of mining projects authorized before 2010.¹⁸ The decision attracted a great deal of criticism,¹⁹ as it substantively equated the “minimum standard of treatment” (MST)—that is, the less protective standard under customary international law that emerges from Article 805(1) of the FTA²⁰—to the more protective “fair and equitable treatment” (FET) standard which applies under other investment agreements. Further, after finding a violation of the MST/FET, the majority held that the existence of an environmental exception—even one as broad as that crafted in the FTA²¹—did not prevent awarding compensation.²² It was severely criticized that the award seemed to give unconditional prevalence to the interests of a private individual—a mining corporation—thereby frustrating the intentions of the state parties, which had drafted the FTA to include environmental and regulatory discretion concerns.²³ Importantly, the arbitral tribunal made the decision against the background of coordinated local and international protests, which in 2016 had contributed to the decision of the International Finance Corporation—the private sector arm of the World Bank—to divest from the goldmine project pursued by Eco Oro.

These are only three examples—involving, respectively, a private adjudicator, a domestic court, and an international arbitral tribunal—that highlight more general patterns in the relationship between the individual and so-called global law.²⁴ This Article offers an analysis of such a relationship, adopting as a starting point for the concept of jurisgenesis, understood as the process of creating legal meaning.²⁵ In other words, in order to analyze the relationship between the individual and global law, I look at the specific ways in which legal meaning

18. Corte Constitucional [C.C.] [Constitutional Court], enero 27, 2016, Sentencia C-035/16, www.corteconstitucional.gov.co/Relatoria/2016/C-035-16.htm (Colom.).

19. See, e.g., Simon Lester, *The Eco Oro Minerals v. Colombia Award: More Evidence that MST/FET Can't Be Salvaged*, INT'L ECON. L. & POL'Y BLOG (Sept. 19, 2021), <https://ielp.worldtradelaw.net/2021/09/the-eco-oro-minerals-v-colombia-award-more-evidence-mst-fet-cant-be-salvaged.html>.

20. See *Eco Oro*, ICSID Case No. ARB/16/41, ¶¶ 743–821.

21. See Free Trade Agreement, *supra* note 16, art. 2201(3).

22. See *Eco Oro*, ICSID Case No. ARB/16/41, ¶ 829. Importantly, this finding even went against Canada's statement, in a non-disputing party submission, that if the measure in question met the requirements of article 2201(3) then “there is no violation of the Agreement and no State liability. Payment of compensation would therefore not be required” (*id.* ¶ 836).

23. *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Partially Dissenting Opinion of Philippe Sands QC, ¶ 4 (Sept. 9, 2021), www.italaw.com/sites/default/files/case-documents/italaw182070_0.pdf.

24. Here, provisionally understood as a regulatory mix of state-made and non-state-made rules that emerged following globalization processes at the domestic, local, regional, and international levels, elaborated by public, private, and hybrid actors alike. See Part II.

25. Robert Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 11 (1983).

is created within global law. Adopting jurisgenesis as an analytical point of entry, the Article identifies and examines three interrelated patterns: symbiosis, oscillation, and strategic subjectification.²⁶

Global law and the individual are in a symbiotic relationship. On the one hand, the concept of the “individual” sustains the development—the jurisgenesis—of global law. This observation concerns not just the fact that global law—like any form of law—needs agents, but that the *specific* construct of the “individual,” as it emerged during legal modernity, is a crucial part of global law’s legal infrastructure.²⁷ On the other hand, in a global(ized) sociolegal environment, global law—with its unique features—creates spaces for legal strategies and instruments to bring various types of social expectations into decision- and lawmaking processes. In other words, global law enables individuals to access (legal) possibilities and participate in the creation of legal meaning at the global level in ways that would otherwise be out of reach.

The symbiotic relationship between global law and the individual is based on a continuous and context-dependent oscillation—an expansion/restriction dynamic—of the individual’s *legal* relevance, depending on the varying need for conflict-based jurisgenesis. This oscillation is contingent, not predetermined, and open to contestation and reconfiguration. The opportunities presented to individuals by global law are not inherently progressive or regressive. Instead, like other legal forms throughout history, these opportunities are subject to power struggles. Moreover, the strategies of these struggles are *specific* to the conditions of the current state of globalization. This oscillation has two effects. First, it further abstracts the modern notion of the individual, increasingly distancing it from anthropomorphic, “realist” models or imagery. Second, it makes the interplay between three distinct, yet interconnected, dimensions of legal subjectification more visible: social individualization, legal personification, and specific legal entitlements. I will refer to this interplay as “global legal subjectification.”

The symbiotic, oscillating relationship between global law and the individual facilitates and helps imagine new strategies of legal subjectification, some of which *may* counter problematic features of

26. To be sure, there is some overlap between these patterns. Both symbiosis and oscillation touch upon the opportunities and venues that global law offers individuals, who can then use them strategically to establish themselves as meaningful actors. However, I maintain this distinction for its analytical and explanatory value.

27. I understand “legal infrastructure” as a set of basic elements within legal discourse presupposed by a normative system to perform its societal functions and produce legal meaning. In this sense, not only the “legal person” but also the “individual” is a construct that must be related to the specific dynamics of given sociolegal processes. Therefore, the use of the phrase “legal infrastructure” here is similar to its use in the “law and political economy” scholarship. See, e.g., Poul F. Kjaer, *The Law of Political Economy*, in *THE LAW OF THE POLITICAL ECONOMY: TRANSFORMATIONS IN THE FUNCTIONS OF LAW 1* (Poul F. Kjaer ed., 2020).

sociolegal globalization. Put differently, the specific dynamics of the relationship between the individual and global law may offer strategic actors guidance to tackle some of the most worrisome trends of sociolegal globalization, which contribute to the oppression, marginalization, instrumentalization, and alienation of living beings, as well as to the ecological/climate disaster.

In examining these patterns, I do not aim to make any direct causal or empirical claim. Nor do I argue that socially constructed individuals are the only drivers of global law's jurisgenesis. Rather, I lay down a map to navigate certain emerging phenomena of sociolegal globalization in legal-theoretical terms. The underlying methodology is functional analysis, originally elaborated to overcome the difficulties of causal analysis in explaining multi-causal problem complexes.²⁸ In other words, I look at phenomena such as those emerging in the three examples mentioned above²⁹ as *effects* related to a *specific function*, here individuated as the production of legal meaning under conditions of globalization. I examine the role of the individual and those three patterns as adequate—not exclusive—causes for such effects, that is, as “functional equivalents.”³⁰ Therefore, when I argue, for example, that global law “needs” (a certain notion of) the individual, or that global law pushes for certain dynamics like that of the abstraction of the notion of the individual, I point to *adequate, functionally equivalent* causes of certain effects related to the performance of a function. Further, functional analysis looks at how problems are construed “as the domain of equivalence between what appears as a problem vis-à-vis the range of solutions proffered.”³¹ Therefore, functional analysis potentially contributes to denaturalizing problem constructions and opening up to critical and genealogical analyses, which cut “into

28. See Niklas Luhmann, *Funktion und Kausalität*, 14 KÖLNER ZEITSCHRIFT FÜR SOZIOLOGIE UND SOZIALPSYCHOLOGIE 617 (1962). For introductions in English, see Gerhard Wagner, *Function and Causality*, 259 REVUE INTERNATIONALE DE PHILOSOPHIE 35 (2012); CLAUDIO BARALDI, GIANCARLO CORSI & ELENA ESPOSITO, UNLOCKING LUHMANN: A KEYWORD INTRODUCTION TO SYSTEMS THEORY 99–100 (2021). For a discussion on functional analysis in comparative law, see Ralf Michaels, *The Functional Method of Comparative Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 339, 358–59 (Mathias Reimann & Reinhard Zimmermann eds., 2006). For an application within the global (constitutional) law scholarship, see CHRIS THORNHILL, A SOCIOLOGY OF TRANSNATIONAL CONSTITUTIONS: SOCIAL FOUNDATIONS OF THE POST-NATIONAL LEGAL STRUCTURE 28–30 (2016).

29. Among others, expansion of transnational strategic litigation as a mode to pursue political agendas, eclectic and selective use of different sets of normative material by adjudicators, emergence of private and hybrid adjudication, de facto attribution of international legal obligations to actors not directly bound by international law norms, etc.

30. See Luhmann, *supra* note 28, at 627 (“What matters is not a law-like or more or less probable relation between certain causes and certain effects but rather the establishing of the functional equivalence of several possible causes from the perspective of a problematic effect.”).

31. EMILIOS CHRISTODOULIDIS, THE REDRESS OF LAW. GLOBALISATION, CONSTITUTIONALISM AND MARKET CAPTURE 333 (2021).

historical trajectories to look at how at crucial junctures certain options were discarded and certain options were installed as conditions of the full range of further developments.”³²

Part I provides a rationale for an analysis focused on the relationship between global law and the individual beyond the human rights paradigm. Part II offers an overview of global law, emphasizing the features most relevant to its relationship with the individual, notably the need for jurisgenesis in the absence of centralized lawmaking. Part III examines the three patterns mentioned above: symbiosis (Part III.A), oscillation (Part III.B), and strategic subjectification (Part III.C). The latter is further broken down by pointing to three strategies of subjectification that aim to strengthen the function of the individual as a catalyst of emancipation and politicization at the global level: elaboration of new legal concepts and regimes, selective consolidation of the legal position of some collective actors, and attribution of legal relevance to the individual (and their claims) *beyond* the right-form.

I. THE INDIVIDUAL BEYOND THE PARADIGM OF HUMAN RIGHTS

Scholarship explicitly focusing on global law has not had a full-fledged “beyond-human-rights” moment; that is, it has rarely theorized the individual beyond the paradigm of human rights. Indeed, in international law scholarship, the relatively recent (re-)emergence of the individual has paralleled the rise of twentieth-century HRL, which made its way into inter-state schemes and has led to significant changes: proliferation of legal instruments conferring rights on individuals; individuals’ direct access to international bodies and tribunals; and recognition of individuals’ responsibility for international crimes. However, the expansion of international law into new regulatory spheres³³ and deeper engagement with international relations (IRs) scholarship have highlighted the need to revisit international law theories and doctrines concerning legal subjects, to reconceptualize the role of individuals and, more recently, to differentiate human rights in the narrow sense from other international individual rights.³⁴

In contrast, the scholarship *specifically* dedicated to global law has dealt mostly with the individual as a rights-holder or through HRL,³⁵ with the latter understood as a specific legal regime “used” to

32. *Id.* at 334. In this sense, I would argue that functional and genealogical analysis are more complementary than what Christodoulidis himself argues. *See infra* notes 84 and 96.

33. Trade, investment, environment, climate, migration, health, criminal law, disaster relief, to mention only a few.

34. *See, e.g.*, JUTTA BRUNNÉE & STEPHEN TOOPE, *LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT* (2010); KATE PARLETT, *THE INDIVIDUAL IN THE INTERNATIONAL LEGAL SYSTEM: CONTINUITY AND CHANGE IN INTERNATIONAL LAW* (2011); ANNE PETERS, *BEYOND HUMAN RIGHTS: THE LEGAL STATUS OF THE INDIVIDUAL IN INTERNATIONAL LAW* (2016); Tamar Megiddo, *Methodological Individualism*, 60 HARV. INT’L L.J. 219 (2019).

35. *See, e.g.*, GIULIANA ZICCARDI CAPALDO, *THE PILLARS OF GLOBAL LAW* (2008); RAFAEL DOMINGO, *THE NEW GLOBAL LAW* 142–44 (2010); NEIL WALKER, *INTIMATIONS OF GLOBAL LAW*

strengthen the legitimacy³⁶ of either formal or informal authority of global governance institutions.³⁷ This centrality of human rights³⁸ can partly be explained by the fact that, contrary to Westphalian/Vattelien international law, “global law” lacks a strong, relatively autonomous, overarching principle of legitimacy such as state sovereignty.³⁹ Much of the interest in the individual in international law scholarship is driven precisely by the perceived necessity to overcome a persisting methodological statism.⁴⁰ Furthermore, in global law literature, most authors tend to focus on the institutions, structures, and processes of emerging legal orders rather than on their relationship with the individual.⁴¹ Indeed, if the individual is understood as a legal person, that is, as a point of imputability of rights and obligations within a specific legal system,⁴² then the very nature of global law—fragmented, fluid, permeable, polycentric⁴³—makes it difficult to analytically frame the legal position of the individual as such.

But this is not all. Since its emergence in current debates, the very idea of global law has been confronted with identity issues and criticisms. Some of these issues concern, for example, the nature of global law as “law” in any of the senses attached to the term according

71–77 (2014); Samantha Besson, *Human Rights as Transnational Constitutional Law*, in *HANDBOOK ON GLOBAL CONSTITUTIONALISM* 234 (Anthony F. Lang & Antje Wiener eds., 2017).

36. See Chris Thornhill, *A Sociology of Constituent Power: The Political Code of Transnational Societal Constitutions*, 20 *IND. J. GLOB. LEGAL STUD.* 551, 569–73 (2013).

37. See Karl-Heinz Ladeur, *Governance, Theory of*, in *THE MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW* (Anne Peters & Rüdiger Wolfrum eds., last updated June 2021), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e940?prd=MPIL> (with subscription).

38. Ludovic Hennebel, *Les droits de l'homme dans les théories du droit global*, in *LA SCIENCE DU DROIT DANS LA GLOBALISATION* 140 (Jean-Yves Chérot & Benoît Frydman eds., 2012).

39. See J.H.H. Weiler, *The Geology of International Law: Governance, Democracy and Legitimacy*, 64 *HEIDELBERG J. INT'L L.* 547 (2004); Rafael Domingo, *Gaius, Vattel, and the New Global Law Paradigm*, 22 *EUR. J. INT'L L.* 627 (2011). For the relevance of the individual in the Westphalian/Vattelien international law, see PARLETT, *supra* note 34, at 48–65; PETERS, *supra* note 34, at 16–21; Antonio Augusto Cançado Trindade, *Individual*, in *CONCEPTS FOR INTERNATIONAL LAW: CONTRIBUTIONS TO DISCIPLINARY THOUGHT* 463 (Jean D'Aspremont & Sahib Singh eds., 2019). For an attempt to move the normative foundations of international law from sovereignty to the (dignity of) human beings, see Anne Peters, *Humanity as the α and Ω of Sovereignty*, 20 *EUR. J. INT'L L.* 513 (2009). For a criticism of how the “global constitutionalism” scholarship engages with human rights as an equivalent of domestic constitutional rights, see EKATERINA Y. KRIVENKO, *RETHINKING HUMAN RIGHTS AND GLOBAL CONSTITUTIONALISM: FROM INCLUSION TO BELONGING* (2017).

40. See Megiddo, *supra* note 34.

41. See BRUNNÉE & TOOPE, *supra* note 34 (representing a notable exception; however, their interactional theory focuses on individuals in understanding the role of international law in international society and what distinguishes international law from social norms).

