THE HISTORY AND THEORY OF INTERNATIONAL LAW

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In the past few decades the understanding of the relationship between nations has undergone a radical transformation. The role of the traditional nation-State is diminishing, along with many of the traditional vocabularies which were once used to describe what has been called, ever since Jeremy Bentham coined the phrase in 1780, 'international law'. The older boundaries between States are growing ever more fluid, new conceptions and new languages have emerged which are slowly coming to replace the image of a world of sovereign independent nation-States which has dominated the study of international relations since the early nineteenth century. This redefinition of the international arena demands a new understanding of classical and contemporary questions in international and legal theory. It is the editors' conviction that the best way to achieve this is by bridging the traditional divide between international legal theory, intellectual history, and legal and political history. The aim of the series, therefore, is to provide a forum for historical studies, from classical antiquity to the twenty-first century, that are theoretically informed and for philosophical work that is historically conscious, in the hope that a new vision of the rapidly evolving international world, its past, and its possible future, may emerge.

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History and Theory

Edited by

TOM SPARKS AND ANNE PETERS

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Global Law and the Individual

*Angelo Jr Golia**

1. Introduction

Since 28 January 2021, the Oversight Board (OB), the independent adjudication body established by Facebook/Meta to review its content moderation practices, has made decisions that are binding upon the social media company. Significantly, a review can be activated either by Meta itself via direct referral or by individual users who disagree with decisions to remove their posts or comments.[1] The first decisions not only overturned content removals but also issued nine policy recommendations.[2] Despite the lack of references to international human rights law (HRL) in Facebook'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,[3] the OB autonomously expanded the 'legal' basis of its review by referencing the UN Guiding Principles on Business and Human Rights (UNGP). Then, in its decisions, it developed a critique of Meta's decision-making process on content moderation, primarily based on Article 2 of the International Covenant on Civil and Political Rights (ICCPR).

A few months later, in May 2021, the District Court of The Hague rendered a landmark judgment, based in part on international law, in the case *Milieudefensie v Royal Dutch Shell*, which held a transnational corporation (TNC) responsible for the first time for its contribution to climate change.[4] The NGO *Milieudefensie* brought the case on its own behalf and on that of 17,379 individual claimants and six other NGOs. On the admissibility, the Court found that plaintiffs could bring a class action in the common interest of preventing dangerous climate change, since the interests of current and future generations of Dutch residents 'are suitable for

* For helpful comments on earlier drafts of this chapter, I am indebted to LI Zhenni, Ann Kathrin Lohse, Lisa Mardikian, Anne Peters, Theodor Shulman, Achilles Skordas, Tom Sparks, and Saskia Stucki. The usual disclaimers apply.

[1] 'Section 3 Oversight Board Bylaws', available at: https://oversightboard.com/governance/.

[2] 'Announcing the Oversight Board's first case decisions', available at: https://oversightboard.com/news/165523235084273-announcing-the-oversight-board-s-first-case-decisions/, accessed 11/10/21.

[3] 'The adoption of the Rulebook for Case Review and Policy Guidance', available at: https://oversightboard.com/sr/rulebook-for-case-review-and-policy-guidance, accessed 11/10/21.

[4] Rechtbank Den Haag, *Milieudefensie et al. v. Royal Dutch Shell PLC*, judgment of 26 May 2021, C/09/571932/HA ZA 19-379, available at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339, accessed 11/10/21.

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bundling so as to safeguard an efficient and effective legal protection of the stakeholders'.[5] On the merits, Shell was found responsible based on domestic tort law[6] providing that a tortious or unlawful act includes 'an act or omission in violation of what is societally accepted according to unwritten law'. Under such an 'unwritten standard of care', the Court held, the company has an obligation to contribute to mitigating climate change by reducing its CO_2 emissions in line with the targets set in the 2015 Paris Agreement.[7] Significantly, the Court highlighted that HRL does not apply directly to corporations. In interpreting the domestic tort provision, however, it gave prominence to both binding and non-binding international law instruments, such as the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR),[8] the Paris Agreement,[9] the UN Guiding Principles,[10] the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, among others;[11] as well as climate science documents, most notably the Assessment Reports of the Intergovernmental Panel on Climate Change.[12] At the same time, the Court held that Shell has an 'individual responsibility' to reduce the emissions over which it has control and influence.[13] This means that it has an 'obligation of result' concerning Shell group's activities and a 'significant best-efforts obligation' regarding Shell group's business relations over which it has no immediate control, including end users.[14] In other words, the target of the Court's decision did not just focus on Shell as a legal person incorporated under Dutch law; it also, and fundamentally, considered Shell as a single, worldwide economic actor.

These are only two examples—taken from proceedings before a private adjudicator and a domestic court, respectively—that highlight more general patterns in the relationship between the individual and what is known as 'global law'.[15] In this chapter, I wish to explore three of these patterns, namely symbiosis, oscillation, and strategic subjectification.

Symbiosis. Global law and the individual are in a symbiotic relationship. This means that what we call the 'individual' supports the development and functions of global law and its specific features. This observation does not concern the fact

[5] *ibid*, para. 4.2.4. The Court applied the test under Dutch Civil Code, Book 3, Section 305a.
[6] Dutch Civil Code, Book 6, Section 162.
[7] Paris Agreement, 12 December 2015, FCCC/CP/2015/L.9/Rev/1.
[8] *Milieudefensie v. Shell* 2021 (n. 4), paras. 4.4.9-4.4.10.
[9] *ibid*, paras. 4.4.26-4.4.28, 4.4.42.
[10] *ibid*, paras. 4.4.2, 4.4.11-4.4.21.
[11] *ibid*, paras. 4.4.11, 4.4.14.
[12] *ibid*, paras. 2.3.5.4, 4.4.26-4.4.34
[13] *ibid*, paras. 4.4.13, 4.4.52.
[14] *ibid*, para. 4.1.4.
[15] Here provisionally understood as a regulatory mix of State-made and non-State-made rules that emerged, following globalisation processes, on the domestic, local, regional, and international levels and elaborated by public, private, and hybrid actors alike. For a more detailed account, see section 3, below.

that global law needs agents, like any other form of law, but rather that the *specific* construct of the 'individual', as it emerged during legal modernity, constitutes its necessary legal infrastructure. At the same time, in a global(ised) socio-legal context, global law, with its distinctive characteristics, creates new arenas for ongoing power struggles, disputes, and diverse expectations within decision- and law-making processes. In other words, global law provides the individual with access to (legal) possibilities that would otherwise be out of reach.

Oscillation. The symbiotic relationship between global law and the individual is characterised by a continuous and context-dependent oscillation—an expansion/restriction dynamic—of the individual's *legal* relevance, which depends on the varying need for conflict-based *iuris genesis*.[16] Such oscillation is contingent, not predetermined but rather open to contestation and reconfiguration. The legal spaces and possibilities created for the individual by global law may not inherently lead to progress or regress. Instead, like other forms that the law has taken over the centuries, these spaces and possibilities are influenced by power struggles and strategies that are *specific* to the current conditions. Such oscillation, in turn, has two effects. First, it pushes towards a heightened level of abstraction in the modern concept of the individual, further distancing it from anthropomorphic, 'realist' models. Second, it makes the interplay between three distinct yet interconnected dimensions of subjectification more visible: social individualisation, legal personification, and specific legal entitlements. I will refer to this interplay as 'global legal subjectification'.