42. HANS KELSEN, *REINE RECHTSLEHRE* 169–71 (2d ed. Verlag Franz Deuticke 1960).

43. See Larry Catá Backer, *The Structural Characteristics of Global Law for the 21st Century: Fracture, Fluidity, Permeability, and Polycentricity*, 17 *TILBURG L. REV.* 177 (2012); see also Parts II and III.

to modern, state-centered models,⁴⁴ and its difference, if any, with transnational law⁴⁵ or cosmopolitan law.⁴⁶ Importantly, the criticisms include the allegation that global law conceptually enables a global neoliberal consensus mainly driven by the United States, as the hegemonic economic and military power that emerged in the immediate aftermath of the Cold War,⁴⁷ a consensus in turn leading to tyrannical and/or market-based governmentality and to the instrumentalization and alienation of living beings and nature.⁴⁸

While these points cannot be addressed here, they justify a more specific examination of the relationship between global law and the individual *beyond* the human rights paradigm. Such an examination, first, helps identify the distinctive features of global law compared to proxies such as transnational law. Second, it contributes to the conceptual distinction between two different but often equated trends of individualization and humanization. Third, analyzing the relationship between the individual and global law based on the latter's polycontextuality⁴⁹ may further substantiate arguments concerning the different status of investment, labor, and environmental rights, among others.⁵⁰ Fourth, it helps imagine new forms of subjectification at the global level, that is, new forms of sociolegal interaction and strategies of collective struggle, potentially beyond the (neo)liberal *acquis* of the rights form.⁵¹

II. GLOBAL LAW: AN OVERVIEW

In its currently prevailing usage,⁵² “global law” can be understood as the reference concept in legal theory for a broad variety of

44. See, e.g., Karl-Heinz Ladeur, *The Evolution of the Law and the Possibility of a “Global Law” Extending Beyond the Sphere of the State: Simultaneously, a Critique of the “Self-Constitutionalisation” Thesis*, *ANCILLA IURIS* 220 (2012); Martin Loughlin, *The Misconceived Search for Global Law*, 8 *TRANSNAT'L LEGAL THEORY* 353 (2017).

45. Dating back at least to PHILIP JESSUP, *TRANSNATIONAL LAW* (1956).

46. For a comparison between Kantian cosmopolitan law and contemporary global law discourse, see Antoine Guilmain, *Du droit cosmopolitique au droit global: Pour une rupture épistémologique dans l'approche juridique*, 23 *REVUE QUÉBÉCOISE DE DROIT INTERNATIONAL* 219, 226–28 (2013).

47. See, e.g., QUINN SLOBODIAN, *GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM* 1–26, 182–217 (2018); Paul S. Berman, *How Legal Pluralism Is and Is Not Distinct from Liberalism*, 11 *INT'L J. CONST. L.* 801 (2013).

48. See Bhupinder S. Chimni, *Co-option and Resistance: Two Faces of Global Administrative Law*, 37 *NYU J. INT'L L. & POLITICS* 799 (2005); AOIFE O'DONOGHUE, *ON TYRANNY AND THE GLOBAL LEGAL ORDER* (2021) (focusing on the legal infrastructure of counterterrorism and on international economic law).

49. That is, a situation characterized by a plurality of mutually irreducible social perspectives. They are not compatible with one another and can be overcome only by rejecting certain values, which in turn leads to different binary distinctions. See Gotthard Günther, *Life as Poly-Contextuality*, in *BEITRÄGE ZUR GRUNDLEGUNG EINER OPERATIONSFÄHIGEN DIALEKTIK* 283 (Gotthard Günther ed., 1976); see also Part II.

50. PETERS, *supra* note 34, at 318.

51. CHRISTOPH MENKE, *CRITIQUE OF RIGHTS* (2020).

52. For a comprehensive discussion of the different conceptions of global law, see WALKER, *supra* note 35, at 55–130. On the relationship of global law with imperial and colonial law, see Lauren Benton & Adam Clulow, *Legal Encounters and the*

phenomena deriving from two main elements: first, increased interconnectedness and autonomization of different social processes triggered by globalization; second, the absence of centralized, unitary lawmaking authorities to address the ensuing need for regulation at the global level.⁵³ Indeed, as currently used, the term “global law” indicates forms of normativity accompanying—i.e., both enabling and reinforced by—the emergence of relatively autonomous and specialized governance frameworks.⁵⁴ The institutions of different regimes and systems (global politics, global economy, global science, and global sport, among others) produce various kinds of formal and informal⁵⁵ norms that interact in different ways with sources of national and international law. These norms emerge from regulations and agreements within international organizations (IOs), international non-binding declarations, memoranda of understanding, general comments, guidelines, public and private codes of conduct, transnational company agreements, standards, terms of service, rankings, and reports.

Indeed, to reduce the increasing complexity and sustain their autonomy, the specialized regimes of global politics, economy, science, media, environment, sport, and other “global” social spheres

Origins of Global Law, in THE CAMBRIDGE WORLD HISTORY 80 (Jerry H. Bentley, Sanjay Subrahmanyam & Merry E. Wiesner-Hanks eds., 2015); Poul F. Kjaer, *Global Law as Inter-Contextuality and as Inter-Legality*, in THE CHALLENGE OF INTER-LEGALITY 302 (Jan Klabbers & Gianluigi Palombella eds., 2019); MARTTI KOSKENNIEMI, TO THE UTMOST PARTS OF THE EARTH: LEGAL IMAGINATION AND INTERNATIONAL POWER, 1300–1870, at 699–794 (2021). The pluralist paradigm is becoming prevalent also in fields influenced by universalist/cosmopolitan paradigms. See, e.g., Lars Viellechner, *Constitutionalism as a Cipher: On the Convergence of Constitutionalist and Pluralist Approaches to the Globalization of Law*, 4 GOETTINGEN J. INT'L L. 599 (2012); Jaakko Husa, *Global Law and Comparative Law: Allies or Adversaries*, 12 J. COMP. L. 461 (2017); Paul S. Berman, *Can Global Legal Pluralism Be Both “Global” and “Pluralist”?*, 29 DUKE J. COMP. & INT'L L. 381 (2019).

53. In this sense, globalization can be considered the extension of functional differentiation as the prevailing—not unique—mode of societal organization from Europe and the “West” to the entire world. Cf. SHMUEL EISENSTADT, SOCIAL DIFFERENTIATION AND STRATIFICATION (1971); 1 NIKLAS LUHMANN, THEORY OF SOCIETY 83–99, 127–31 (Rodhes Barrett trans., Stanford Univ. Press 2012); BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION AND EMANCIPATION 196 (3d ed. 2020); Mikhail Xifaras, *The Global Turn in Legal Theory*, 29 CAN. J.L. & JURIS. 215, 216–20 (2016). Considering the criticism from postcolonial authors (e.g., Lars Eckstein & Christoph Reinfandt, *Luhmann in da Contact Zone: Towards a Postcolonial Critique of Sociological Systems Theory*, in THEORY MATTERS: THE PLACE OF THEORY IN LITERARY AND CULTURAL STUDIES TODAY 151 (Martin Middeke & Christoph Reinfandt eds., 2017), one may observe that the Global South is partially and selectively excluded from functional differentiation but remains part of world society with stratified or segmented differentiation, which gives rise to a whole set of different forms of exclusions. Seen from the perspective of the Global North/Global South divide, then, world society is characterized by conflicts between distinct principles of social differentiation. Cf. Marcelo Neves, *From Transconstitutionalism to Transdemocracy*, 23 EUR. L.J. 380, 390 (2017); see also CHRISTODOULIDIS, *supra* note 31, at 304–05.

54. See Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society*, in GLOBAL LAW WITHOUT A STATE 3, 8 (Gunther Teubner ed., 1997); Pierrick Le Golf, *Global Law: A Legal Phenomenon Emerging from the Process of Globalization*, 14 IND. J. GLOB. LEGAL STUD. 119 (2007).

55. See JOOST PAUWELYN ET AL., INFORMAL INTERNATIONAL LAWMAKING (2012).

progressively need to establish new normative frameworks. Traditional state-centered (national and international) law alone no longer seems to suffice, precisely because of the constraints imposed by the conditions of globalization.⁵⁶ New lawmaking centers and normative practices have therefore emerged.⁵⁷ These centers and practices, on the one hand, intertwine with more traditional sources⁵⁸ through interpretation, the circulation of argumentative and legal models, implicit or explicit references, etc. For example, the OB refers not only to its own Charter, Bylaws, and Meta's Standards of the Community, but also to a wide array of international law sources and argumentative practices, such as the proportionality test.⁵⁹ On the other hand, such centers and practices may effectively replace traditional sources in various regulatory fields.⁶⁰ Continuing with the same example, the content moderation rules of a digital platform like Meta increasingly serve as the primary reference point for freedom of expression online, with the OB having the "last word" for almost three billion users worldwide.⁶¹ This situation is also characterized by the rise of various interconnected public, private, and hybrid actors.⁶² In addition

56. Cf. JEAN-BERNARD AUBY, *GLOBALISATION, LAW AND THE STATE* 14–19 (2017). Current debates on whether the emergence of global law marks the "end" of international law cannot be addressed here. However, such stark opposition is tenable only if one considers international law as a purely Westphalian/Vattelien project, a view that is at least historically inaccurate. See, e.g., Oren Perez, *Purity Lost: The Paradoxical Face of the New Transnational Legal Body*, 33 *BROOK. J. INT'L L.* 1 (2007); BRUNNÉE & TOOPE, *supra* note 34, at 2–3. Furthermore, the increasing legal relevance of the individual in international law does not, by itself, turn the latter into global law, as in a sort of linear trajectory where the "end" of the former marks the "start" of the latter. Instead, they remain distinct normative processes which closely intertwine, especially around regulatory areas where state-centered decision-making alone is (regarded as) ineffective or absent. For a discussion in the field of animal and environmental regulation, see Anne Peters, *Global Animal Law: What It Is and Why We Need It*, 5 *TRANSNAT'L LEGAL THEORY* 9, 16–20 (2016); Louis J. Kotzé, *A Global Environmental Constitution for the Anthropocene?*, 8 *TRANSNAT'L ENV'T L.* 11 (2018).

57. See generally JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (2000); ANNE PETERS ET AL., *NON-STATE ACTORS AS STANDARD SETTERS* (2009); REBECCA SCHMIDT, *REGULATORY INTEGRATION ACROSS BORDERS: PUBLIC-PRIVATE COOPERATION IN TRANSNATIONAL REGULATION* (2018).

58. See generally Ralf Michaels, *The Re-state-ment of Non-State-Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*, 51 *WAYNE L. REV.* 1209 (2005); THE CHALLENGE OF INTER-LEGALITY, *supra* note 52; ENTANGLED LEGALITIES BEYOND THE STATE (Nico Krisch ed., 2021).

59. See Anne Peters, *Proportionality as a Global Constitutional Principle*, in *HANDBOOK ON GLOBAL CONSTITUTIONALISM* 248 (Anthony F. Lang & Antje Wiener eds., 2017).

60. A traditional example is the Codex Alimentarius Commission with its standards, a corpus of instruments de facto regulating global food security. See Gerald G. Sander, *Codex Alimentarius Commission (CAC)*, in *THE MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW* 276 (Rüdiger Wolfrum ed., 2012).

61. Tellingly, the lawsuits of former U.S. President Trump, alleging First Amendment violations by Twitter, Meta, and Google YouTube for their decision to remove his accounts following the Capitol attack on January 6, 2021, so far have been unsuccessful. See *Trump v. Twitter*, No. 21-cv-08378-JD (N.D. Cal. May 6, 2022), www.courtlistener.com/docket/60682486/165/trump-v-twitter-inc/.

62. See Gunther Teubner, *Hybrid Laws: Constitutionalizing Private Governance Networks*, in *LEGALITY AND COMMUNITY: ON THE INTELLECTUAL LEGACY OF PHILIP SELZNICK*

to traditional “public” IOs, governance systems now include domestic and international administrative agencies, transnational private actors, international and domestic courts and dispute-settlement bodies, and standard-setting bodies.⁶³ It is also noteworthy that the term “global law” encompasses⁶⁴ both the substantive norms of these distinct processes⁶⁵ and the norms and techniques through which such processes interact, overlap, conflict, and exchange normative meaning among themselves as well as with national and international law.⁶⁶

These processes have also triggered at least two dynamics of depoliticization. First, social processes once open to political struggle, characterized by non-predetermined outcomes and the reversibility of decisional processes (e.g., maximization of investment protection), are becoming more and more juridified.⁶⁷ Especially in regulatory fields where different actors and movements push for radical change and rapid action, global governance institutions (and their laws) often tend to institutionalize watered-down compromises and de-radicalize movements, ultimately legitimizing or strengthening the interests of hegemonic actors.⁶⁸ Second, collective decision making has shifted from state-centered structures and processes to global-governance institutions and even to private actors that overtly derive their legitimacy

311 (Robert A. Kagan et al. eds., 2002); Jean-Christophe Graz, *Les hybrides de la mondialisation: Acteurs, objets et espaces de l'économie politique internationale*, 56 REVUE FRANÇAISE DE SCIENCE POLITIQUE 765 (2005); Oren Perez, *Transnational Networked Authority*, 35 LEIDEN J. INT'L L. 265 (2022).

63. See GLOBAL GOVERNANCE AND THE EMERGENCE OF GLOBAL INSTITUTIONS FOR THE 21ST CENTURY (Augusto Lopez-Claros, Arthur L. Dahl & Maja Groff eds., 2020).

64. These two forms are sometimes indicated as “transnational legal substance” and “transnational legal process.” See Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996).

65. Examples include some specific regimes of international law such as the 2005 International Health Regulations of the WHO; the sources of the so-called new *lex mercatoria*; the standards elaborated by the International Standard Organization (ISO); the Recommendations of the Financial Action Task Force (FATF); the Helsinki Declaration of the World Medical Association (WMA) on the ethical principles for medical research involving human subjects; the 1970 Friendly Relations Declaration of the UN General Assembly; the 1972 Stockholm Declaration on the Human Environment of the UN Conference on the Human Environment; expert-based soft law, such as the 2017 Global Pact for the Environment; the private regulation of TNCs, such as Meta's Standards of the Community; the 2021 ALI-ELI Principles for a Data Economy; some forms of religious and indigenous law.

66. Among others, mechanisms of implicit or explicit *renvoi*; comparative and foreign law in judicial reasoning; interpretations that favor international law; construction of open norms clauses such as due diligence, good faith, and duty of care through non-binding instruments; systemic integration principles; “constitutional tolerance”; comitology; subsidiarity.

67. See Benedict Kingsbury & Stephan W. Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law* (Inst. for Int'l L. & Justice Working Paper 2009/6, 2009), <https://ssrn.com/abstract=1466980>; Nicolás M. Perrone & David Schneiderman, *International Economic Law's Wreckage: Depoliticization, Inequality, Precarity*, in RESEARCH HANDBOOK ON CRITICAL LEGAL THEORY 446 (Emilios Christodoulidis, Ruth Dukes & Marco Goldoni eds., 2019).

68. See, e.g., BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW* (2003).

from technical expertise and efficiency rather than processes of political deliberation.