Strategic subjectification. The symbiotic, oscillating relationship between global law and the individual facilitates the development of strategies of legal subjectification, some of which may potentially be used to counter problematic issues of globalisation. In other words, analysing the dynamics of the relationship between the individual and global law may offer strategic guidance to tackle some of the worst trends of (legal) globalisation, which contribute to the oppression, isolation, marginalisation, instrumentalisation, and alienation of people, as well as contributing to ecological and climate disasters.

The chapter proceeds as follows. Section 2 briefly explores the reasons for an analysis that focuses on the relationship between global law and the individual *beyond* the human rights paradigm. Section 3 offers a general overview of global law, emphasising the features most relevant to its relationship with the individual, notably the need for *iuris genesis* in the absence of strong centralised law-making. Section 4 explores the three patterns mentioned, namely symbiosis (section 4.1), oscillation (section 4.2), and strategic subjectification (section 4.3). This section is broken down further to emphasise potential strategies of subjectification that aim

[16] Broadly understood as the 'creation of legal meaning', following Robert Cover, 'Foreword: Nomos and Narrative' *Harvard Law Review* 97 (1983), 4-68, at 11.

to strengthen the role of the individual as a catalyst of global emancipation and politicisation. Section 5 concludes the chapter.

2. The Need for a 'Beyond Human Rights' Moment

Unlike the discourse of international law, scholarship explicitly focusing on global law has not had a fully fledged '*beyond human rights*' moment, that is, it has rarely theorised the role of the individual *beyond* the paradigm of human rights.

In the realm of international law scholarship, the relatively recent (re-)emergence of the individual paralleled the rise of twentieth-century HRL, which made its way into inter-State schemes and has led to significant structural changes: the proliferation of legal instruments conferring rights on individuals; direct access for individuals to international organisations and tribunals; and recognition of individual accountability for international crimes. However, the expansion of the scope of international law into new spheres—such as trade, investment, environment, climate, migration, health, criminal law, disaster relief—has raised the need to revisit the doctrine of legal subjects, to reconceptualise the legal position of the individual, and, in more recent times, to differentiate human rights in the narrow sense from other international individual rights.[17]

However, the scholarship *specifically* dedicated to (the notion of) global law has dealt predominantly with the individual as a rights holder,[18] with HRL perceived as a specific framework 'used' as a pool of legitimacy[19] to strengthen the either formal or informal authority of global governance institutions. This emphasis on human rights could partly be explained by the fact that, unlike Westphalian international law, 'global law' lacks a strong, relatively autonomous, overarching principle of legitimacy such as State sovereignty. Furthermore, in a literature characterised by interdisciplinarity and transdisciplinarity, most authors focus on the institutions, structures, and processes of emerging global legal dynamics, often overlooking the specific role of the individual. Indeed, if the individual is understood as equivalent to the legal person, that is, as a point of imputability of rights and obligations

[17] Among a rich literature, see Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge: CUP 2016); see also Peters and Sparks, 'Introduction' (chapter 1), in this volume.

[18] See, among many others, Rafael Domingo, *The New Global Law* (Cambridge: CUP 2010), 142-44; Neil Walker, *Intimations of Global Law* (Cambridge: CUP 2014), 71-77; Samantha Besson, 'Human Rights as Transnational Constitutional Law', in Anthony F. Lang and Antje Wiener (eds.), *Handbook on Global Constitutionalism* (Cheltenham: Edward Elgar 2017), 234-63. To be sure, this simplifies a literature that has analysed the role of individuals in a variety of fields not always strictly related to human rights: see, among many, Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: CUP 2010); Tamar Megiddo, 'Methodological Individualism' *Harvard International Law Journal* 60 (2019), 219-65.

[19] *cf.* Chris Thornhill, 'A Sociology of Constituent Power: The Political Code of Transnational Societal Constitutions' *Indiana Journal of Global Legal Studies* 20 (2013), 551-603, esp. at 569-73.

deriving from the norms of a specific, self-contained legal system, then the very nature of global law—fragmented, fluid, permeable, and polycentric[20]—makes it difficult to frame its legal position, at least *beyond* the human rights regime.

But that is not all. Since its emergence in its current form, the very idea of global law has been faced with identity issues and criticism. They concern, for example, its nature as 'law' in any of the senses attached to the term according to modern, State-centred models,[21] and its difference, if any, with the transnational law discourse[22] or with (the philosophy of) cosmopolitan law. Importantly, these writings assert that the concept of global law enables a global neoliberal consensus largely shaped by the economic and military superpower that emerged in the immediate aftermath of the Cold War. This, in turn, results in market-based governmentality and the instrumentalisation and alienation of both living beings and the environment.[23]

While these issues cannot adequately be explored here, they justify the need for a more specific examination of the individual *within* global law that goes beyond the human rights framework. Such an examination, first, helps individuate the *proprium* of global law, compared to conceptual alternatives such as transnational law. Second, it contributes to a much-needed conceptual distinction between two different but often conflated trends: individualisation and humanisation. Third, analysing the relationship between individual and global law based on the global law's polycontexturality[24] may further substantiate claims, raised in international law scholarship, concerning the different legal status of investment, labour, and environmental rights.[25] Fourth, it helps imagine new forms of subjectification at the global level, that is, new forms of socio-legal interaction and collective struggle, potentially transcending the (neo-)liberal *acquis* of the rights form.

3. Global Law: An Overview

We can define 'global law' as the conceptual fallout of a situation where the increased inter-connectedness and autonomy of various social processes, triggered

[20] *cf.* Larry Catá Backer, 'The Structural Characteristics of Global Law for the 21st Century: Fracture, Fluidity, Permeability, and Polycentricity' *Tilburg Law Review* 17 (2012), 177-99.

[21] See, e.g., Martin Loughlin, 'The Misconceived Search for Global Law' *Transnational Legal Theory* 8 (2017), 353-59.

[22] Dating back at least to Philip Jessup, *Transnational Law* (New Haven, CT: Yale University Press 1956).

[23] *cf.* Bhupinder S. Chimni, 'Co-option and Resistance: Two Faces of Global Administrative Law' *NYU Journal of International Law and Politics* 37 (2005), 799-827; and more recently Aoife O'Donoghue, On Tyranny and the Global Legal Order (Cambridge: CUP 2021).

[24] That is, a situation characterised by a plurality of mutually irreducible social perspectives. They are not compatible with one another and can be overcome only by the rejection of values, which in turn leads to different binary distinctions. See Gotthard Günther, 'Life as Poly-Contexturality', in Gotthard Günther, *Beiträge zur Grundlegung einer operationsfähigen Dialektik*, vol. 1 (Hamburg: Meiner 1976), 283-306.

[25] Peters, *Beyond Human Rights* 2016 (n. 17), 318.

by globalisation and the ensuing need for global regulation, have not been accompanied by the establishment of centralised, unitary law-making authorities. Indeed, in its currently prevailing use,[26] 'global law' indicates forms of normativity accompanying—that is, simultaneously enabling and re-enforced by—the emergence of relatively autonomous and specialised global governance frameworks.[27] The institutions within various regimes and systems, such as global politics, global economy, global science, and global sport, generate a diverse range of both formal and informal[28] norms and normative practices that interact in different ways with sources of national and international law. These norms and practices include regulations and agreements emerging within international organisations (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 manage the growing complexity and maintain their autonomy, the specialised systems of global politics, economy, science, media, environment, sport, and other 'global' social spheres increasingly need to establish new normative frameworks. Traditional State-centred (both national and international) law alone no longer appears sufficient *precisely* because of the constraints caused by globalisation.[29] New law-making centres and normative practices have emerged which, on the one hand, interconnect (through interpretation, circulation of argumentative and legal models, implicit or explicit *renvoi*, etc.) with more traditional sources[30] and, on the other hand, may de facto replace them in specific regulatory fields.[31] This situation is also characterised by the rise of various interconnected public, private, and hybrid[32] actors: next to traditional, 'public law' IOs, the global governance system is now populated by domestic and international administrative agencies, transnational private actors, international and domestic courts and

[26] For a mapping of the different conceptions of global law, see Walker, *Intimations* 2014 (n. 18), 55-130. On imperial and colonial law as functional antecedents of global law, see Poul F. Kjaer, 'Global Law as Inter-Contextuality and as Inter-Legality', in Jan Klabbers and Gianluigi Palombella (eds.), *The Challenge of Inter-legality* (Cambridge: CUP 2019), 302-18.