At the same time, global law triggers opposite dynamics of repoliticization,⁶⁹ from which new strategies, targets, and venues of political struggle emerge. These often arise from the networking of both hegemonic and non-hegemonic actors, movements, coordinated practices of participation and contestation,⁷⁰ and strategic litigation.⁷¹

Understood as the “systematization of anarchy,”⁷² global law does not indicate a not-yet-developed, *still* incomplete legal order.⁷³ Global law is *intrinsically* incomplete.⁷⁴ Instead, global law refers to a plurality of heterarchical normative processes,⁷⁵ which at least potentially have a global reach. Global law can be applied in various legal contexts that are not predetermined. Therefore, the adjective “global” does not refer to an actual global scope, but rather to the absence of predetermined territorial and normative boundaries.⁷⁶ This does not mean that global legal processes lack boundaries altogether. Instead, their boundaries are constantly redefined at the level of the single

69. See Anne Peters, *Dual Democracy*, in THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 263 (Jan Klabbers, Anne Peters & Geir Ulfstein eds., 2009); Gunther Teubner, *Quod Omnes tangit: Transnational Constitutions Without Democracy?*, 45 J.L. & Soc’y S5 (2018). For a rule-of-law perspective, see David Lefkowitz, *Global Legal Pluralism and the Rule of Law*, in THE OXFORD HANDBOOK OF GLOBAL LEGAL PLURALISM 366 (Paul S. Berman ed., 2020). See *contra* Ioannis Kampourakis, *The Postmodern Legal Ordering of the Economy*, 28 IND. J. GLOB. LEGAL STUD. 101, 142–46 (2021).

70. See LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY (Boaventura de Sousa Santos & César A. Rodriguez-Garavito eds., 2005); John D. Clarke, *The Globalization of Civil Society*, in THE EMERGENCE OF GLOBAL CIVIL SOCIETY 3 (James W. Walker & Andrew S. Thompson eds., 2008). For a study case focusing on F4F and the Hong Kong protests of 2019–2020, see Binendri Perera, *The School Strike for Climate as People’s Engagement in the Transnational Legal Process and Global Constitutionalism*, 11 GLOBAL CONST. 9 (2022) (underlining the (domestic) constitutionalism gaps as the immediate cause of the protests and people’s direct engagement in the domestic and transnational legal process).

71. See Benoit Frydman & Ludovic Hennebel, *Le contentieux transnational des droits de l’Homme: Une analyse stratégique*, 20 REVUE TRIMESTRIELLE DES DROITS DE L’HOMME 73, 77–136 (2009).

72. Cf. Catá Backer, *supra* note 43, at 180.

73. See Le Golf, *supra* note 54, at 128.; Michel Virally, *Un tiers droit? Réflexions théoriques*, in LE DROIT DES RELATIONS ÉCONOMIQUES INTERNATIONALES: ÉTUDES OFFERTES À BERTHOLD GOLDMAN 373, 385 (1982).

74. See Xifaras, *supra* note 53, at 234.

75. Cf. Catá Backer, *supra* note 43, at 182 (summarizing these characteristics referring to four elements: fracture, fluidity, permeability, and polycentricity). See also AUBY, *supra* note 56, at 80. For an attempt to frame global law in monist/Kelsenian terms, see Tomasz Widiak, *Polycentric vs. Fragmented: A Neo-Kelsenian Order of Global Law*, 10 TRANSNAT’L LEGAL THEORY 229 (2019). Several theorists have described this situation with different kinds of metaphors and frameworks: game theory and networks (Ost and van de Kerchove), network theory and “serial law” (Ladeur, Vesting), “patchwork” (Delmas-Marty), “hodgepodge” (David Kennedy), “bricolage” (Frydman), “entanglements” (Krisch). Based on this feature, Lindahl argues that term “global law” is inadequate and one would need to refer to (emergent) global legal orders: see Hans Lindahl, *Collective Action and Emergent Global Legal Orders*, in JURISPRUDENCE IN A GLOBALIZED WORLD 128 (Jorge L. Fabra-Zamora ed., 2020).

76. Cf. WALKER, *supra* note 35, at 21.

legal act.⁷⁷ Single acts of legislation, administration, adjudication, or contracts selectively include or exclude different kinds of normative material and address different kinds of subjects, thus continuously shifting the line between law and non-law as well as between different legal systems.⁷⁸ From this perspective, global law emerges from loosely connected normative “episodes” that continuously reshape the boundaries of a given legal system, both retrospectively and prospectively.

To be sure, in most cases, the single legal act must still present itself as based on the chains of validity of the specific system where that act is enforced or adjudicated. Adjudicators like the Hague district court, the OB, and the *Eco Oro* tribunal may claim that they are applying Dutch tort law, Meta’s Standards of the Community, and the Canada–Colombia FTA, respectively. In fact, they increasingly resort to a broader set of normative materials, often against the intentions of those who drafted those texts.⁷⁹ Thus, courts and adjudicators not only act as institutions embedded in one legal system or as branches of government; rather, bodies such as the district court of the Hague, the *Eco Oro* tribunal, and the OB increasingly serve, with varying results, as “guardians” of legal orders relating to the governance of, for example, the economy, the climate, or freedom of expression. These developments also make it more difficult for an external observer to identify in advance the normative material used to reach a decision and, therefore, to guess its concrete outcome. Global law does not relegate legal indeterminacy to the margins but rather recognizes it as the very core of lawmaking and decision making.⁸⁰

Due to the weakening of established hierarchies and increasing use of diverse normative material, “global” experts⁸¹ and lawyers now play a more central and self-aware role. More evidently than in state-centered schemes, practitioners and international civil servants play a fundamental role in “coding” the structures of global law.⁸² Likewise,

77. Cf. Hans Lindahl, *A-Legality: Postnationalism and the Question of Legal Boundaries*, 73 MOD. L. REV. 30 (2010). See also THOMAS VESTING, *LEGAL THEORY* 63–75 (2018).

78. Cf. Gunther Teubner, *Breaking Frames: The Global Interplay of Legal and Social Systems*, 45 AM. J. COMP. L. 149 (1997).

79. Especially in international arbitration, several studies show the relevance of “soft” law, rankings, indicators, and other kinds of normative material. Cf. Katia Fach Gomez, *Enforcing Global Law: International Arbitration and Informal Regulatory Instruments*, 47 J. LEGAL PLURALISM & UNOFFICIAL L. 112 (2015); Jose Alvarez, *Reviewing the Use of “Soft Law” in Investment Arbitration*, 7 EUR. INT’L ARB. REV. 149 (2018); Giovanna Adinolfi, *Soft Law in International Investment Law and Arbitration*, 1 IT. REV. INT’L COMP. L. 86 (2021).

80. Which does not make them less normative. Compare Teubner, *supra* note 54, at 21 (“[global law] is soft law, not weak law”) with NTINA TZOUVALA, *CAPITALISM AS CIVILISATION: A HISTORY OF INTERNATIONAL LAW* 38 (2020). For a discussion of the issues related to the lack of certainty and predictability from the perspective of the rule of law, see Lefkowitz, *supra* note 69.

81. See EXPERTS, NETWORKS AND INTERNATIONAL LAW (Holly Cullen, Joanna Harrington & Catherine Renshaw eds., 2017).

82. Cf. Le Golf, *supra* note 54, at 137; Guy Fiti Sinclair, *The International Civil Servant in Theory and Practice: Law, Morality, and Expertise*, 25 EUR. J. INT’L L. 747 (2015); DAVID KENNEDY, *A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE*

scholars increasingly embrace, and actively use, progressive interpretations, scholarly analyses, and “naming experiments”⁸³ to generate new legal meaning or pursue normative agendas at the global level.⁸⁴ This trend marks a shift not only in the relationship between legal expertise and its object⁸⁵ but also in the relationship between a community of “global” legal experts and their societal self-perception.⁸⁶ To be sure, this trend includes not only lawyers but also institutional actors⁸⁷ at both domestic and international levels, IOs, social and political movements worldwide. In this sense, “global law” denotes a specific attitude towards law in general, an aspect that especially Neil Walker has highlighted.⁸⁸

The polycentricity of global law should be understood more precisely as polycontextuality.⁸⁹ This means that it is not just characterized by multiple centers but that these centers are placed in different territorial, functional, and institutional contexts and that their norm- and decision-making is guided by mutually irreducible rationalities.

GLOBAL POLITICAL ECONOMY 89 (2016); KATHARINA PISTOR, *THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY* 158 (2019).

83. Susan Marks, *Naming Global Administrative Law*, 37 NYU J. INT’L L. & POL. 995 (2006); Peer Zumbansen, *Transnational Law: Theories and Applications*, in *THE OXFORD HANDBOOK OF TRANSNATIONAL LAW* 4, 20 (Peer Zumbansen ed., 2021).

84. Cf. WALKER, *supra* note 35, at 188. This is particularly apparent in the fields of global administrative law, animal law, and environmental law: see Benedict Kingsbury, Nico Krisch & Richard Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15 (2005); ANNE PETERS, *ANIMALS IN INTERNATIONAL LAW* 532 (2021); Kati Kulovesi et al., *Global Environmental Law: Context and Theory, Challenge and Promise*, 8 TRANSNAT’L ENV’T L. 405 (2019). Although sometimes recalled mockingly (Loughlin, *supra* note 44), such *avant-gardisme* in global law discourse puts it in a better position potentially to individuate problems undetected by traditional legal radars and, possibly, to offer solutions and counterstrategies that can then be incorporated in more conventional legal forms. At its best, global law—the concrete practice of involved actors, the object of study, and the self-aware scholarly discourse—seeks not to replace established paradigms but to offer a self-reflective and generative critique of them. In this sense, Zumbansen’s criticism that the phrase “global law” is “abstract, misleading, and elusive” (Zumbansen, *supra* note 83) in comparison to “transnational law” is perhaps too harsh: cf. Roger Cotterrell, *What Is Transnational Law?*, 37 LAW & SOC. INQUIRY 500, 522 (2012).

85. Cf. Domingo, *supra* note 39; Guilmain, *supra* note 46; Benoit Frydman, *A Pragmatic Approach to Global Law*, in *PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE* 181 (Horatia Muir Watt & Diego Arroyo eds., 2014); Xifaras, *supra* note 53.

86. Cf. SANTOS, *supra* note 53; Morag Goodwin, *Embracing the Challenge: Legal Scholarship in a Global Era*, 4 TRANSNAT’L LEGAL THEORY 686 (2013); Devika Hovell, *The Idea of Global Public Law: Response to Unbound Symposium Essays*, 110 AM. J. INT’L L. UNBOUND 80 (2016); WALKER, *supra* note 35, at 47–54; Neil Walker, *The Jurist in a Global Age*, in *METHODOLOGY IN THE NEW LEGAL WORLD* 84 (Rob Van Gestel et al. eds., 2017); AUBY, *supra* note 56, at 140; Miodrag Jovanović, *Global/Transnational Law Challenges to Theorizing About Law*, in *JURISPRUDENCE IN A GLOBALIZED WORLD*, *supra* note 75, at 54.

87. Cf. Karen J. Alter, *From Colonial to Multilateral International Law: A Global Capitalism and Law Investigation*, 19 INT’L J. CONST. L. 798 (2021).

88. WALKER, *supra* note 35, at 18 (defining global law as “any practical endorsement of, or commitment to, the universal or otherwise global-in-general warrant of some laws or of some dimensions of law”).

89. See Gunther, *supra* note 54.

The right to property, for example, is interpreted in different ways by regional courts within the human rights regime (e.g., European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR))⁹⁰ and in yet other ways by the dispute-settlement bodies of the global investment regime (e.g., investor–state dispute settlement (ISDS) bodies), despite frequent but still selective cross-references.⁹¹ In each case, partially different normative materials serve as the basis for interpreting the relevant provisions. From the perspective of international law, it is precisely this polycontextuality that offers further arguments to justify, for example, different treatments of property rights. In the context of the investment protection regime, property rights function to protect the system of global investments; in the context of the HRL regime, narrowly understood, they are meant to protect the humanity of the individual—whatever its meaning.

III. PATTERNS

When considering the patterns of the relationship between global law and the individual, it is important to distinguish this relationship from that between global law and (the recognition of) legal personality.⁹² Indeed, because of the polycontextuality, incompleteness, and fluidity of global law, a unitary conception of legal personality would contradict its very nature. Instead, from the perspective of global law, the individual may have multiple or no legal personalities.⁹³ One paradoxical feature of global law is that to operate *as law*, it has to assume socially constructed individuals who are not necessarily legal persons in all of the legal processes of which it is composed. In this sense, global law decenters the issue of legal personification and shifts the focus to how an entity is *individualized* as a precondition for its legal relevance in a given system.⁹⁴ Put differently, from the perspective of global law, the central question is no longer only: “What are the

90. Cf. Yuval Shany, *International Courts as Inter-Legality Hubs*, in THE CHALLENGE OF INTER-LEGALITY, *supra* note 52, at 319.

91. See Silvia Steininger, *What's Human Rights Got to Do with It? An Empirical Analysis of Human Rights References in Investment Arbitration*, 31 LEIDEN J. INT'L L. 33 (2018) (showing that invocations of human rights in investment arbitration tend to favor investor claims).

92. See *supra* Part I.

93. Cf. PETERS, *supra* note 34, at 9.

94. This is less exotic and “sociological” than it may appear: for distinctions between legal subjects and legal persons in older international law literature, see PETERS, *supra* note 34, at 36–37. Unsurprisingly, authors interested in questions of legal pluralism and organizationhood have often oriented themselves to “objective” and “socially constructed” conceptions of legal personality, detached from explicit recognition in law. See, e.g., Neil MacCormick, *Persons as Institutional Facts*, in REINE RECHTSLEHRE IM SPIEGEL IHRER FORTSETZER UND KRITIKER 371 (Ota Weinberger & Werner Krawietz eds., 1988) (in legal theory); FINN SEYERSTED, OBJECTIVE INTERNATIONAL PERSONALITY OF INTERGOVERNMENTAL ORGANIZATIONS: DO THEIR CAPACITIES REALLY DEPEND UPON THE CONVENTIONS ESTABLISHING THEM? (1963) (in international organizations law).

legal conditions for the recognition of legal personality?”⁹⁵ Two further questions arise: “What kind of social individual does global law presuppose?” and, conversely, “What kind of law does the individual need in the context of globalization?”⁹⁶ Importantly, these two questions can be separated only from an analytical point of view. In practice, they constitute two sides of the same coin.⁹⁷

A. *Symbiosis*

To answer these questions, one may start by noting that global law is primarily based on the prototypical model of actorhood that emerged in (Western) legal modernity.⁹⁸ This model assumes anthropomorphic, abstract actors, formally equal to one another, capable of expressing their “free” will either immediately or mediately,⁹⁹ and generally detached from specific societal belongings¹⁰⁰—with the notable exception of political membership (citizenship).¹⁰¹ Once the legal relevance of

95. To be sure, the history of law is traversed by a tension between the legal relevance of individuals and their lack of, or partial legal personality. One may think of slaves, women, fetuses, and trade unions. However, even those cases emerged in constellations where the legal construction of individuals mostly gravitated around *one* system—in Western legal modernity, the state legal system. In contrast, what characterizes global law and drives the decentering is the fact that the recognition of full, partial or no legal personality varies for *each* of its intertwined normative processes or centers. See *infra* notes 104 and 144; Parts III.B and C.

96. I ask these questions in the sense of Foucault’s “conceptual needs,” as they do not seek to found a theory of the object, as the conceptualized object is not the single criterion of a good conceptualization. Instead, “we have to know the historical conditions which motivate our conceptualization. We need a historical awareness of our present circumstances.” Michel Foucault, *The Subject and Power*, 8 CRITICAL INQUIRY 777, 778 (1982).

97. *Id.* at 782.

98. Cf. John W. Meyer & Ronald L. Jepperson, *The “Actors” of Modern Society: The Cultural Construction of Social Agency*, 18 SOCIO. THEORY 100 (2000).

99. Importantly, the recognition of broader spaces of individual freedom in law did not narrow but rather expanded the possibilities for exercising power relationships, thus opening up to new forms of governmentality. Cf. Foucault, *supra* note 96, at 786, 789–90; NIKLAS LUHMANN, *TRUST AND POWER* 112–13 (Howard Davis, John Raffan & Kathryn Rooney trans., Wiley 1979).

100. See ALAIN SUPOT, *HOMO JURIDICUS: ON THE ANTHROPOLOGICAL FUNCTION OF THE LAW* 13–14 (Saskia Brown trans., Verso 2007). To be sure, this abstraction—and the liberal political theory underlying it—was based on the model of the white European male and did, in fact, hide/strengthen emerging systems of expropriation, exploitation, and domestication towards workers, migrants, racialized and gendered people, especially in the Global South. See, e.g., Mari J. Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls’ Theory of Justice*, 16 N. M. L. REV. 613 (1986); Wendy Brown, *Suffering Rights as Paradoxes*, 7 CONSTELLATIONS 208 (2000); NANCY FRASER & RAHEL JAEGLI, *CAPITALISM: A CONVERSATION IN CRITICAL THEORY* 16–17, 40–47 (2018). It is equally important to stress that Global North intellectual elites also contributed (however progressive and well-intentioned) to the silencing/hiding of subaltern subjects. Cf. Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in *COLONIAL DISCOURSE AND POST-COLONIAL THEORY* 66 (Patrick Williams & Laura Chrisman eds., 1992).

101. Cf. Gert Verschraegen, *Hybrid Constitutionalism, Fundamental Rights and the State*, 40 NETHERLANDS J. LEG. PHILS. 216 (2011). On the actual relevance of citizenship in the construction of modern societies, see Chris Thornhill, *The Citizen of Many Worlds: Societal Constitutionalism and the Antinomies of Democracy*, 45 J.L. & Soc’y 73, 79–83 (2018).

strictly assigned status- and role-based positions in a stratified society, like that of the Middle Ages, has been (selectively) erased, the individual under modern law becomes a relatively abstract, “free,” de-contextualized entity. The individual is attributed the capacity to autonomously and simultaneously *act* in different social spheres¹⁰² and, consequently, to pursue self-realization in various contexts—as *homo politicus*, *oeconomicus*, *scientificus*, etc.¹⁰³—through a set of rights recognized in (state) law¹⁰⁴ that can be invoked in both private and public relationships. Relatedly, modern law does not recognize the power of private individuals to unilaterally determine other subjects’ legal position. Following the differentiation, typical of (Western) modernity, between state and society and between public and private,¹⁰⁵ social powers retreated in a sort of untransparent legal limbo. This differentiation, however, marginalized social powers in legal terms only, curtailing modern law’s capacity to “see” their capacity to unilaterally determine other subjects’ legal position—formerly recognized and addressed in law.

These features constitute essential preconditions for the emergence and development of global law. As seen above, “global law” denotes a plurality of normative processes that cannot always rely on centralized legislation or administration, i.e., hierarchical law-production based on the unilateral determination of other subjects’ legal position.

102. Cf. Niklas Luhmann, *The Individuality of the Individual: Historical Meanings and Contemporary Problems*, in *ESSAYS ON SELF-REFERENCE* 107, 112 (1990).

103. On the question of how pluralized forms of self-realization are linked to the differentiation of the modern personality, see Cornelia Bohn, *Twofold Freedom and Contingency*, 22 *SIMMEL STUDIES* 45 (2018); Andreas Fischer-Lescano, *Subjektlose Rechte*, in *GEGENRECHTE: RECHT JENSEITS DES SUBJEKTS* 377, 386 (Hannah Franzki, Andreas Fischer-Lescano & Johan Horst eds., 2018).

104. Especially postmodern thinkers would argue that the subjectivizing discourses which emerge from law and legal *texts*—especially the discourse on rights—produce the social individual in the first place. See, e.g., Louis Althusser, *Ideology and Ideological State Apparatuses (Notes Towards an Investigation)*, in *ESSAYS ON IDEOLOGY* 1 (Ben Brewster trans., Verso 1984) (1970); NIKLAS LUHMANN, *GRUNDRECHTE ALS INSTITUTION: EIN BEITRAG ZUR POLITISCHEN SOZIOLOGIE* 53–83 (2d ed. 1974); KARL-HEINZ LADEUR, *RECHTSSUBJEKT UND RECHTSSTRUKTUR. VERSUCH ÜBER DIE FUNKTIONSWEISE DER RECHTSSUBJEKTIVITÄT* 9–17, 73–102 (1978); PIERRE BOURDIEU, *CE QUE PARLER VEUT DIRE* 99–100, 126–27 (1982); Brown, *supra* note 100. This also means that, in a constellation dominated by state-centered law, the state—as the main “place” of societal inclusion—plays a central role in the process of social individualization. Cf. SUPLOT, *supra* note 100, at 28. For a problematization of this standard account from a socio-historical perspective, see DE SOUSA SANTOS, *supra* note 53, at 78; THOMAS VESTING, *GENTLEMAN, MANAGER, HOMO DIGITALIS: DER WANDEL DER RECHTSSUBJEKTIVITÄT IN DER MODERNE* (2021). See also Part III.C.

105. Which is not stark separation but rather an intensification of interdependence and mutual relationships between the “political” claims emerging within society and “politics” (the societal sector gravitating around state structures tasked with collectively binding decision-making). Cf. LUHMANN, *supra* note 104, at 99. In the context of sociological globalization, see Poul Kjaer, *The Concept of the Political in the Concept of Transnational Constitutionalism: A Sociological Perspective*, in *AFTER GLOBALIZATION. NEW PATTERNS OF CONFLICT AND THEIR SOCIOLOGICAL AND LEGAL RECONSTRUCTION* 285 (Christian Jorges & Tommi Ralli eds., 2011).

Under these conditions, global law's jurisgenesis *functionally* needs modes of law-production based on the management and solution of at least potentially divergent claims of formally equal actors,¹⁰⁶ i.e., ideally, adjudication and contract. Investor-state and commercial arbitration awards, panel reports of the World Trade Organization (WTO) Dispute Settlement Body,¹⁰⁷ contracts drafted or adjudicated following UNIDROIT principles and UNCITRAL Model Laws,¹⁰⁸ as well as formal and informal agreements among various administrative agencies, constantly generate new rules that are central to the functioning of the global law of the economy.¹⁰⁹ As a matter of principle, legal interactions that rely on the formal equality of the participants can potentially lead to conflicts due to their adversarial nature. These interactions are essential for driving the development of global law—specifically its jurisgenesis, or the creation of legal meaning—particularly given its “episodic” character, as mentioned above. Therefore, global law “needs” the individual to sustain its own jurisgenesis, perhaps even more so than its national/international counterparts.

A second, closely related reason why global law depends on the individual is due to its polycontextuality. Given that normative frameworks based on divergent rationalities and contexts are fragmented and mutually irreducible,¹¹⁰ an actor capable of raising claims in different legal systems—systems that otherwise hardly communicate—indirectly facilitates their interaction.¹¹¹ In other words, socially constructed individuals, as they evolved from legal modernity, transmit legal meaning, thus potentially linking different normative processes.¹¹² In their concrete development, global legal processes

106. This point mirrors the argument that the recursivity of global norm-making (the dynamic interplay of multiple reform cycles between law on the books and law in action within and between national and global lawmaking forums and sites of implementation) is propelled by four mechanisms: actor mismatch, diagnostic struggles, contradictions, and indeterminacy. See Terence C. Halliday, *Recursivity of Global Normmaking: A Sociolegal Agenda*, 5 ANN. REV. L. & SOC. SCI. 263 (2009). Diagnostic struggles are defined as “contests among actors over diagnoses of problems to be rectified.”

107. The WTO Dispute Settlement Body is currently in crisis, because it is inquorate after the United States blocked the appointment of members to its Appellate Body. A number of WTO members agreed to participate in the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) and other alternative appeal mechanisms pursuant to Article 25 of the Dispute Settlement Understanding (DSU). For an updated overview and a list of cases pending under such mechanisms, see MULTI-PARTY INTERIM APPEAL ARBITRATION ARRANGEMENT (MPIA), https://wtotplurilaterals.info/plural_initiative/the-mpia (last visited Sept. 28, 2022).

108. See, e.g., Model Law on International Commercial Arbitration, GAOR, 40th Sess., Supp. No. 17, Annex I (June 21, 1985).

109. See Jan Wouters, *Government by Negotiation*, in RESEARCH HANDBOOK ON GLOBAL ADMINISTRATIVE LAW 196 (Sabino Cassese ed., 2016).

110. See Gunther, *supra* note 54.

111. Cf. Gert Verschraegen, *Human Rights and Modern Society: A Sociological Analysis from the Perspective of Systems Theory*, 29 J.L. & Soc'y 258 (2002).

112. Cf. Koh, *supra* note 64; Maya Steinitz, *Transnational Legal Process Theories*, in OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 350 (Cesare Romano et al. eds., 2013).

“capture” individuals’ claims not only to sustain their own jurisgenesis but also to adapt reflexively to each other.¹¹³ In this sense, the ability to navigate overlapping systems enables the abstract individual to advocate for normative developments across various global contexts, potentially leading to co-evolution, cross-fertilization, and mutual adaptation.¹¹⁴ By asserting their claims across different contexts, individuals facilitate the encounter between and potentially the mutual adaptation or integration of global political, economic, and scientific justice, among others, thereby contributing to the sustainability of the anarchy¹¹⁵ of global law.¹¹⁶

Here, it is instructive to contrast the positions of the early twentieth-century dualists¹¹⁷ in international law scholarship¹¹⁸—who were concerned about the risk of the individual being subjected to multiple legal regimes with contradictory normative requirements—with the current reality encapsulated by the term “global law.” In fact, under the conditions of global law, where governance frameworks often overlap, the affiliation of an individual to multiple legal orders is not seen as a risk per se but rather as a prerequisite for their sustainability.¹¹⁹

To summarize, there are two main reasons why global law “needs” the individual. First, in the absence of centralized authorities capable of unilateral, general, hierarchical lawmaking, global law’s jurisgenesis relies on conflict-based, horizontal norm-production—particularly through adjudication and contracts. This process requires the individual as a specific kind of actor that emerged with legal modernity. Second, in a polycontextual setting, global law needs actors to raise claims in different legal systems that otherwise have limited interaction in terms of legal meaning. In doing so, the socially constructed individual transmits legal meaning, especially through litigation,

113. From the institutional perspective of the courts, this point has most recently been stressed by Shany, *supra* note 90.

114. Especially when it comes to their specific conceptions of justice. See Neil Walker, *The Gap Between Global Law and Global Justice*, in *IN PURSUIT OF PLURALIST JURISPRUDENCE* 216 (Nicole Roughan & Andrew Halpin eds., 2017); Shany, *supra* note 90.

115. Or “un-governance,” as Desai and Lang put it. See Deval Desai & Andrew Lang, *Introduction: Global Un-governance*, 11 *TRANSNAT’L LEGAL THEORY* 219 (2020).

116. Cf. Monica Hakimi, *The Integrative Effects of Global Legal Pluralism*, in *THE OXFORD HANDBOOK OF GLOBAL LEGAL PLURALISM*, *supra* note 69, at 558, 563.

117. That is, at a time when the legal-conceptual structures of the global order had crystallized around sovereign political entities and state-centered legal positivism had displaced the individual.

118. See HEINRICH TRIEPEL, *VÖLKERRECHT UND LANDESRECHT* 254–64 (1899).

119. Cf. KRIVENKO, *supra* note 39. Already in the 1930s, Scelle—contrary to then dominant dualist approaches—linked his theory of “role splitting” (*dédoublement fonctionnel*) to the existence of a world community (“société internationale globale ou oecuménique”) consisting of a plurality of communities which intersect and overlap with each other and where individuals have “the social power to create legal situations.” See Georges Scelle, *Règles générales du droit de la paix*, 46 *RECUEIL DES COURS* 327, 356, 367 (1933).

indirectly linking different normative processes at the global level and enabling their coexistence.

For their part, individuals also “exploit” the specific features of global law. In the context of globalization, the autonomous, modern individual increasingly relies on normative frameworks with the distinct characteristics of global law. The dynamics of depoliticization and repoliticization, as mentioned earlier, mean that claims or policy goals are often only actionable through legal means in forums outside an individual’s “original” context, based on diverse normative materials that do not always easily qualify as “law.” For instance, under the current social, legal, and technological conditions of globalization, the mitigation of the climate crisis necessitates strategies that extend beyond national politics and directly engage non-state actors, as exemplified by the *Milieudefensie* case. In this sense, while citizenship “still plays a crucial role in mediating the balance between inclusion and exclusion in global society,”¹²⁰ global law partially shifts practices traditionally associated with national citizenship—such as claims to rights and participation in lawmaking—and relocates them, often through collective organizations or networks, into distinct spheres at the global level.

In the same vein, practices such as law-shopping, forum-shopping, and transnational litigation can be seen as a strategic selection of normative systems based on the opportunities they offer—in terms of recognition of legal personality, procedural and substantive law, or the broader impact of the decision sought. In other words, for better or worse, global law offers the socially constructed actors typical of legal modernity the opportunity to further emancipate themselves from the constraints of lawmaking centered around state and interstate schemes.¹²¹ In this sense, global law may also serve progressive and anticolonial purposes, and even help reduce the power gap between hegemonic and non-hegemonic actors.¹²²

120. Verschraegen, *supra* note 101, at 222.

121. This means acknowledging that not all individuals are equally empowered within the context of global law. However, this dynamic is not unique to global law: sociopolitical exclusion and disempowerment, driven by arbitrary exercise of power, unregulated social matrices, and (global) capitalism, have also been entrenched in the Westphalian/Vattelien order. In this order, equal citizenship, national political processes, and discourses on “civilization” often served as façades that obscured de facto social exclusion and legitimized oppressive and imperial institutions. See Thornhill, *supra* note 101, at 79–83; TZOUVALA, *supra* note 80. It could be argued that global law neither conceals nor legitimizes the realities of global capitalism and imperialism per se. Instead, it alters the conditions under which various strategies of (dis)empowerment and emancipation may be pursued and succeed. See generally DE SOUSA SANTOS, *supra* note 53, 522.