[27] *cf.* Gunther Teubner, 'Global Bukowina: Legal Pluralism in the World Society', in Gunther Teubner (ed.), *Global Law without a State* (Aldershot: Dartmouth Gower 1997), 3-28, at 8. See also Pierrick Le Golf, 'Global Law: A Legal Phenomenon Emerging from the Process of Globalization' *Indiana Journal of Global Legal Studies* 14 (2007), 119-45.

[28] See only Joost Pauwelyn, Ramses Wessel, and Jan Wouters (eds.), *Informal International Lawmaking* (Oxford: OUP 2012).

[29] *cf.* Jean-Bernard Auby, *Globalisation, Law and the State* (Oxford: Hart 2017), 14-19.

[30] In the most recent literature, see Nico Krisch (ed.), *Entangled Legalities Beyond the State* (Cambridge: CUP 2021).

[31] A classic example is the Codex Alimentarius Commission, whose standards de facto regulate food security at the global level.

[32] See Gunther Teubner, 'Hybrid Laws: Constitutionalizing Private Governance Networks', in Robert A. Kagan, Martin Krygier, and Kenneth Winston (eds.), *Legality and Community: On the Intellectual Legacy of Philip Selznick* (Berkeley, CA: Berkeley Public Policy Press 2002), 311-33; Jean-Christophe Graz, 'Les hybrides de la mondialisation. Acteurs, objets et espaces de l'économie politique internationale' *Revue française de science politique* 56 (2005), 765-87; Oren Perez, 'Transnational Networked Authority' *Leiden Journal of International Law* 35 (2022), 265-93.

dispute-settlement bodies, and standard-setting bodies.[33] It is also noteworthy that the term 'global law' includes both[34] the substantive norms of these distinct processes[35] 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.[36]

From a normative perspective, these processes have also set in motion at least two interconnected dynamics of depoliticisation. First, social processes once open to political struggle, characterised by non-predetermined outcomes and by the reversibility of decisional processes (e.g. maximisation of investment protection), are becoming increasingly juridified. Second, collective decision-making has shifted, in part, from State-centred structures and processes to global governance institutions and even private actors that overtly draw their legitimacy from technical expertise or output efficiency rather than from processes of political deliberation. At the same time, global law is characterised by different dynamics of repoliticisation,[37] from which new focal points and venues for political contention emerge—often from the collaboration of both hegemonic and non-hegemonic actors, movements, coordinated practices of participation and contestation, and transnational strategic litigation.

Conceptualised as the 'systematisation of anarchy',[38] global law does not imply an underdeveloped or *still* incomplete legal order. The incompleteness of global law is intrinsic to its nature. Instead, global law pertains to a multitude of interconnected and non-heterarchical normative processes[39] that, at least *potentially*, have a global reach. Global law is law that *could* be applied in a multiplicity of legal contexts that are not predetermined. The adjective 'global', then, does not refer to

[33] Among the most recent literature, see Rebecca Schmidt, *Regulatory Integration Across Borders: Public-Private Cooperation in Transnational Regulation* (Cambridge: CUP 2018).

[34] In the transnational law discourse, these two forms are indicated as 'transnational legal substance' and 'transnational legal process': see Harold H. Koh, 'Transnational Legal Process' *Nebraska Law Review* 75 (1996), 181-207.

[35] Among others, some regimes of international law such as the 2005 International Health Regulations of the World Health Organization (WHO); the sources of the *lex mercatoria*; the standards elaborated by the International Standard Organization; the Recommendations of the Financial Action Task Force; the Helsinki Declaration of the World Medical Association on the ethical principles for medical research involving human subjects; the Friendly Relations Declaration and the Stockholm Declaration on the Human Environment of the UN General Assembly; expert-based soft law such as the Global Pact for the Environment; the internal private regulation of TNCs such as Facebook's Standards of the Community; and some forms of religious and indigenous law.

[36] Among others, mechanisms of implicit or explicit *renvoi*; comparative and foreign law in judicial reasoning; international law-friendly interpretation; construction of open norms clauses such as due diligence, good faith, and duty of care through soft law instruments; systemic integration principles; 'constitutional tolerance'; comitology; and subsidiarity.

[37] See generally Anne Peters, 'Dual Democracy', in Jan Klabbers, Anne Peters, and Geir Ulfstein (eds.), *The Constitutionalization of International Law* (Oxford: OUP 2009), 263-341; Gunther Teubner, '*Quod omnes tangit*: Transnational Constitutions Without Democracy?' *Journal of Law and Society* 45 (2018), 5-29. For a criticism, see Ioannis Kampourakis, 'The Postmodern Legal Ordering of the Economy' *Indiana Journal of Global Legal Studies* 28 (2021), 101-52, esp. at 142-46.

[38] *cf.* Backer, 'The Structural Characteristics' 2012 (n. 20), 180.

[39] According to *ibid*, there are four: fracture, fluidity, permeability, and polycentricity.

actual territorial scope but to the absence of pre-determined territorial and normative boundaries.[40] This does not mean that global legal processes are without boundaries *tout court*. Instead, such boundaries are constantly redefined at the level of the single legal act.[41] Single acts of legislation, administration, adjudication, or contractual agreements incorporate or exclude various forms of normative content and address diverse subjects. As a result, they constantly redefine the distinction between what constitutes law and what does not, while reshaping the boundaries of the legal systems in which they operate.[42]

To be sure, in most cases, the single legal act must still conform to the conventional legal hierarchy. Adjudicators like The Hague District Court or the Facebook OB may still claim that they are applying domestic tort law or Facebook's Standards of the Community. However, they increasingly resort—often against the intention of their drafters—to a broader set of normative material. Courts and adjudicators, then, act not only as institutions embedded in one legal system or as branches of government, but increasingly as 'guardians' of global legal orders—relating to the governance frameworks of, for example, economy, climate, and freedom of expression. This situation also makes 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.

A final point: the polycentricity of global law should be understood more precisely as polycontexturality.[43] This means that it is not just characterised by multiple centres but that these centres are placed in different territorial, functional, and institutional contexts and that their norm- and decision-making is guided by potentially conflicting rationalities. The right to property, for example, is interpreted in different ways by regional courts within the human rights regime (e.g. the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR))[44] 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.[45] 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 polycontexturality that might offer further arguments to justify, for example, the different treatment of property rights depending on the context and the function

[40] *cf.* Walker, *Intimations* 2014 (n. 18), 21.

[41] *cf.* Hans Lindahl, 'A-Legality: Postnationalism and the Question of Legal Boundaries' *Modern Law Review* 73 (2010), 30-56; and more generally, Thomas Vesting, *Legal Theory* (Oxford: Beck-Hart 2018), 63-75.

[42] Gunther Teubner, 'Breaking Frames: The Global Interplay of Legal and Social Systems' *American Journal of Comparative Law* 45 (1997), 149-69.