122. Examples include the Global Pact for the Environment and the 2015 Pan-African Investment Code (PAIC), the first continent-wide African model investment treaty elaborated to promote sustainable development. See Makane M. Mbengue & Stefanie Schacherer, *The “Africanization” of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime*, 18 J. WORLD INV. & TRADE 414 (2017). In the case law of international courts, the different stance of the ECtHR and IACtHR about legal persons as right-holders may serve as an example. See Advisory Opinion OC-22/16, *Titularidad de Derechos de las Personas*

In different ways, the three cases recalled at the beginning of this Article are representative of this trend. The *Eco Oro* tribunal granted the investor's claim by referring to a higher standard of protection that was excluded by the parties of the underlying FTA but which is firmly rooted in the global investment regime. By these means, thanks to an assortment of international binding and non-binding norms,¹²³ a corporate actor like *Eco Oro* was able to pursue its own interests by escaping not only the constraints set at the national level by the host state but also those envisaged by Colombia and Canada as international lawmakers. In the *Milieudefensie* case, climate activists pushed for the application of different types of normative materials to create *ex novo* legal obligations upon a TNC, which as such was not directly bound by relevant climate and environmental international law. Here, too, the creative use of binding and non-binding norms, allowed non-hegemonic actors to bypass the limits of international law(making) and hold a corporate actor legally accountable. In the case of the OB, both single users and Meta—probably with different goals—activated a mechanism within a *global* social arena where no single national regulation on free speech applies. Here again, the OB's eclectic use of private norms and sources of HRL also reflects the need to regulate global online speech while still preserving the internet as we know it, that is, limiting the so-called internet balkanization.¹²⁴

To summarize, there are two key reasons why the individual “needs” global law. First, due to the dynamics of depoliticization and repoliticization, claims can often only be raised through legal means in forums distinct from an individual's “original” legal context, based on diverse normative materials that do not easily qualify as “law.” Second, by facilitating law shopping, forum shopping, transnational litigation, etc., global law enables actors to strategically select normative systems that provide opportunities to advance individual interests or policy agendas at the global level. The notion that the relationship between global law and the individual is symbiotic highlights their interdependence.¹²⁵ Global law has evolved in this manner because legal modernity has shaped a specific model of actorhood. In

Juridicas en el Sistema Interamericano de Derechos Humanos, Inter-Am. Ct. H.R. (ser. A) No. 22, ¶¶ 34–105 (Feb. 26, 2016) (stating that legal entities do not hold the same rights as natural persons under the IACHR. However, certain entities—specifically, trade unions, tribal and indigenous organizations, and individuals connected to legal entities—do have rights under the IACHR and may petition the Inter-American System when those rights are allegedly violated).

123. See *supra* note 79.

124. That is, the emerging phenomenon whereby the internet is becoming more and more splintered due to technology, commerce, politics, nationalism, religion, and national interests. Various states are currently insisting on enforcement, with national content moderation laws, antitrust, and data protection absolutism. See, e.g., Chien Hwei Wu, *Sovereignty Fever: The Territorial Turn of Global Cyber Order*, 81 HEIDELBERG J. INT'L L. 651 (2021).

125. See similarly BRUNNÉE & TOOPE, *supra* note 34, at 12–15, 33–35 (relying on constructivist theories in IRs and sociological thought).

the context of globalization, it is only (or primarily) global law that continues to construct the individual as a self-authorized agent pursuing goals through legal means. For better or worse, decisions like those of the Hague District Court, the OB, and the *Eco Oro* tribunal are only possible within the framework of global law. They demonstrate how global law enables various individuals to employ legal avenues to achieve various objectives, including investment protection, climate action, and regulation of online speech.

B. Oscillation

Global legal processes result in patterns of oscillation by selectively expanding or restricting the possibility of conflict—and consequently the legal (ir)relevance of the socially constructed individual—depending on their varying need for jurisgenesis. On the one hand, governance frameworks that may rely on authoritative lawmaking, or on epistemic or scientific authority, tend to accord less relevance to the individual in terms of legal personification and specific entitlements.¹²⁶ Alternatively, these frameworks rely on a more general human rights discourse, primarily *ex post facto*, or as a source of output legitimacy, rather than as an operational necessity.¹²⁷ In both scenarios, there are none, or only weak legal mechanisms, available to individuals.¹²⁸

On the other hand, the individual assumes greater legal relevance in contexts where “administrative” or “legislative” modes of norm production are relatively weak or absent. Even here, however, the intrinsic dynamic of a given system influences such relevance: the global investments regime gravitating around investor–state arbitration, for example, accords economic actors a central role and tends to marginalize other types of individuals.¹²⁹ At the same time, human

126. The main example might be the absence of individual complaint mechanisms against the sanctions of the UN Security Council. See Monika Heupel, *UN Sanctions Policy and the Protection of Subsistence Rights: Fighting Off a Reputational Crisis*, in PROTECTING THE INDIVIDUAL FROM INTERNATIONAL AUTHORITY 66 (Monika Heupel & Michael Zürn eds., 2017). From a broader perspective, see Gavin Sullivan, *Transnational Legal Assemblages and Global Security Law: Topologies and Temporalities of the List*, 5 TRANSNAT'L LEGAL THEORY 81 (2014).

127. The main example might be the WHO, an IO that can rely on one of the most robust forms of legislation-like international lawmaking (the International Health Regulations) and on epistemic/scientific expertise as a source of legitimacy. See Benjamin M. Meier & William Onzivu, *The Evolution of Human Rights in World Health Organization Policy and the Future of Human Rights Through Global Health Governance*, 128 PUB. HEALTH 179 (2014). Another significant example is the World Bank, an IO with a high degree of administrative autonomy. See Galit A. Sarfaty, *Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank*, 103 AM. J. INT'L L. 647 (2009).

128. Cf. PARLETT, *supra* note 34, at 348–49.

129. The current system, based on investors' rights, is the evolution of a system based on diplomatic protection, and as such might be seen as the result of a partial autonomization of the global economy system from the political rationality of sovereign actors. Cf. Michał Kaczmarczyk, *The Differentiation of International Arbitration and the Claim for Democracy*, 12 TRANSNAT'L LEGAL THEORY 78 (2021).

rights and environmental movements push to be recognized as relevant subjects in this same regime, for example in the form of *amici curiae* or stakeholders. In this context, the oscillating subjectification within the investment regime can be seen as a battleground where the struggle between two distinct governance frameworks and their conflicting rationalities plays out: the regulation and protection of the global (neoliberal) economy versus the regulation and protection of the global environment.

The oscillation pattern has two further effects. First, it pushes the concept of the individual toward further abstraction, broadly understood as a distancing from the features typically associated with flesh-and-blood human beings, moving towards less “realist” imaginaries.¹³⁰ Indeed, because global law must accommodate increasingly diverse and complex legal positions, the foundational, shared elements of the involved systems must become more abstract. If different criteria of legal relevance are accorded to the individual entities oscillating among distinct yet interconnected regimes, the concept of the individual must become more abstract to encompass a broader range of instances.

In particular, the perceived need for effective global regulation of the environment, climate, and new technologies—and the strategies of the involved actors—expands the direct or indirect legal relevance of entities such as non-human animals, ecosystems, rivers, algorithms, humanoid robots, and combinations thereof.¹³¹ Once these entities start to populate the realm of legal subjects across different systems, their conceptual genus must become more abstract (or less anthropomorphic).¹³² It is one thing to include men, women, children, and collective entities primarily conceived as ensembles of humans (such as states and corporations) within the concept of the actor. It is quite another thing to also include trees, rivers, non-human animals, ecosystems, and the like, which possess entirely different ontological properties. To manage the complexity deriving from the increasing divergence and autonomization of governance frameworks and their respective normative systems, global legal orders need to share “simpler” basic units and the related concepts need to meet fewer “material”

130. See *infra* note 134.

131. This process also comes with its own set of issues and more or less new hegemonies. See *supra* note 100; Artwell Nhemachena & Esther Dhakwa, *Beyond Eurocentric Human Rights Jurisprudence and Towards Animality?: Humanoid Robots and the Decomposition of African Humanism and Personhood*, in *SOCIAL AND LEGAL THEORY IN THE AGE OF DECOLONIALITY: (RE-)ENVISIONING PAN-AFRICAN JURISPRUDENCE IN THE 21ST CENTURY* 73 (Artwell Nhemachena, Tapiwa V. Warikandwa & Samuel K. Amoo eds., 2018); Iyan Offor, *Second Wave Animal Ethics and (Global) Animal Law: A View from the Margins*, 11 J. HUM. RTS. & ENV. 268 (2020).

132. This is particularly apparent in the field of “earth system law.” For a thorough overview of state of the art, see Marie-Catherine Petersmann, *Sympoietic Thinking and Earth System Law: The Earth, Its Subjects and the Law*, 9 EARTH SYS. GOVERNANCE (2021), www.sciencedirect.com/science/article/pii/S2589811621000185.

requirements.¹³³ Such a concept, then, departs more decisively from the flesh-and-blood human being and entities recognized as having specific ontological/psychological properties (will, interests, pain, reflexive capacities, empathy, action). Put differently, global law tips the balance from realist towards phenomenological or constructivist imaginaries of the individual.¹³⁴ In this sense, highlighting the oscillation pattern adds a layer of complexity to an international legal discourse that often equates individualization and humanization.

But what would characterize this more abstract concept? The individual presupposed by global law should increasingly be able to engage with multiple and overlapping normative processes that potentially have a global reach. Therefore, global legal processes seem to rely increasingly on the concept of the individual as a point of reference for socially constructed claims, either as a claimant or as the addressee of a claim. This individual, as “required” by global law, does not necessarily hold legal rights or bear legal duties in a given system.¹³⁵ The concept of right is often too closely tied to self-interest,¹³⁶ thus restricting the set of entities that may “trigger” the jurisgenesis of (global) law. Instead, this individual could be any entity that is socially considered capable of raising a claim, either directly or indirectly, or an entity socially considered as the addressee of a claim, a notion which does not necessarily involve self-interest.¹³⁷ While this is

133. This trend towards a more abstract notion of individual parallels and is coherent with the trend towards the rematerialization/refeudalization of roles of “postliberal”/neoliberal era, from an all-inclusive legal personality to more concrete and context-dependent *loci* of attribution of rights and duties. See CHRISTODOULIDIS, *supra* note 31, at 213 (“[D]ivergent uses of discretion and shifting interpretations of rights are... centrifugal forces... But heterogeneities of this kind demand aggregations at higher levels”); Alain Supiot, *The Public-Private Relation in the Context of Today's Refeudalization*, 11 INT'L J. CONST. L. 129 (2013); LUHMANN, *supra* note 53, at 266.

134. The distinction relates to “the degree to which units or relations under analysis are thought to be relatively generic (*i.e.*, not very historically or contextually specific in ‘realist’ imagery) versus highly constructed (*i.e.*, quite historically or contextually generated).” Meyer & Jepperson, *supra* note 98, at 101 n.1.

135. See Part III.C.

136. This pertains both to the individual of the bourgeois revolution and the individual of the communist revolution. In both cases, the driving force is self-interest. Cf. MENKE, *supra* note 51, at 267. It is not clear whether the legal form itself necessitated this pattern or whether it was the result of a “hijacking” by (Western) capitalism. See, e.g., TZOUVALA, *supra* note 80, at 60–61 (and literature cited). One may still argue that the specific individualization of the modern legal subject does not per se require self-interest and (economic) selfishness. Although the trajectories of individualism, capitalism, (neo)liberalism, and globalization turned out to be closely intertwined and eventually reinforced each other, they remain at least conceptually distinct and may be open to disentanglement. See VESTING, *supra* note 104 (offering a theoretical-historical account); BENJAMIN L. MCKEAN, *DISORIENTING NEOLIBERALISM: GLOBAL JUSTICE AND THE OUTER LIMIT OF FREEDOM* (2020) (offering a strategic account); Alter, *supra* note 87 (offering an extensive discussion from the perspective of international law).

137. This trend is particularly apparent in animal law scholarship. See Juan Pablo Mañalich Raffo, *Animalhood, Interests, and Rights*, 11 J. HUM. RTS. & ENV. 156 (2020); VISA KURKI, *A THEORY OF LEGAL PERSONHOOD* (2019) (proposing a “bundle theory of legal personhood” based on two tenets: (i) legal personhood is a cluster property and consists of incidents which are separate but interconnected; (ii) these incidents involve primarily the endowment with particular types of claim-rights, responsibilities, and/or competences).

still only a trend,¹³⁸ any entity becomes an individual, at least for the purposes of global law, when *socially* attributed the capacity to have a claim or to be the addressee of a claim.¹³⁹ Conceptually, other qualities—such as the capacity to suffer, autonomous will, the capacity for social communication—and legal statuses—such as legal personality, specific rights or duties—are secondary considerations.

These observations lead to a second effect related to the oscillation pattern: the increased visibility of the interplay between three distinct yet interconnected dimensions of legal subjectification at the global level, namely—social individualization,¹⁴⁰ legal personification,¹⁴¹ and specific legal entitlements. While these three dimensions often overlap or may even represent a continuum, their distinctions remain significant. For example, once society recognizes the claim of non-human animals not to have unnecessary suffering inflicted upon them, for the purposes of global law these animals *are* individuals (social individualization), regardless of who legally represents these claims or the methods and locations of such representation. Once such claims translate into legal obligations for others not to cause suffering (specific legal entitlements), it is often only a short step to recognizing correlative rights and, subsequently, full-fledged legal personality (legal personification).¹⁴² The same logic applies, for instance, to the (socially constructed) claim of a river not to be polluted or of a

138. For a significant example, see Advisory Opinion OC-23/17, *Medio Ambiente y Derechos Humanos*, Inter-Am. Ct. H.R. (ser. A) No. 23, ¶ 59 (Nov. 15, 2017) (stating that a violation of the right to a healthy environment could be established even without identifying affected individuals).

139. Cf. Meyer & Jepperson, *supra* note 98, at 108 (referring to the agency for non-actor entities. In this regard, whether a human being, a corporation, a non-human animal, a river, or an ecosystem are individuals depends on how different social processes “construct” them as well as their interaction with social processes themselves).

140. Broadly understood as the attribution of the quality of “individual” in a given social context, irrespective of specific ontological or legal prerequisites.