[43] See Günther, 'Life' 1976 (n. 24).

[44] *cf.* most recently Yuval Shany, 'International Courts as Inter-Legality Hubs', in Jan Klabbers and Gianluigi Palombella (eds.), *The Challenge of Inter-legality* (Cambridge: CUP 2019), 319-38.

[45] *cf.* Silvia Steininger, 'What's Human Rights Got To Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration' *Leiden Journal of International Law* 31 (2018), 33-58.

performed. In the context of the investment protection regime, they function to protect the system of global investments; in the context of the narrower framework of the HRL regime, their purpose is to protect the humanity of the individual –regardless of its meaning.

4. Patterns

An initial point to emphasise when discussing the patterns of the relationship between the individual and global law is the conceptual distinction with the issue of legal personality. Indeed, precisely because of the polycontexturality, 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 legal personalities or none at all, depending on the specific system under consideration. One paradoxical feature of global law is that in order to function *as law*, it must presuppose the existence of socially constructed individuals who may not necessarily qualify as legal persons in all and each of the legal processes that comprise it. As the issue of legal personification loses centrality, the focus switches to the conditions under which an entity is *individualised* as a precondition for its legal relevance in a given system. In other words, from the perspective of global law, the central question is no longer: 'What are the legal conditions for the recognition of legal personality?' Instead, the central questions become: 'What kind of individual does global law presuppose?', and conversely: 'What kind of law does the individual need in the context of globalisation?'.

4.1 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:[46] anthropomorphic, abstract actors, formally equal to others, capable of expressing their will either immediately or mediately, and generally detached from specific societal belongings, with the notable exception of political membership (citizenship).[47] Freed from the constraints of a stratified society, like that of the Middle Ages, and from legal positions linked to status and role, the individual under modern law is a relatively abstract, decontextualised entity which can simultaneously *act* in different social spheres (as *homo politicus*, *economicus*, *scientificus*,

[46] cf. John W. Meyer and Ronald L. Jepperson, 'The "Actors" of Modern Society: The Cultural Construction of Social Agency' *Sociological Theory* 18 (2000), 100-20.

[47] *cf.* Gert Verschraegen, 'Hybrid Constitutionalism, Fundamental Rights and the State' *Netherlands Journal of Legal Philosophy* 40 (2011), 216-29.

etc.).[48] Similarly, modern law does not recognise the power of private individuals to unilaterally determine the legal status of other subjects. The functional differentiation typical of western modernity, distinguishing between state and society and between public and private, has led to the loss of *legally recognised* capacity for social power unilaterally to determine the legal status of other subjects.

These features are essential preconditions for the formation and development of global law. As seen in section 3, global law consists of a multiplicity of interconnected normative processes that cannot always rely on centralised legislation or administration, that is, hierarchical law-production based on the unilateral determination of the legal status of other subjects. For this reason, global law has to resort to modes of law-production that are based on at least potentially divergent claims of legally equal subjects, that is, adjudication and contract. For example, investor-State and commercial arbitration awards, panel reports of the World Trade Organization (WTO) Dispute Settlement Body,[49] contracts drafted or adjudicated following UNIDROIT principles and United Nations Commission on International Trade Law (UNCITRAL) Model Laws,[50] as well as formal or informal agreements among various administrative agencies constantly produce new rules that constitute the dynamic core of global economic law. In principle, these forms of legal interaction, based on the formal equality of participating entities, can potentially give rise to conflicts because of their adversarial modes of engagement. Such forms of legal interaction are crucial to advancing *iuris generative* processes. Therefore, global law 'needs' the individual to sustain its own *iuris genesis*, or at least it needs this more than its national/international counterparts do.

The second, closely related, reason why global law needs the individual concerns its polycontextural character. Given that normative frameworks based on divergent rationalities and contexts are fragmented and mutually irreducible, an actor able to raise claims in different legal systems, often characterised by limited communication, effectively connects them indirectly.[51] In other words, the socially constructed individual transmits legal meaning, especially through litigation, thus potentially linking different normative processes.[52] In their concrete development,

[48] *cf.* Niklas Luhmann, 'The Individuality of the Individual: Historical Meanings and Contemporary Problems', in Niklas Luhmann (ed.), *Essays on Self-Reference* (New York, NY: Columbia University Press 1990), 107-22, at 112.

[49] Which, as is known, is currently in crisis because of the US's obstruction of the appointment of members to its Appellate Body, resulting in a lack of a quorum under its rules. A number of WTO members agreed to participate in the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) and other alternative appeal mechanisms pursuant to Art. 25 of the Dispute Settlement Understanding (DSU). An updated overview and a list of cases pending under such mechanisms are available at: https://wtoplurilaterals.info/plural_initiative/the-mpia/, accessed 11/10/21.

[50] See, e.g., Model Law on International Commercial Arbitration, 21 June 1985, GAOR 40th Session Supp. 17, Annex I.

[51] *cf.* Gert Verschraegen, 'Human Rights and Modern Society: A Sociological Analysis from the Perspective of Systems Theory' *Journal of Law and Society* 29 (2002), 258-81.

[52] This element has been highlighted especially in the 'transnational legal process' scholarship: see Koh, 'Transnational Legal Process' 1996 (n. 34); Maya Steinitz, 'Transnational Legal Process Theories',

global legal processes 'capture' individuals' claims not only to sustain their own *iuris genesis* but also to adapt to each other reflexively. In this sense, the capacity to 'cross' overlapping legal systems allows the abstract individual, typical of legal modernity, to push for normative developments in different global contexts, possibly leading to co-evolution, cross-fertilisation, and adaptation. By asserting their claims across different contexts, individuals facilitate the encounter between, and potentially the mutual adaptation or integration of, for example, global *political*, *economic*, and *scientific* justice, ultimately contributing to the sustainability of the inherent anarchy within global law.

The individual, for their part, also 'exploits' the specific features of global law. In the context of globalisation, the autonomous, modern individual increasingly needs normative realities that possess the specific characteristics of global law. The (de/re-)politicisation dynamics recalled in section 3 mean that claims can often be raised only in fora different from an individual's 'original' legal context and on the basis of diverse normative materials that do not always easily qualify as 'law'. In this sense, and although citizenship 'still plays a crucial role in mediating the balance between inclusion and exclusion in global society',[53] the rise of global law has partially directed practices traditionally linked to national citizenship—claims to rights and participation in law-making—away from centralised political institutions and relocated them, often through collective organisations or networks, in distinct global functional spheres.

Similarly, practices such as law-shopping, forum-shopping, or 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, broader impact of the decision sought—to advance individual interests or policy agendas at the global level. In other words, global law offers the socially constructed actors typical of legal modernity the opportunity, for better or worse, to further emancipate themselves from the constraints inherent in forms of law-making primarily based on State and inter-State arrangements. In this sense, global law may well serve progressive and anti-colonial purposes and help reduce the gap between so-called developing and developed countries.[54]

in Cesare P. R. Romano, Karen J. Alter, and Yuval Shany (eds.), *Oxford Handbook of International Adjudication* (Oxford: OUP 2013), 339-56, at 350-56.

[53] Verschraegen, 'Hybrid Constitutionalism' 2011 (n. 47), 222.

[54] See, e.g., the Global Pact for the Environment, a process initiated in 2017 by a network of experts and supported by the General Assembly of the UN (UNGA, Towards a Global Pact for the Environment, 10 May 2018, A/RES/72/L.51) and the Draft Pan-African Investment Code (PAIC) adopted by the African Union Commission—Economic Affairs Department in December 2016 (available at: https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf, accessed 11/10/21), a model investment treaty elaborated with a view to promoting sustainable development.

The different stances of the ECtHR and the IACtHR regarding legal persons as right-holders may serve as an example here.[55] Similarly, especially in the context of global environmental law, it is apparent that single individuals and collective entities tend to push strategically for different types of soft law and scientific reports, to transform them into norms that are legally binding on other actors. Other contexts provide similar examples, for instance when it comes to investor rights.

To conclude this section, arguing that the relationship between global law and the individual is symbiotic means that they are co-dependent. Global law could emerge in this form only because legal modernity has shaped a *specific* model of actorhood. In the era of globalisation, it is predominantly global law that continues to construct the individual as a self-authorised agent. For better or worse, decisions like those rendered by the Hague District Court in *Milieudefensie* and Facebook's OB are only possible within the framework of global law.

4.2 Oscillation

Global legal processes give rise to 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 need for *iuris genesis*.

On the one hand, global governance frameworks that rely, for one reason or another, on authoritative law-making or on epistemic or scientific authority tend to assign less importance to the individual in terms of legal personification and specific entitlements.[56] Alternatively, they rely on a more general human rights discourse, mainly ex post facto or as a source of output legitimacy rather than an operational necessity.[57] In both cases, there are no or only weak legal mechanisms available to individuals.

On the other hand, the individual has greater legal relevance in contexts where 'administrative' or 'legislative' modes of norm-production are relatively weak or absent. Even here, however, such relevance is influenced by the intrinsic dynamic of a given system: the global investments regime gravitating around investor-State arbitration, for example, assigns economic actors a central role and tends to marginalise other types of individuals. At the same time, human rights and

[55] See IACtHR, *Titularidad de Derechos de las Personas Juridicas en el Sistema Interamericano de Derechos Humanos*, Advisory Opinion of 26 February 2016, OC-22/16, at paras. 34-105, stating that, while legal persons do not hold the same rights as natural persons under the Inter-American Commission on Human Rights (IACHR), certain entities—specifically, trade unions, tribal and indigenous organisations, and individuals connected to legal entities—do have rights under the Convention and may petition the Inter-American System when those rights are allegedly violated.

[56] e.g., the absence of individual complaint mechanisms against the sanctions of the UN Security Council.

[57] e.g., the WHO, an IO that can rely on one of the strongest legal frameworks, international law-making (the International Health Regulations), and on epistemic/scientific expertise as a source of legitimacy.

environmental movements are striving to gain acknowledgement as relevant subjects in this same regime, for example in the form of *amici curiae* or stakeholders. In this regard, the oscillating subjectification within the investment regime can be seen as the arena where the conflict between two distinct governance frameworks and their conflicting rationality is played out: regulation and protection of global (neoliberal) economy versus regulation and protection of the global environment.

The oscillation pattern, in turn, has two other effects. First, it pushes the concept of the individual further away from anthropomorphic models and towards more abstract ones. Indeed, because global law must accommodate increasingly diverse and complex governance frameworks, the basic elements of the involved systems become more abstract. When individual entities and objects oscillate among distinct yet interconnected regimes, the need arises for the concept of the individual to become more abstract so that it can cover a broader range of situations. In this context, the perceived need for more effective global regulation of the environment, climate, and new technologies—along with the corresponding strategies pursued by relevant actors—broadens the either direct or indirect legal relevance of entities like non-human animals, ecosystems, rivers, algorithms, humanoid robots, and combinations thereof. Once these entities start to populate the realm of legal subjects in different systems, their conceptual genus needs to be more abstract (or rather: less anthropomorphic). It is one thing to include men, women, children, and collective entities predominantly conceived as groups of human beings (States, corporations) in the concept of the actor, but it is quite another thing to *also* include trees, rivers, non-human animals, etc. Such a concept departs more decisively from flesh-and-blood human beings and entities recognised as having specific ontological or psychological properties (e.g. will, interests, pain, reflexive capacities, empathy, action). In other words, global law tips the balance from realist towards phenomenological or constructivist imaginaries of the individual.[58] In this sense, the analysis of the oscillation/abstraction pattern adds a much-needed layer of complexity to an international legal discourse that often equates individualisation with humanisation.

But what does this allegedly more abstract concept look like? The individual presupposed by global law should be able to engage with multiple and overlapping normative processes that (may) have a global reach. In this regard, global processes seem to progressively tend towards a concept of the individual as a point of reference for socially constructed claims, either as a claimant or as an addressee. This individual 'needed' by global law is not necessarily the holder of a legal right or the bearer of a legal duty. The concept of rights seems to be too strictly related to *self-interest*, which already restricts the set of entities and events that may 'trigger' the

[58] *cf.* Meyer and Jepperson, 'The "Actors"' 2000 (n. 46), 101.

iuris genesis of global law. Rather, this individual would be any entity socially considered able to raise a claim, either immediately or mediately; or an entity socially considered to be the addressee of a claim. Although for now this is only a trend,[59] the social attribution to any entity of the capacity to raise a claim or to be the addressee of a claim progressively makes such an entity an individual, at least for the purposes of global law.[60] At least conceptually, other qualities such as the capacity to suffer; autonomous will; the capacity for social communication; and legal status such as legal personality, specific rights, and duties come later.

These observations lead us to the 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 individualisation, legal personification, and specific legal entitlements. These three dimensions often overlap or may even represent a *continuum*. For example, once society recognises the claim or expectation of non-human animals not to have unnecessary suffering inflicted upon them, they *are* individuals for the purposes of global law, regardless of who represents those claims or expectations by legal means, or how or where they do so. Once such claims translate into legal obligations upon others not to cause suffering, it is often only a short step to recognising correlative rights and eventually full-fledged legal personality.[61] The same would apply, for example, to the (socially constructed) claim of a river not to be polluted or of a specific ecosystem not to have its integrity compromised. However, social individualisation, legal personification, and the attribution of specific rights or obligations remain analytically distinct. The *interplay* between such dimensions in global law may be referred to as *global legal subjectification* and gives rise to different strategies by the actors involved – both hegemonic and non-hegemonic. In each of these cases, legal subjectification takes a different path and responds to different functional logics.

To be sure, the interplay between the three dimensions—social individualisation, legal personification, and the attribution of specific rights or obligations—also occurs in State-centred legal frameworks.[62] However, the specific features of global law make these dimensions even more apparent, and global law potentially

[59] See, e.g., IACtHR, *Medio Ambiente y Derechos Humanos*, Advisory Opinion of 15 November 2017, OC-23/17, at para. 59, stating that a violation of the right to a healthy environment could be found even without the identification of affected individuals.

[60] *cf.* Meyer and Jepperson, 'The "Actors"' 2000 (n. 46), 108.

[61] This is most apparent in the rulings of Ecuador's Constitutional Court which, based on Art. 10 of the 2008 Constitution, first granted rights to mangrove ecosystems and a cloud forest (Sentencia No. 22-18-IN/21 of 8 September 2021; *Los Cedros*, Sentencia No. 1149-19-JP/21 of 10 November 2021) and more recently explicitly recognised that individual animals are protected by the rights of nature which also includes the right to free development of animal behaviour (*Estrellita*, Sentencia No. 253-20-JH/22 of 27 January 2022). On these issues, see only Saskia Stucki, 'Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights' *Oxford Journal of Legal Studies* 40 (2020), 533-60, at 437-549.