141. Here again understood in standard Kelsenian terms. See Kelsen, *supra* note 42.

142. Such development is most apparent in the rulings of Ecuador’s Constitutional Court which, based on Article 10 of the 2008 Constitution, first granted rights to mangrove ecosystems (Corte Constitucional [C.C.] [Constitutional Court], septiembre 8, 2021, Sentencia No. 22-18-IN/21, http://esacc.corteconstitucional.gob.ec/storage/api/v1/10_DWL_FL/e2NhcNBLdGE6J3RyYW1pdGUUnLCB1dWlkOidIN2NkMjRmMS1hODMxLTQxMTETODEZzi1iZTQyOWQ0ZjQxYTMucGRmJ30=), then to a cloud forest (C.C., noviembre 10, 2021, Sentencia No. 1149-19-JP/21, http://esacc.corteconstitucional.gob.ec/storage/api/v1/10_DWL_FL/e2NhcNBLdGE6J3RyYW1pdGUUnLCB1dWlkOic3ZmMxMjVmMi1iMzZkLTRkZDQtYTM2NC1kOGNiMWIwYWViMWMucGRmJ30= (Los Cedros)), and finally recognized that individual animals are protected by the rights of nature which also include the right to free development of animal behavior (C.C., enero 27, 2022, Sentencia No. 253-20-JH/22, http://esacc.corteconstitucional.gob.ec/storage/api/v1/10_DWL_FL/e2NhcNBLdGE6J3RyYW1pdGUUnLCB1dWlkOic3ZmMxMjVmMi1iMzZkLTRkZDQtYTM2NC1kOGNiMWIwYWViMWMucGRmJ30= (Mona Estrellita)). See ANDREAS GUTMANN, *HYBRIDE RECHTSSUBJEKTIVITÄT: DIE RECHTE DER “NATUR ODER PACHA MAMA” IN DER ECUADORIANISCHEN VERFASSUNG VON 2008* (2021); Saskia Stucki, *Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights*, 40 OXFORD J. LEGAL STUD. 533 (2020).

specific ecosystem not to have its integrity compromised. However, social individualization, legal personification, and the attribution of specific rights or obligations remain analytically distinct. The interplay between such dimensions represents the process of global legal subjectification and enables the actors involved—both hegemonic and non-hegemonic—to utilize different strategies. In each case, legal subjectification follows a unique path and responds to different functional logics.

It is also important to note that the interplay between the three dimensions occurs in traditional, state-centered legal contexts, as well.¹⁴³ However, the specific features of global law not only make these dimensions more apparent but also shape them differently across its various centers.¹⁴⁴ Depending on their own patterns, various governance frameworks may frame the legal relevance of a socially constructed individual differently, ranging from complete invisibility to indirect legal relevance, to the recognition of personality with limited legal entitlements, to the full array of legal rights granted within that specific system. This observation leads to the final pattern of the relationship between global law and the individual: strategic subjectification.

C. *Strategic Subjectification*

The symbiotic, oscillating relationship between global law and the individual facilitates and inspires strategies of legal subjectification at the global level. In this context, both strategic actors, who consciously pursue diverse political agendas (e.g., hegemonic states, military-economic elites, global law firms, NGOs, or environmental and animal activists), and the intrinsic dynamics of globalization encourage a diversification of the criteria of relevance for the individual.¹⁴⁵ Demands to recognize animals' legal personality and calls for animal rights are not new to modern legal thought.¹⁴⁶ However, an animal rights movement and a global animal law have gained momentum only recently, as biodiversity loss and climate-related emergencies have elevated issues such as reducing meat consumption.¹⁴⁷ Global law not only

143. Cf. *supra* note 95.

144. Cf. Gunther Teubner, *How the Law Thinks: Toward a Constructivist Epistemology of Law*, 14 SELFORGANIZATION 87, 98 (1990) ("The point is not the individual subject withering away but the multiplication of centers of cognition.").

145. Cf. Elizabeth H. Boyle & John W. Meyer, *Modern Law as a Secularized and Global Model: Implications for the Sociology of Law*, 49 SOZIALE WELT 213, 227 (1998).

146. See, e.g., HENRY S. SALT, *ANIMALS' RIGHTS: CONSIDERED IN RELATION TO SOCIAL PROGRESS* (1892); Cesare Goretta, *L'animale quale soggetto di diritto*, 19 RIVISTA DI FILOSOFIA 348 (1928).

147. This is a simplification of a more complex network of interrelations, whereby the social and legal recognition of animal rights is based on both growing ethical/moral reasons and material conditions (i.e., environmental crises) that make it necessary to reconsider the exploitation of animals, which paves the way (in a materialist sense) for the ethics to be taken more seriously. See SASKIA STUCKI, *ONE RIGHTS: HUMAN AND ANIMAL RIGHTS IN THE ANTHROPOCENE* (2023). I am indebted to Saskia Stucki for this point.

utilizes specific strategies of subjectification to support its dynamics but also becomes dependent on—and is potentially influenced by—their variations, thereby remaining open to non-predetermined evolutionary trajectories.

Examples of strategic subjectification include the distinction between TNCs as unitary global individuals and the legal persons through which they operate (the individual companies, each with recognized legal personality in different legal systems).¹⁴⁸ Similarly, the Organization for Security and Co-operation in Europe (OSCE), while not a formally recognized international legal person, acts through domestic law entities and is increasingly considered a *de facto* IO.¹⁴⁹ Conversely, IOs may strategically be granted international legal personality to enable states avoid legal accountability.¹⁵⁰ Although the discussion extends beyond the scope of this Article, a further example of this dynamic can be observed in processes in where political communities are subjectified as states.¹⁵¹

In other instances, actors strategically avoid legal personification. For example, the “Fridays for Future” (F4F) movement, which seeks to influence environmental and climate regulations¹⁵² and relies on scientific evidence for legitimacy, is recognized as an increasingly relevant *individual* actor at the global level. However, its leaders deliberately avoid pursuing its legal personification—not even within the

148. See Fleur Johns, *The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory*, 19 MELB. U. L. REV. 893 (1993); DOREEN LUSTIG, *VEILED POWER: INTERNATIONAL LAW AND THE PRIVATE CORPORATION 1886–1981* (2020).

149. See Niels Blokker & Ramses A. Wessel, *Revisiting Questions of Organisationhood, Legal Personality and Membership in the OSCE: The Interplay Between Law, Politics and Practice*, in *THE LEGAL FRAMEWORK OF THE OSCE* 135 (Mateja Steinbrück Platise et al. eds., 2019); Lia Tabassi, *The Role of the Organisation in Asserting Legal Personality: The Position of the OSCE Secretariat on the OSCE's*, in *THE LEGAL FRAMEWORK OF THE OSCE*, *supra*, at 48. In international legal scholarship, a point of reference is still CATHERINE BRÖLMANN, *THE INSTITUTIONAL VEIL IN PUBLIC INTERNATIONAL LAW: INTERNATIONAL ORGANISATIONS AND THE LAW OF TREATIES* (2007).

150. Jean D'Aspremont, *Abuse of the Legal Personality of International Organizations and the Responsibility of Member States*, 4 INT'L ORG. L. REV. 91 (2007).

151. For the circular nature of this process, see LADEUR, *supra* note 104, at 103; Peter Fitzpatrick, *Latin Roots: The Force of International Law as Event*, in *EVENTS: THE FORCE OF INTERNATIONAL LAW* 43, 44 (Fleur Johns, Richard Joyce & Sundhya Pahuja eds., 2011); ROSE PARFITT, *THE PROCESS OF INTERNATIONAL LEGAL REPRODUCTION: INEQUALITY, HISTORIOGRAPHY, RESISTANCE* 17–56, 77–153 (2019). It may appear odd to put “public” actors such as states, IOs, and transgovernmental networks next to “private” actors and to group them under the genus “individual” for the purposes of global law. However, the very nature of global law, and especially the absence of centralized lawmaking authorities, means that, depending on the context, a given entity might be public (i.e., capable of unilaterally determining other subjects’ legal situation) or private (i.e., dealing with other entities on equal legal footing). Cf. BRUNNÉE & TOOPE, *supra* note 34, at 35–36. The COVAX initiative, where entities such as the WHO and states act as private individuals on the global market of vaccines on an equal footing with other participants, is a telling example. See Armin von Bogdandy & Pedro Villarreal, *The Role of International Law in Vaccinating Against COVID-19: Appraising the COVAX Initiative*, 81 HEIDELBERG J. INT'L L. 89 (2021).

152. See Perera, *supra* note 70, at 11–12.

various national systems where it operates. Importantly, however, the global legal subjectification of F4F is not devoid of legal infrastructure. It is supported by a foundation established under Swedish law¹⁵³ and by several trademarks¹⁵⁴ registered in 2020 with the European Union Intellectual Property Office (EUIPO). As such, it is protected by the comprehensive armor of intellectual property law, a global regime anchored by the World Intellectual Property Organization (WIPO) and the WTO.

As these examples illustrate, global law does not rule out that problems and functional needs are articulated by individuals choosing the systems in which to implement their plans. A nuanced account should consider the micro-level of acts and communications attributed to socially constructed individuals with diverse interests, goals, and conceptions of justice, which drive the variation mechanism in sociolegal evolution.¹⁵⁵ In this sense, global legal subjectification remains open, non-predetermined, and subject to contestation and (re-)politicization.¹⁵⁶

It is important, however, not to overlook that the dynamics outlined above may exacerbate alienation, instrumentalization, and oppression either generated, reinforced, or concealed by various governance frameworks. Through diverse strategies of subjectification, global legal processes may facilitate different forms of governmentality that discipline individuals according to their specific accretion imperatives, particularly those based on market rationality.¹⁵⁷ This means that even when strategies not strictly neoliberal are successfully pursued, the polycontextuality of global law may still promote the emergence of dangerous tunnel visions,¹⁵⁸ single-issue politics, and epistemic capture. For example, global environmental movements often struggle to align with

153. Stiftelsen The Greta Thunberg and Beata Ernman Foundation.

154. The main ones are the trademark “Greta Thunberg” owned by the Stiftelsen The Greta Thunberg Foundation, and the trademark “Fridays for Future,” owned by the Australian-Swedish climate activist Janine O’Keeffe.

155. Cf. GUNTHER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* 44–45 (1993); VESTING, *supra* note 77, at 150–57.

156. Insisting on the contingent, non-predetermined character of such processes does not exclude that mechanisms of (bio)power at the global level thrive on rather than negate contingency. See Fleur Johns, *On Dead Circuits and Non-Events, in* CONTINGENCY IN INTERNATIONAL LAW: ON THE POSSIBILITY OF DIFFERENT LEGAL HISTORIES 25 (Ingo Venzke & Kevin J. Heller eds., 2021). See also Part III.A.

157. Such imperatives do not come only from global economy but also from the knowledge imperative of science, the innovation imperative of technology, the news cycle imperative of information media, the standardization imperative of the law, etc. The symbiotic, oscillating relationship between the individual and global law does not necessarily correspond to that between (neo)liberal individualism and global market economy. For two converging perspectives, see Gunther Teubner, *Counter-Rights: On the Trans-Subjective Potential of Subjective Rights, in* THE LAW OF THE POLITICAL ECONOMY: TRANSFORMATIONS IN THE FUNCTIONS OF LAW 372 (Paul F. Kjaer ed., 2020); FRASER & JÄGGI, *supra* note 100, at 28–31.

158. Cf. Martti Koskeniemi, *The Politics of International Law: 20 Years Later*, 29 EUR. J. INT’L L. 7, 12 (2009).

global labor rights movements, and these, in turn, struggle to align with refugee protection movements.¹⁵⁹ Similarly, the relatively high degree of protection granted to indigenous peoples has polarized the question of “indigeneity,” leading to heated debates about who qualifies as insiders and outsiders of this category. The strategies pursued in such cases often lead to unintended consequences for the (self-)perception of the peoples they aim to represent.¹⁶⁰ From this perspective, global legal subjectification can also potentially lead to further forms of oppression and co-optation.

Nevertheless, this dynamic can also exert an emancipatory force. As noted above,¹⁶¹ in contexts where legal systems are (perceived as) not overlapping,¹⁶² the recognition of legal personality within a specific system plays a dominant role in the processes of subjectification. As long as national and international legal systems do not overlap (too much), and other types of normative systems do not establish their own forms of legal subjectification, state-centered law plays a crucial role in the social construction of the individual by recognizing legal personality, citizenship, and specific legal entitlements.

State apparatuses and laws continue to play a central role even amidst the evolving conditions of current sociolegal globalization.¹⁶³ However, in a landscape characterized by polycontextual, permeable, and fluid global normative processes, where each governance framework and/or system may have its own criteria of legal personification and specific legal entitlements, the likelihood that a given entity might be recognized as a legal person or hold some form of legal relevance *somewhere* increases dramatically. Consequently, an entity recognized as a legal person or endowed with either direct or indirect legal entitlements in some territorial or functional context (“somewhere”)—whether as a citizen, investor, refugee, worker, social media user, natural entity, or other—potentially exists as an individual *elsewhere*.¹⁶⁴ For instance, a river may not be a legal person outside India, New Zealand, or Canada, but its recognition as such in these places enhances its chances of being socially constructed as an individual

159. Cf. Thomas Kleinlein, *Fragmentierungen im Öffentlichen Recht: Diskursvergleich im internationalen und im nationalen Recht*, 132 DEUTSCHES VERWALTUNGSBLATT 1072, 1078 (2017); Teubner, *supra* note 69, at 22–25; Alexander Somek, *The Social Question in a Transnational Context*, in THE OXFORD HANDBOOK OF TRANSNATIONAL LAW, *supra* note 83, at 748.

160. Cf. Marie-Catherine Petersmann, *Contested Indigeneity and Traditionality in Environmental Litigation: The Politics of Expertise in Regional Human Rights Courts*, 21 EUR. HUM. RIGHTS LAW REV. 132 (2021).

161. See *supra* Part III.A and note 104.

162. As in the ideal-typical legal modernity, based on the internal/external divide and on strictly dualist theories of international law.

163. Cf. DE SOUSA SANTOS, *supra* note 53, at 79, 113; Jiří Příbáň, *Asking the Sovereignty Question in Global Legal Pluralism: From “Weak” Jurisprudence to “Strong” Socio-Legal Theories of Constitutional Power Operations*, 28 RATIO JURIS 31, 45–48 (2015).

164. From a historical perspective, see generally CHRISTOPHER A. CASEY, NATIONALS ABROAD: GLOBALIZATION, INDIVIDUAL RIGHTS, AND THE MAKING OF MODERN INTERNATIONAL LAW (2020).

elsewhere, thus becoming potentially relevant to legal processes *elsewhere*.¹⁶⁵ Legally binding norms in different systems may or may not create obligations upon single corporate entities. However, the fact that the UNGP created a normative space and language establishing responsibilities upon TNCs as unitary actors helps to penetrate corporate veils and *individualize* TNCs for strategic action *everywhere*. Similarly, a certain family member may not always have the right to reunification under the migration laws applicable *somewhere*, but global legal processes provide frameworks to contest exclusions, potentially expanding such right and, relatedly, the notions of family member and ultimately of family itself.¹⁶⁶

To put it in figurative terms, global legal processes function as river basins where vessels of legal meaning sail and may take unexpected routes.¹⁶⁷ Due to the abundance of relatively autonomous, yet interconnected, overlapping normative processes at the global level, state-centered law is less relevant to determining social individualization and subjectification—what Althusser referred to as “interpellation.”¹⁶⁸ By these means, global law potentially establishes the conditions for recognizing one own’s subjugation and for the (re)emergence of new or suppressed collectives and discourses.¹⁶⁹

This observation underscores the possibility of imagining strategies of legal subjectification tailored to the specific features of global law.¹⁷⁰ While the role of lawyers—and law in general—should not be overestimated,¹⁷¹ the manner in which the legal infrastructures of globalization are “coded” *does* have an impact on its evolution.¹⁷² In this sense, global law can potentially retain and even amplify emancipatory and repoliticizing potential¹⁷³ by establishing forms of legal

165. In this sense, while I agree with Lindahl (*supra* note 75) that emergent global legal orders are still “located” *somewhere*, this feature does not necessarily make the term “global law” inadequate, because the single “emergent global legal orders” as such do not exhaust the “global law” as an overall phenomenon.

166. Cf. DAPHNA HACKER, *LEGALIZED FAMILIES IN THE ERA OF BORDERED GLOBALIZATION* 149–96 (2017).

167. This metaphor oversimplifies a more complex dynamic that has been described as “interlegality.” See Boaventura De Sousa Santos, *Law: A Map of Misreading: Toward a Postmodern Conception of Law*, 14 J.L. & Soc’y 279 (1987); THE CHALLENGE OF INTER-LEGALITY, *supra* note 52.

168. See Althusser, *supra* note 104; see also LADEUR, *supra* note 104.

169. Cf. de Sousa Santos, *supra* note 167, at 299; HANS LINDHAL, *FAULT LINES OF GLOBALIZATION. LEGAL ORDER AND THE POLITICS OF A-LEGALITY* 106–13 (2013) (referring to an “enlarged first-person plural perspective”).

170. See McKean, *supra* note 136.

171. See Ntina Tzouvala, *Global Capitalism and Law, and Where to Find Them*, 20 INT’L J. CONST. L. 60 (2022).

172. See PISTOR, *supra* note 82; KENNEDY *supra* note 82; Alter, *supra* note 87; Martti Koskenniemi, *International Law as “Global Governance,”* in *SEARCHING FOR CONTEMPORARY LEGAL THOUGHT* 199, 215–16 (Justin Desautels-Stein & Christopher Tomlins eds., 2017).

173. Cf. Peer Zumbansen, *Can Transnational Law Be Critical?*, in *RESEARCH HANDBOOK ON CRITICAL LEGAL THEORY*, *supra* note 67, at 473. Whether this potential is “transformative” or merely “progressive” is a different issue. See Robert Knox, *Marxism, International Law, and Political Strategy*, 22 LEIDEN J. INT’L L. 413 (2009).

subjectification that, at the very least, force the appearance of—and then de-reify—conditions of oppression and (global) injustice.¹⁷⁴ Addressing the challenges of globalization, then, is not merely a matter of political imagination—whether mediated by public law or not¹⁷⁵—but also of legal imagination.¹⁷⁶ The legal imagination of global law—of more or less militant “global” lawyers—may help strengthen the agency of emancipatory forces at the global level,¹⁷⁷ to taming unconstrained power and social processes, and to breaking down the oppressive ones.¹⁷⁸ Here, I would like to point to three macro-strategies emerging in the practice and thought of global law(yers).¹⁷⁹

1. New Legal Concepts and Regimes

A first strategy involves tipping the balance of the oscillation pattern through the innovative legal “coding” of new concepts and regimes concerning socially constructed individuals. This strategy aims to bring otherwise invisible actors into visibility and to intensify repoliticization dynamics.¹⁸⁰ “Seeing” an entity as an individual through the lens of new legal concepts and regimes enables direct claims against them or, conversely, challenges the protection of a corporate veil. Thus, the concept of the individual as a socially constructed reference point for a claim can serve a starting point, which is then redefined and regulated differently in each context. New legal

174. For a significant example, see *Vedanta Resources PLC v. Lungowe*, [2019] UKSC 20 (the Court asserting jurisdiction over a U.K. parent company for alleged torts committed by its subsidiary in Zambia, piercing the state (and possibly the corporate) veil, and thus “forcing” the appearance of a global actor/individual that in legal literature has been conceptualized as “global value chain.”). For a discussion of the case from this perspective, see Doreen Lustig, *The Vedanta Challenge to Multilateralism: Piercing the Boundaries of the Global Legal Order*, 20 INT’L J. CONST. L. 35 (2022). For a broader and updated outline of the current state of common law doctrines that consistently inhibit host state plaintiffs from advancing transnational home state claims, see Hassan M. Ahmad, *The Jurisdictional Vacuum: Transnational Corporate Human Rights Claims in Common Law Home States*, 70 AM. J. COMP. L. 227 (2022).

175. Loughlin, *supra* note 44.

176. Cf. Walker, *supra* note 114, at 236–38; CHRISTODOULIDIS, *supra* note 31, at 46, 286; see generally Roberto M. Unger, *Legal Analysis as Institutional Imagination*, 59 MOD. L. REV. 1 (1996).

177. See CHRISTODOULIDIS, *supra* note 31, at 461–79 (discussing what he calls “militant formalism”).

178. Cf. Ioannis Kampourakis, *From Global Justice to Supply Chain Ethics*, 12 TRANSNAT’L LEGAL THEORY 213, 226 (2021).

179. This is a different issue from the—no less important—concrete operationalization of rights *already* positivized in any given system. Likewise, it is important to highlight that, to the extent they aim at *representing* subaltern subjects, all such strategies, to different extent and in various forms, unavoidably carry the risk of *silencing* and *othering* them, thus further reifying and perpetuating subject constructions rooted in Western First World/Global North. See Spivak, *supra* note 100.

180. This endeavor has a normative thrust, insofar as it aims to increase law’s capacity to govern social realities by “seeing” them differently. On the normativity of legal concepts, see CHRISTODOULIDIS, *supra* note 31, at 255–58. See also the sources cited *supra* note 172.

concepts and regimes should be “reimagined” by carefully calibrating both liabilities and entitlements according to the specific risks they pose to global society and the opportunities they offer.¹⁸¹

As discussed above, it is particularly the relative legal invisibility of TNCs and transnational networks as unitary global actors—as *individuals*—that contributes to some of the most alarming trends within global law. In this area, scholars are increasingly striving to broaden or to introduce (new) legal concepts of TNC,¹⁸² IO,¹⁸³ transnational networks,¹⁸⁴ global supply chains,¹⁸⁵ to include actors that, even without international legal personality, exert de facto authority over individuals.

Additionally, other scholarly proposals are working to develop general principles of liability for these entities and their members. In this context, a potential model is the proposal on the “Guiding Principles on Shared Responsibility in International Law,” a project aimed at codifying and advancing the rules governing the shared responsibility of “international persons.”¹⁸⁶ This project seeks to align the rules of shared responsibility established by the International Law Commission for States and IOs in situations involving injuries where contributions may be individual, concurrent, or cumulative. In this project, the term “international person” as a potential duty-bearer refers only to states and IOs, but the authors clarify that this focus is “without prejudice to the possibility that other actors, such as individuals or other non-state actors, bear international obligations and share responsibility in certain circumstances.”¹⁸⁷

In the realm of international lawmaking, an illustrative example is the legally binding instrument to regulate the activities of TNCs and

181. Cf. KURKI, *supra* note 137; see generally Thomas Vesting, Stefan Koriath & Ino Augsberg, *Einleitung*, in *GRUNDRECHTE ALS PHÄNOMENE KOLLEKTIVER ORDNUNG* 1 (Thomas Vesting, Stefan Koriath & Ino Augsberg eds., 2014).

182. See Kevin B. Sobel-Read, *Reimagining the Unimaginable: Law and the Ongoing Transformation of Global Value Chains into Integrated Legal Entities*, 16 EUR. REV. CONTRACT L. 160 (2020).

183. See ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 47–48 (1994); Dapo Akande, *International Organizations*, in *INTERNATIONAL LAW* 233 (M. Evans ed., 2018); Angelo Jr Golia & Anne Peters, *The Concept of International Organization*, in *CAMBRIDGE COMPANION TO INTERNATIONAL ORGANIZATIONS LAW* 25 (Jan Klabbers ed., 2022).

184. See Angelo Jr Golia & Gunther Teubner, *Networked Statehood: An Institutionalised Self-contradiction in the Process of Globalisation?*, 12 TRANSNAT'L LEGAL THEORY 7 (2021).

185. See Sobel-Read, *supra* note 182; Klaas H. Eller, *Is “Global Value Chain” a Legal Concept? Situating Contract Law in Discourses Around Global Production*, 16 EUR. REV. CONTRACT L. 3 (2020).

186. André Nollkaemper et al., *Guiding Principles on Shared Responsibility in International Law*, 31 EUR. J. INT'L L. 15 (2020).

187. *Id.* at 22 (Commentary to Principle 1, para. 1). But see Bhupinder S. Chimni, *The Articles on State Responsibility and the Guiding Principles of Shared Responsibility: A TWAIL Perspective*, 31 EUR. J. INT'L L. 1211 (2021) (arguing that they fail to address the shared responsibility of state and non-state actors, such as TNCs, for the violation of human rights and environmental norms and the application of the special and different treatment (SDT) principles in determining shared responsibility).

other business enterprises, which is currently being negotiated by the intergovernmental working group established in 2014.¹⁸⁸ Notably, the drafts circulated to date require states to regulate “business activities of transnational character.”¹⁸⁹ While the draft treaty would not directly impose obligation on TNCs under international law, it aims to shift the focus of international regulation from individual entities incorporated at the domestic level to the unitary economic actor responsible for human rights violations. Importantly, this shift is achieved without the need to recognize the international legal personality of TNCs.

At the domestic level, some legislatures are adopting a similar approach. Following the relative success of the General Data Protection Regulation (GDPR)¹⁹⁰ as a global standard in the field of digital privacy, the European Union and several European countries are increasingly employing techniques of “territorial extension”¹⁹¹ to leverage the so-called Brussels effect.¹⁹² This approach is particularly evident in various types of “global supply chain” laws, which impose substantive human rights duties, obligations of vigilance, due diligence, and non-financial reporting on businesses incorporated or based within their jurisdictions, and potentially sanction them for human rights violations occurring throughout their supply chains.¹⁹³

188. U.N. Human Rights Council Res. 26/9, U.N. Doc. No. A/HRC/RES/26/9 (July 14, 2014).

189. See Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, art. 1(4), 3d draft (Aug. 17, 2021), www.ohchr.org/sites/default/files/LBI3rdDRAFT.pdf.

190. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 2016 O.J. (L 119) 1.

191. Cf. Joanne Scott, *Extraterritoriality and Territorial Extension in EU Law*, 62 AM. J. COMP. L. 87 (2014).

192. That is, the power to shape the global business environment thanks to the sheer weight of its market, especially in competition regulation, consumer health and safety, or environmental protection. See ANU BRADFORD, *THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD* (2020).

193. See, e.g., Modern Slavery Act 2015 (Transparency in Supply Chain) Regulations 2015, SI 2015/1833, reg. 2 (U.K.); Loi 2017-750 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017-750 of March 27, 2017 on the Duty of Oversight of Parent Companies and Commissioning Enterprises], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 28, 2017, p. 9 (Fr.); Wet zorgplicht kinderarbeid [Law on the Introduction of a Duty of Care to Prevent the Supply of Goods and Services Produced Using Child Labor] van 24 oktober 2019, Stb. 2019, 401 (Neth.); Lieferkettensorgfaltspflichtengesetz [Supply Chain Due Diligence Law], June 11, 2021, BUNDESGESETZBLATT [BGBl.] at I 2959 (Ger.); Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 on Non-financial Reporting, 2014 O.J. (L 330) 1; Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 on Conflict Minerals Imports, 2017 O.J. (L 130) 1. At the time of writing of this Article, the European Commission and the European Parliament are elaborating a legislative proposal for a “European Due Diligence Act” which will most probably take the form of a directive. On the problematic issues arising from this strategy, see Caroline O. Lichuma, (*Laws*) *Made in the “First World”: A TWAIL Critique of the Use of Domestic Legislation to Extraterritorially Regulate Global Value Chains*, 81 HEIDELBERG J. INT’L L. 497 (2021); INTAN SUWANDI, *VALUE CHAINS: THE NEW ECONOMIC IMPERIALISM* (2019); see generally Kampourakis, *supra* note 178.

In the sphere of international adjudication, one emancipatory strategy of subjectification could involve the use of counterclaims¹⁹⁴ and denial-of-benefits clauses¹⁹⁵ in international investment arbitration. Analogously, this strategy could extend to selectively granting legal entitlements to, and imposing liability on, “new” individuals, such as non-human animals,¹⁹⁶ natural entities, and artificial intelligence programs.¹⁹⁷

2. Selective Consolidation of Collective Actors’ Legal Position

A second strategy, closely related to the first, involves substantively and procedurally strengthening the role of civil society actors as vectors of emancipation and repoliticization at the global level.¹⁹⁸ Crucially, what is at stake here is not only the emancipation of flesh-and-blood human beings but also of collectives and groups. This might entail establishing legal frameworks that enhance the transnational bargaining power of collective actors, for example by supporting the right to strike¹⁹⁹ and facilitating transnational company agreements in the field of social and labor law.²⁰⁰ In the European context,

194. See *Urbaser S.A. et al. v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, ¶¶ 1182–221 (Dec. 8, 2016); *David R. Aven et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award, ¶¶ 737–42 (Sept. 18, 2018).

195. Meant to avoid the misuse of investment agreements as a “free ride” by third-country interests or undesirable forms of “treaty-shopping” by private actors. See, e.g., *Philip Morris Asia Ltd. v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, ¶ 585 (Dec. 17, 2015); *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, ¶¶ 4.60–4.92 (June 1, 2012). See also Loukas Mistelis & Crina Baltag, “Denial of Benefits” Clause in Investment Treaty Arbitration (Queen Mary Univ. of London, Sch. of Law, Legal Stud. Rsch. Paper No. 293/2018, 2018), <https://ssrn.com/abstract=3300618>.

196. For an overview of the ECtHR’s case law on animal welfare, see Tom Sparks, *Protection of Animals Through Human Rights: The Case-Law of the European Court of Human Rights*, in *STUDIES IN GLOBAL ANIMAL LAW* 153 (Anne Peters ed., 2020).

197. See ANNA BECKERS & GUNTHER TEUBNER, *THREE LIABILITY REGIMES FOR ARTIFICIAL INTELLIGENCE: ALGORITHMIC ACTANTS, HYBRIDS, CROWDS* (2021).