[62] One can consider the unique historical developments in the realm of law with regard to slaves, women, foetuses, and labour unions.

shapes them differently *for each of its centres*. Following their own logic and patterns, the various governance frameworks and regimes may frame the *legal* relevance of a socially constructed individual differently, ranging from their outright invisibility to indirect legal relevance, to the recognition of personality with only a few legal entitlements, to the full-fledged armoury of legal rights granted in that specific system.

4.3 Strategic Subjectification

The symbiotic, oscillating relationship between global law and the individual facilitates and helps imagine different strategies of legal subjectification at the global level. In this regard, the need strategically to diversify the criteria of the individual's relevance is triggered *both* by actors pursuing different agendas on different sides of the political spectrum (e.g. hegemonic States, military-economic elites, global law firms, NGOs, or environmental and animal activists) *and* by the intrinsic dynamics of globalisation.[63] Calls to treat animals as legal persons and for animal rights are not new in modern legal history.[64] But an animal rights movement and *global* animal law have fully emerged and gained momentum only recently, as biodiversity loss and climate-related emergencies have made questions such as the reduction of meat consumption more pressing.[65] Global law uses—indeed, has to use—strategies of subjectification to accompany its own dynamics. However, by using them, global law also becomes dependent on, and is potentially influenced by, their variations, thus remaining open to non-predetermined evolutionary trajectories.

Examples of strategic subjectification concern the distinction between TNCs (the unitary global *individuals*) and the single legal entities through which they operate and raise claims (the single companies, recognised legal personality in different legal systems).[66] *Mutatis mutandis*, the OSCE, although it is not a formally recognised international legal person, *acts* through domestic law entities and is increasingly considered a de facto IO.[67] Conversely, international legal

[63] *cf.* Elizabeth H. Boyle and John W. Meyer, 'Modern Law as a Secularized and Global Model: Implications for the Sociology of Law' *Soziale Welt* 49 (1998), 213-32, at 227.

[64] See, e.g., Henry S. Salt, *Animals' Rights: Considered in Relation to Social Progress* (London: Bell & Sons 1892).

[65] To be sure, this is a simplification of a more complex network of inter-relations, whereby the social and legal recognition of animal rights is based on both growing ethical/moral reasons as well as 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: *cf.* Saskia Stucki, *One Rights: Human and Animal Rights in the Anthropocene* (Cham: Springer 2023).

[66] Among the most recent literature, see Doreen Lustig, *Veiled Power. International Law and the Private Corporation 1886-1981* (Oxford: OUP 2020).

[67] See Niels Blokker and Ramses A. Wessel, 'Revisiting Questions of Organisationhood, Legal Personality and Membership in the OSCE: The Interplay Between Law, Politics and Practice', in

personality may strategically be granted to IOs in order for States to avoid legal accountability.[68] Although the issue goes beyond the scope of this chapter, a further example of this dynamic may even be found in processes in which political communities are subjectified as States.

In other cases, actors strategically avoid legal personification. A global movement such as Fridays for Future, which seeks to bring about environmental and climate regulation and relies on scientific evidence as a source of legitimation, is recognised as an increasingly significant individual actor within the global community. Its leaders deliberately do not pursue its legal personification – not even within the various national systems. Importantly, however, the global legal subjectification of 'Fridays for Future' does not exist in a legal void; it is supported by a legal infrastructure. It is sustained by a foundation established under Swedish law and several trademarks registered in 2020 at the European Union Intellectual Property Office (EUIPO). As such, it is protected by the full armour of intellectual property law, which is globally administered by organisations like the World Intellectual Property Organization (WIPO) and the WTO.

These few examples show that global law does not preclude that 'problems and functional needs are articulated by individuals and groups that choose the systems and organizations where to carry on their plans'.[69] A precise analysis of the strategies employed by various actors should consider the micro-level actions and communications attributed to socially constructed individuals with different interests, goals, and conceptions of justice. These differences among individuals play a significant role in shaping the mechanisms of sociolegal evolution.[70] In this sense, the processes of *global legal subjectification* remain open, non-predetermined, and subject to challenges and (re-)politicisation.

It is important to emphasise that the dynamics outlined in this section may increase the alienation and exploitation inherent in many global regimes. Indeed, by employing different strategies of subjectification, global legal processes can facilitate distinct forms of governmentality, which govern individuals based on their particular accumulation imperatives, especially those based on market-based rationality. This also means that even when emancipatory strategies are effective, the polycontexturality of global normative processes can facilitate tunnel vision, single-issue politics, and the domination of a particular knowledge or perspective (epistemic capture). For example, global environmental movements often struggle

Mateja Steinbrück Platise, Carolyn Moser, and Anne Peters (eds.), *The Legal Framework of the OSCE* (Cambridge: CUP 2019), 135-64.

[68] Jean D'Aspremont, 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States' *International Organizations Law Review* 4 (2007), 91-119.

[69] Guilherme Vilaca, 'Transnational Law, Functional Differentiation and Evolution' *E-Publica* 2 (2015), 41-83, at 67.

[70] *cf.* Gunther Teubner, *Law as an Autopoietic System* (Oxford: Blackwell 1993), at 44-45; Vesting, *Legal Theory* 2018 (n. 41), 150-57.

to converge with global labour rights movements, and the latter with refugee protection movements.[71] In another context, the relatively high level of protection afforded to indigenous peoples has created division and controversy concerning the concept of 'indigeneity', leading to intense debates about who should be included or excluded from this category of legal subjects. The strategies pursued in such cases often lead to unintended consequences for the identity and (self-) perception of the peoples they represent.[72] In other words, from this perspective, global legal subjectification can potentially lead to other forms of depoliticisation and co-optation.

Conversely, however, such a dynamic may also work as an emancipatory force. Indeed, in situations where legal systems and processes do not overlap and are self-contained—as in the ideal-typical legal modernity based on the internal/external divide and on strictly dualist theories of international law—recognition of legal personality within a particular system plays a dominant role in the process of subjectification. As long as national and international legal systems do not overlap (too much) and other kinds of normativity are not able to establish their own forms of legal subjectification, State-centred law plays a central role in the social construction of the individual by recognising legal personality, citizenship, and specific legal entitlements. Certainly, State institutions and laws retain a significant role. However, in a situation characterised by polycontextural, permeable, and fluid global normative processes, where each governance framework and/or system may have its own criteria of legal personification, the chances that a specific entity might *visibly* be a legal person *somewhere* increase dramatically. Therefore, an entity existing as a legal person or endowed with either direct or indirect legal entitlements in some territorial or functional context ('somewhere')—such as a citizen, investor, refugee, worker, or natural entity—potentially exists as an individual *elsewhere*. A river may not be a legal person outside New Zealand or Canada, but the fact that it is recognised as a legal person *there* increases its chances of being socially constructed as an individual *elsewhere*, thus becoming potentially relevant to legal processes *everywhere*. The abundance of relatively autonomous yet interconnected normative processes at the global level, then, makes State-centred law less relevant to determining social individualisation.

From a more normative standpoint, such observations emphasise the need to imagine emancipatory strategies of legal subjectification. Although the role of lawyers (and law in general) should not be overestimated, 'coding' the infrastructures of global law one way rather than another does have an impact on globalisation and

[71] *cf.* Thomas Kleinlein, 'Fragmentierungen im Öffentlichen Recht: Diskursvergleich im internationalen und im nationalen Recht' *Deutsches Verwaltungsblatt* 17 (2017), 1072-79, at 1078; Gunther Teubner, '*Quod Omnes Tangit*' 2018 (n. 37), 22-25.

[72] *cf.* Marie-Catherine Petersmann, 'Contested Indigeneity and Traditionality in Environmental Litigation: The Politics of Expertise in Regional Human Rights Courts' *Human Rights Law Review* 21 (2021), 132-56.

its evolution.[73] In this sense, global law can potentially retain and even strengthen its emancipatory and repoliticising potential by establishing forms of legal subjectification that allow for the expression of non-self-interested claims. Here, I would like to highlight three potential macro-strategies.

4.3.1 New Legal Concepts and Regimes

A first and relatively conventional strategy involves shifting the equilibrium of the oscillation pattern through the introduction of new legal 'coding'. By shaping new concepts and regimes concerning socially constructed individuals, this strategy aims to make otherwise invisible actors emerge and to increase repoliticisation dynamics. 'Seeing' an entity as an individual using new concepts and legal frameworks is a way to assert normative demands against them or, conversely, to deny them the benefit of a corporate veil. Consequently, the concept of the individual as the socially constructed locus of a claim may work as a starting point that is then respecified and regulated differently in each context. Indeed, new legal concepts and frameworks should be 'imagined' by carefully calibrating both responsibilities and rights according to the specific risks and opportunities that they present to global society.

As seen in section 4.3, it is the relative legal invisibility of TNCs and transnational networks as unitary global actors—*as individuals*—that plays a significant role in driving some of the most concerning trends associated with global law. In this field, in order to attach legal obligations to de facto international institutions and other actors, scholars are increasingly trying to broaden or introduce legal concepts of TNC,[74] IO,[75] and transnational networks[76] to include entities which, even without international legal personality, exercise de facto authority over other individuals.

Similarly, other scholarly proposals aim to develop overarching principles of accountability for these entities, as well as their members or nodes. In this vein, a potential model is the proposal, 'Guiding Principles on Shared Responsibility in International Law', a project that aims to codify and advance the rules of shared

[73] See generally Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton, NJ: Princeton University Press 2019) and, from within international legal scholarship, see Martti Koskenniemi, 'International Law as "Global Governance"', in Justin Desautels-Stein and Christopher Tomlins (eds.), *Searching for Contemporary Legal Thought* (Cambridge: CUP 2017), 199-218, at 215-16.

[74] See Kevin B. Sobel-Read, 'Reimagining the Unimaginable: Law and the Ongoing Transformation of Global Value Chains into Integrated Legal Entities', *European Review of Contract Law* 16 (2020), 160-85.

[75] See Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994), 47-48; Dapo Akande, 'International Organizations', in Malcolm Evans (ed.), *International Law* (5th edn, Oxford: OUP 2018), 227-58, at 233; Angelo Jr Golia and Anne Peters, 'The Concept of International Organization', in Jan Klabbers (ed.), *Cambridge Companion to International Organizations Law* (Cambridge: CUP 2022), 25-49, at 33-34 and 48-49.

[76] See Angelo Jr Golia and Gunther Teubner, 'Networked Statehood: An Institutionalised Self-contradiction in the Process of Globalisation?' *Transnational Legal Theory* 12 (2021), 7-43.

responsibility of 'international persons'.[77] The project's purpose is to harmonise the rules of shared responsibility, which were previously established by the International Law Commission for States and IOs in cases involving an indivisible injury to which contribution may be individual, concurrent, or cumulative. In this project, the phrase 'international person' as potential duty-bearer refers only to States and IOs, but the authors specify 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'.[78]

In terms of international law-making, an interesting example is the legally binding instrument to regulate the activities of TNCs and other business enterprises, currently under negotiation at the intergovernmental working group established in 2014 by the UN Human Rights Council.[79] For our purposes, it is noteworthy that the drafts circulated to date obligate States to regulate 'business activities of transnational character'.[80] In this way, although the draft treaty would not directly impose any obligation on TNCs under international law, it would switch the focus of international regulation from the single entities incorporated at the domestic level to the unitary economic actor—the global *individual*—responsible for the human rights violations. Importantly, it would do so without having to recognise the autonomous international legal personality of TNCs.

At the domestic level, some legislators are moving in the same direction. Following the relative success of the General Data Protection Regulation (GDPR)[81] as a global standard, the EU and several European countries are increasingly resorting to different techniques of 'territorial extension'[82] in an attempt to exploit the so-called 'Brussels effect'.[83] This is particularly evident when it comes to various forms of 'global supply chain' regulations, which impose obligations of vigilance, due diligence, or non-financial reporting on businesses incorporated or based in

[77] André Nollkaemper et al., 'Guiding Principles on Shared Responsibility in International Law' *European Journal of International Law* 31 (2020), 15-72. For networks, see Golia and Teubner, 'Networked Statehood' 2021 (n. 76), 33-40.

[78] Nollkaemper et al., 'Guiding Principles' 2020 (n. 77), 22 (Commentary to Principle 1, para. 1).

[79] UN, Human Rights Council, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, 14 July 2014, A/HRC/RES/26/9.

[80] See Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, Third revised draft of the legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, 17 August 2021, available at: https://www.ohchr.org/sites/default/files/LBI3rdDRAFT.pdf, accessed 11/10/21, Art. 1(4).

[81] EU: Regulation 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data of 27 April 2016.

[82] *cf.* Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' *American Journal of Comparative Law* 62 (2014), 87-126.

[83] That is, the power to shape the global business environment due to the sheer weight of its market, especially through standards in areas such as competition regulation, consumer health and safety, and environmental protection. See Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford: OUP 2020).

their jurisdictions. These regulations may impose sanctions on these businesses for human rights violations occurring within their supply chains.[84]

At the level of international adjudication, one emancipatory strategy of subjectification might be to expand the use of counter-claims[85] and denial-of-benefits clauses[86] in international investment arbitration. *Mutatis mutandis*, this strategy may also involve selectively granting legal entitlements to, and imposing liability on, 'new' individuals such as non-human animals,[87] natural entities, or artificial intelligence programmes.[88]

4.3.2 Speaking with the Voiceless

A second strategy is closely related to the first. It consists of strengthening, both substantively and procedurally, the role of civil society actors as catalysts for renewed political engagement at the global level. This might mean establishing appropriate legal frameworks to support the transnational bargaining power of social actors, for example by strengthening the legal protection afforded to the right to strike or by means of so-called transnational company agreements in the realm of social and labour law.[89] In the European context, an interesting model is the proposal developed by the European Trade Union Confederation (ETUC) in 2014 for an Optional Legal Framework for transnational agreements.[90] Similar

[84] See, among other jurisdictions, the UK: The Modern Slavery Act 2015 (Transparency in Supply Chain) Regulations 2015, SI 2015/1833, Regulation 2; France: Loi 2017-750 relative au devoir de vigilance des societies meres et des enterprises donneuses d'ordre of 23 March 2017 (Law on the Law of the duty of oversight of parent companies and commissioning enterprises); The Netherlands: Wet zorgplicht kinderarbeid of 24 October 2019 (Law on the introduction of a duty of care to prevent the supply of goods and services produced using child labour); Germany: Lieferkettensorgfaltspflichteng esetz of 11 June 2021 (Supply Chain Due Diligence Law); EU: Directive 2014/95/EU of the European Parliament and of the Council on non-financial reporting of 22 October 2014; and Regulation 2017/821 of the European Parliament and of the Council on conflict minerals imports of 17 May 2017. At the moment, 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.

[85] See ICSID, *Urbaser S.A. et al. v. The Argentine Republic*, Award of 8 December 2016, ICSID Case No. ARB/07/26, at paras. 1182-221; ICSID, *David R. Aven et al. v. Republic of Costa Rica*, Award of 18 September 2018, ICSID Case No. UNCT/15/3, at paras. 737-42.