198. See McKean, *supra* note 136, ch. 5.

199. For significant cases in the inter-American legal space, articulating the binding quality of ILO labor standards, and the interpretation of these standards by specialized bodies, see Advisory Opinion OC-27/21, *Los Derechos a la Libertad Sindical, Negociación Colectiva y Huelga, y Su Relación con Otros Derechos, con Perspectiva De Género*, Inter-Am. Ct. H.R. (ser. A) No. 27 (May 5, 2021); *Extrabajadores del Organismo Judicial v. Guatemala*, Preliminary Objections, Merits, and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 445 (Nov. 17, 2021). For a comprehensive analysis, see Mariela Morales Antoniazzi & Julieta Lobato, *Un paso al frente: La huelga como derecho humano en el sistema interamericano de derechos humanos*, in *LA DIMENSIÓN LABORAL DEL CONSTITUCIONALISMO TRANSFORMADOR EN AMÉRICA LATINA: CONSTRUCCIÓN DE UN IUS COMMUNE* (Armin von Bogdandy et al. eds., forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4040939.

200. ISABELLE SCHÖMANN ET AL., EUR. TRADE UNION INST., *TRANSNATIONAL COLLECTIVE BARGAINING AT COMPANY LEVEL: A NEW COMPONENT OF EUROPEAN INDUSTRIAL RELATIONS?* (2012), www.etui.org/publications/books/transnational-collective-bargaining-at-company-level-a-new-component-of-european-industrial-relations. For a comprehensive and empirically informed account on the bargaining power of workers under the current conditions of global capitalism, see ASHOK KUMAR, *MONOPSONY CAPITALISM POWER AND PRODUCTION IN THE TWILIGHT OF THE SWEATSHOP AGE* (2020).

the EU Commission proposed a Directive to promote collective bargaining to the purposes of adequate minimum wages.²⁰¹ Similarly, the European Trade Union Confederation (ETUC) has proposed an Optional Legal Framework for transnational collective agreements (TCAs).²⁰² Such partnerships may well emerge at the global level, for instance in the context of climate regulation under the auspices of the UN Framework Convention on Climate Change (UNFCCC) and the Paris Agreement.²⁰³

Another facet of this approach involves utilizing both existing and new litigation strategies to elevate claims based on individual rights to political issues at the global level. If global capitalism—as a depersonalized social process—cannot be sued directly, then (global) law must devise ways to hold accountable the entities that enable its most harmful dynamics. Focusing particularly on climate litigation, such strategies can aid repoliticization by federating movements, fostering exchanges of arguments between various global actors, and highlighting global injustices.²⁰⁴ In this context, the *Milieudefensie* decision has become a landmark, showcasing how domestic and international norms can be framed as global law to challenge entire business models, rather than merely individual corporate entities.

At the procedural level, the IACtHR's 2017 Advisory Opinion concerning the persons entitled to petition the Inter-American System is a pertinent example. It currently permits only certain collective actors to file claims based on the type of claims and interests they represent.²⁰⁵ However, a significant advancement in this field would occur

201. Proposal for a Directive of the European Parliament and of the Council on Adequate Minimum Wages in the European Union, COM/2020/682 final (Oct. 28, 2010), <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52020PC0682>.

202. See Eur. Trade Union Confederation Res., Proposal for an Optional Legal Framework for Transnational Negotiations in Multinational Companies (Mar. 11, 2014), www.etuc.org/en/document/etuc-resolution-proposal-optional-legal-framework-transnational-negotiations-multinational (advocating for the establishment of an Optional Legal Framework for TCAs to be introduced through a binding decision of the EU, giving legal relevance to transnational collective agreements whose legal nature is currently unclear. This decision would have its legal basis in Article 6 TEU and in Articles 152, 154, and 156 TFEU and would have the form of either a decision of the Council and of the Parliament (Article 288 TFEU) or a decision of the social partners (Article 155 TFEU)). For a discussion, see SILVANA SCIARRA, SOLIDARITY AND CONFLICT: EUROPEAN SOCIAL LAW IN CRISIS 75–78 (2018).

203. See Charlotte Streck, *Strengthening the Paris Agreement by Holding Non-state Actors Accountable: Establishing Normative Links Between Transnational Partnerships and Treaty Implementation*, 10 TRANSNAT'L ENV. L. 493 (2021).

204. Cf. Matthias Petel, *Analyse de l'usage stratégique des droits humains au sein du contentieux climatique contre les États* (Max Planck Inst. for Comp. Pub. L. & Int'l L. Research Paper Series No. 2020-33, 2020), <https://ssrn.com/abstract=3692955>. To be sure, the aim of “giving visibility to global injustices” is also to force something to appear as a problem and to strategically deploy (global) law to stabilize the conditions for such appearance. See CHRISTODOULIDIS, *supra* note 31, at 3; see generally *id.* at 119–48, 433–555.

205. See Advisory Opinion OC-22/16, *Titularidad de Derechos de las Personas Jurídicas en el Sistema Interamericano de Derechos Humanos*, Inter-Am. Ct. H.R. (ser. A) No. 22 (Feb. 26, 2016).

if collective, organized actors were granted broader opportunities to raise claims on behalf of individuals they do not directly represent. Here, the collective complaint procedure under the Additional Protocol to the European Social Charter (ESC) provides a useful model.²⁰⁶ This procedure allows social partners and NGOs to address questions concerning a state's non-compliance with the ESC provisions directly before the European Committee of Social Rights (ECSR)—without the necessity to exhaust domestic remedies first. Importantly, the claimant organization need not be a direct victim of the alleged violation to lodge a complaint, nor does the claimant need to be based in the jurisdiction in which the violation occurred. It is noteworthy that the ECSR's decisions within this procedure were the only international instances to explicitly find that several measures implementing EU austerity policies during the post-2008 economic crisis violated (social) human rights.²⁰⁷

3. The Individual Beyond the Right

A third and more radical strategy, recently outlined by Christoph Menke²⁰⁸ and embraced by Katharina Pistor,²⁰⁹ involves recognizing the relevance of a “new” individual *beyond*, and even *without*, the modern rights-form. This approach views the rights-form as overly compromised by capitalist/bourgeois society, which emerged from Western legal modernity,²¹⁰ and by the colonialist/imperialist legacy of modern international law.²¹¹ This strategy proposes considering claims based on so-called counter-rights in legal terms, by utilizing and creating legal instruments to modify social practices that can be initiated by individuals.²¹² Indeed, according to this proposal, no

206. Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, Nov. 9, 1995, ETS No. 158.

207. See, e.g., Fed. of Employed Pensioners of Greece (IKA-ETAM) v. Greece, Eur. Comm. of Soc. Rts., Decision on the Merits of the Complaint No. 76/2012 (Dec. 7, 2012), <https://hudoc.esc.coe.int/eng/?i=cc-76-2012-dmerits-en>; Eur. Roma & Travellers Forum v. France, Eur. Comm. of Soc. Rights, Decision on the Merits of the Complaint No. 64/2011 (Jan. 24, 2012), <https://hudoc.esc.coe.int/eng/?i=cc-64-2011-dmerits-en>; see also Karin Lukas, *The Collective Complaint Procedure of the European Social Charter: Some Lessons for the EU?*, 41 LEGAL ISSUES ECON. INTEGRATION 275 (2014).

208. MENKE, *supra* note 51, at 267–91.

209. PISTOR, *supra* note 82, at 231–34.

210. See MARY A. GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 14 (1991); MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY (2001); SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD (2018); JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART (2021).

211. See, e.g., ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2005); Sundhya Pahuja, *The Postcoloniality of International Law*, 46 HARV. INT'L L.J. 459 (2005); HUMAN RIGHTS FROM A THIRD WORLD PERSPECTIVE: CRITIQUE, HISTORY AND INTERNATIONAL LAW (José-Manuel Barreto ed., 2013).

212. See Fischer-Lescano, *supra* note 103 (offering the most significant effort to date to translate Menke's essentially philosophical proposal of “counter-rights” into the language of legal doctrine and legal-procedural mechanisms, and outlining the concept of “rights without a subject” (*Subjektlose Rechte*)).

civil rights should be sacrosanct indefinitely. Instead, all rights and claims to rights should be reflexively compared to those of others. In a global order where no rights are inviolable, where participation is universal but not obligatory, the traditional rights-form is supplanted by the pure claim, and the legal person is replaced by the pure, socially constructed individual.²¹³ This transforms the concept of rights into counter-rights, turning them into a temporary empowerment for change, rather than legal tools to defend a preexisting, crystallized status quo or an individual's self-will. By disempowering, or at least decentering, the rights discourse, this shift aims to re-empower politics.²¹⁴ Contrary to individuals in legal modernity who assert the sovereignty—the *activity*—of their own will, the individuals envisioned by such counter-rights *reclaim* their own exclusion, affirming their weakness and their *passivity*. The revolution of the counter-right, Menke argues, consists in the revolt of the “insurrectionary slave.”

This strategy might seem abstract, but it is possible to see it embodied in movements like F4F, mentioned above. As is well known, F4F is a global movement predominantly involving school-age activists who engage in globally coordinated protests and acts of disobedience to urge political leaders to tackle the climate crisis. The movement consists mainly of people who, due to their age, are excluded from most electoral and political processes of institutional politics. Instead of rejecting their status as “children,” they embrace it. The foundation of their (counter-)rights lies precisely in their passive status, in their very exclusion. They call for global social change based precisely on this status.

Returning to global law, the example of F4F²¹⁵ helps to illustrate how Menke's proposal could be further expanded: first, by attributing such counter-rights to collectives, organizations, social movements, and networks²¹⁶—not as replacements for individual rights to resistance²¹⁷ but as complements; and, second, by developing a broad spectrum of such counter-rights designed to overcome various types of motivational constraints and accretion imperatives across distinct contexts (power accumulation in politics, profit accumulation in the economy, knowledge accumulation in science, and so on).²¹⁸

213. See Fischer-Lescano, *supra* note 103, at 392.

214. See *id.* at 392.

215. See Daniel M. Brinks, Arkaja Singh & Bruce M. Wilson, *The Decentered Construction of Global Rights: Lessons from the Human Rights to Water and Sanitation*, 14 WATER 1795 (2022) (proving another illustrative example of the decentered sociolegal construction of a claim at the global level).

216. See HANS LINDBAHL, *AUTHORITY AND THE GLOBALISATION OF INCLUSION AND EXCLUSION* 286 (2018).

217. Cf. Daniela Bifulco & Angelo Jr Golia, *The Right of Resistance as a State Law Basis for Transnational Regimes' Self-Contestation*, 45 J.L. & Soc'y S94 (2018); Saskia Stucki, *In Defence of Green Civil Disobedience: Judicial Courage in the Face of Climate Crisis and State Inaction*, VERFASSUNGSBLOG (Oct. 30, 2020), <https://verfassungsblog.de/in-defence-of-green-civil-disobedience>.

218. Cf. Teubner, *supra* note 157, at 376–93.

CONCLUSION

An examination of the relationship between global law and the individual reveals a multifaceted reality that resists a singular interpretation. However, analyzing this relationship through the lens of jurisgenesis, and exploring the patterns of symbiosis, oscillation, and strategic subjectification, illuminate the specific role of the individual in an ongoing shift—namely, the shift from legal production models focused almost exclusively on the state to models where diverse strategic actors and epistemic communities play more prominent roles.²¹⁹

This analysis also aids in distinguishing global law from its conceptual proxies. Global law is neither purely cosmopolitan, based on universal political, economic, or other principles of rationality, nor is it merely transnational law that regulates cross-boundary processes involving private and hybrid actors. While the significance of semantic disputes should not be exaggerated, one reason why global legal processes are considered “global” rather than just “transnational” may lie in the role played by the individual in their jurisgenesis.²²⁰ The individual is viewed as a socially constructed entity who, as such, is *potentially* relevant across a non-predetermined range of locations, irrespective of the attribution of citizenship or the recognition of legal personality within a specific legal system.

Furthermore, this analysis can enrich parallel debates in international legal scholarship. It problematizes the common equation of individualization with humanization. Additionally, it provides insights that support arguments—already present in some sectors of international law scholarship²²¹—about the qualitative differences in subjective legal entitlements depending on the functional context in which they are invoked or applied.²²² For example, the distinctions between international refugee rights and human rights, or between international labor rights and human rights, is consistent with the distinct strategic “needs” for legal personification and entitlements of various global functional systems. These systems may be geared toward regulating refugee and migration flows,²²³ the capital–labor

219. Richard Collins, *The Slipperiness of “Global Law,”* 37 OXFORD J. LEGAL STUD. 714, 738 (2017) (noting that it helps “the observer understand not merely the direction of social forces and the contours of debate surrounding their direction, but how those forces act upon, condition and change social phenomena such as law or legal orders, ultimately making them the things that they are and substantiating certain institutional features that they cannot function without”).

220. Cf. Christopher A. Whytock, *The Concept of a Global Legal System*, in THE MANY LIVES OF TRANSNATIONAL LAW: CRITICAL ENGAGEMENTS WITH JESSUP’S BOLD PROPOSAL 72, 76–77 (Peer Zumbansen ed., 2020).

221. PETERS, *supra* note 34.

222. For an application in the context of EU law with reference to citizenship, see Lisa Mardikian, *Reframing EU Citizenship as Stakeholder Constituency, or . . . Why the Court of Justice Got it Right on Economically Inactive EU Citizens*, in ECONOMIC CONSTITUTIONALISM IN A TURBULENT WORLD 183 (Achilles Skordas, Gábor Halmay & Lisa Mardikian eds., 2023).

223. See Satvinder S. Juss, *Transnational Refugee Law*, in THE OXFORD HANDBOOK OF TRANSNATIONAL LAW, *supra* note 83, at 218.

relationship foundational to the global economy,²²⁴ or the protection of the human as human. This is true regardless of whether these distinctions tend towards superimposition and convergence, as in the former scenario,²²⁵ or towards divergences and tensions, as in the latter.²²⁶

Before concluding, I wish to suggest a potential avenue for future research. While it has not been possible to develop it fully here, any analysis of the relationship between global law and the individual should investigate both the functional and the institutional contexts in which distinct types of normativity emerge and interact. Global law scholars are thus faced with the dual analytical and normative challenge of considering global legal processes in both their functional dimension—the individual *and* the law of global politics, the law of global economy, the law of global science, the law of global environment, among others—and their organizational dimension, namely, the specific systems of collective action and decision making that, alongside states, concretely shape the law and power dynamics within such functional systems (involving individuals *and* IOs, networks, TNCs).²²⁷ Legal theory and regulatory techniques must elaborate analytical and normative frameworks sophisticated enough to capture the interplay between these dimensions. Only through such a comprehensive approach can an authentically normative legal theory contribute to the emancipatory potential of global law (and beyond) and enhance the transformative capabilities of its institutions.

224. See Adelle Blackett, *Global Governance, Legal Pluralism and the Decentred State: A Labor Law Critique of Codes of Corporate Conduct*, 8 IND. J. GLOB. LEGAL STUD. 401 (2001); Adelle Blackett, *Architects, Landscapers, and Gardeners in the Transnational Futures of International Labor Law*, in THE OXFORD HANDBOOK OF TRANSNATIONAL LAW, *supra* note 83, at 592.

225. PETERS, *supra* note 34, at 450–57.

226. *Id.* at 457–68. For a discussion on convergence-promoting and divergence-accommodating conceptions of global law, see WALKER, *supra* note 35, at 55.

227. *Cf.* Foucault, *supra* note 96, at 791.