[86] 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., UNCITRAL, *Philip Morris Asia Limited v. The Commonwealth of Australia*, Award on Jurisdiction and Admissibility of 17 December 2015, PCA Case No. 2012-12, at para. 585; ICSID, *Pacific Rim Cayman LLC v. Republic of El Salvador*, Decision on the Respondent's Jurisdictional Objections of 1 June 2012, ICSID Case No. ARB/09/12, at paras. 4.60-4.92.

[87] For an overview of the case law of the ECtHR on animal welfare, see Tom Sparks, 'Protection of Animals Through Human Rights: The Case-Law of the European Court of Human Rights', in Anne Peters (ed.), *Studies in Global Animal Law* (Berlin: Springer 2020), 153-71.

[88] See Anna Beckers and Gunther Teubner, *Three Liability Regimes for Artificial Intelligence: Algorithmic Actants, Hybrids, Crowds* (Oxford: Hart 2022).

[89] Isabelle Schömann et al. (eds.), *Transnational Collective Bargaining at Company Level. A New Component of European Industrial Relations?* (Brussels: European Trade Union Institute 2012).

[90] European Trade Union Confederation (ETUC) Resolution: Proposal for an Optional Legal Framework for transnational negotiations in multinational companies, March 2014, available at: https://www.etuc.org/en/document/etuc-resolution-proposal-optional-legal-framework-transnational-negotiations-multinational, accessed 11/10/21. According to this proposal, the decision would bestow legal significance upon transnational collective agreements, which currently have an ambiguous legal status.

partnerships may well emerge at the global level, for example in the context of climate regulation under the umbrella of the UN Framework Convention on Climate Change (UNFCCC) and the Paris Agreement.[91]

Another example of this strategy would be using both existing and new litigation strategies to transform claims based on individual rights into political issues at the global level.[92] If it is not possible to directly bring global capitalism and global injustice, which are depersonified social processes, to trial, then (global) law must find new ways to hold the entities that enable their most destructive dynamics accountable. Borrowing an argument formulated in the field of climate litigation,[93] one could assert that such strategies have the potential to foster renewed political engagement. They accomplish this by uniting movements, fostering the exchange of ideas among various stakeholders around the world, and shedding light on global injustices. In this regard, the *Milieudefensie* decision has already become a classic illustration of how domestic and international norms may be thematised as global law to put entire business models rather than just a corporate person on trial.

Similarly, at the procedural level, the IACtHR's 2017 advisory opinion concerning the eligibility of individuals to petition the Inter-American System is a relevant point of reference because it allows only certain collective actors, based on the type of claims and interests they represent.[94] However, it would truly advance this field if collective, organised actors had more opportunities to raise claims on behalf of individuals they do not directly represent. In this context, a point of reference could be the collective complaint procedure introduced by the Additional Protocol to the European Social Charter (ESC).[95] This procedure allows social partners and NGOs to raise questions concerning the non-compliance of a State's law or practice with one of the provisions of the ESC directly—that is, without domestic remedies having been exhausted—before the European Committee of Social Rights (ECSR). Notably, the claimant organisation need not be a direct victim of the alleged violation to lodge a complaint, nor does the claimant need to be based in the

The legal basis of the decision would be Art. 6 of the Treaty on European Union (TEU) and Arts. 152, 154, and 156 of the Treaty on the Functioning of the European Union (TFEU), and would have the form of either a Decision of the Council and of the Parliament (Art. 288 TFEU) or a Decision of the social partners (Art. 155 TFEU).

[91] See Charlotte Streck, 'Strengthening the Paris Agreement by Holding Non-State Actors Accountable: Establishing Normative Links between Transnational Partnerships and Treaty Implementation' *Transnational Environmental Law* 10 (2021), 1-23.

[92] *cf.* Gunther Teubner, 'Horizontal Effect Revisited. A Reply to Four Comments' *Netherlands Journal of Legal Philosophy* 10 (2011), 275-85, at 279.

[93] See Matthias Petel, 'Analyse de l'usage stratégique des droits humains au sein du contentieux climatique contre les États' *Max Planck Institute for Comparative Public Law & International Law Research Paper No. 2020-33*, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3692955, accessed 11/10/21.

[94] See *Titularidad* 2016 (n. 55).

[95] Council of Europe, Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, 9 November 1995, ETS No.158.

jurisdiction in which the violation occurred. It is telling that the ECSR decisions adopted within this procedure were the only international instances to find explicitly that the several measures implementing EU austerity policies violated (social) human rights.[96]

4.3.3 The Individual Beyond the Right

A third and more radical strategy, recently outlined by Christoph Menke[97] and endorsed by Katharina Pistor,[98] consists of assigning significance to a 'new' form of the individual that transcends or exists independently of the conventional rights framework of modernity. This conventional framework is considered too entangled by the capitalist and bourgeois societal norms that emerged from legal modernity, along with the colonialist/imperialist legacy of modern international law.[99] According to this proposal, no civil rights should be sacrosanct forever. Instead, all rights and claims to rights should be systematically evaluated in relation to those of others. In a global order where no rights are intangible, where all may—but nobody has to—participate, the conventional rights framework is replaced by the *pure claim*, and the legal person by the *pure individual*. This profoundly transforms the concept of right, turning it into a counter-right, that is, into a temporal empowerment for change. It is therefore no longer a legal tool invoked to defend a pre-existing, crystallised status quo or the subject's self-will. By disempowering or at least shifting the focus away from the rights discourse, this transition aims to reinvigorate politics. Contrary to the individuals of legal modernity who assert sovereignty, the *activity* of their own will, the individuals envisaged in the context of these counter-rights *reclaim* their own exclusion, *affirm* their vulnerability, their *passivity*. As Menke contends, the revolution of the counter-right involves the uprising of the 'insurrectionary slave'.

This strategy might seem abstract[100]—even utopian—but a potential model could be identified in the Fridays for Future movement mentioned in section 4.3. Fridays for Future is a global movement, mainly composed of school-aged activists who participate in globally coordinated protests and acts of civil disobedience

[96] See, e.g., European Committee of Social Rights, *Federation of employed pensioners of Greece (IKA-ETAM) v. Greece*, Decision of 7 December 2012, Complaint No. 76/2012; *European Roma and Travellers Forum v. France*, Decision on the merits of 24 January 2012, Complaint No. 64/2011; see Karin Lukas, 'The Collective Complaint Procedure of the European Social Charter: Some Lessons for the EU?' *Legal Issues of Economic Integration* 41 (2014), 275-88.

[97] See Christoph Menke, *Critique of Rights* (Cambridge: Polity Press 2020), 267-91.

[98] Pistor, *The Code* 2019 (n. 73), 231-34.

[99] See, among many others, Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: CUP 2005); Sundhya Pahuja, 'The Postcoloniality of International Law' *Harvard International Law Journal* 46 (2005), 459-70; José-Manuel Barreto (ed.), *Human Rights from a Third World Perspective: Critique, History and International Law* (Newcastle upon Tyne: Cambridge Scholars 2013).

[100] Pistor, *The Code* 2019 (n. 73), 232-33 points to the significant problems involved in the massive political-legal changes required by Menke's proposal.

to demand that political leaders take action to tackle the climate emergency. The movement consists predominantly of people who, because of their age, are excluded from most electoral and political procedures of institutional politics. Rather than rejecting their status as 'children', however, they reclaim it. The basis of their (counter-)rights lies *precisely* in their reclaimed passive status, in their exclusion. They invoke global social change *precisely* based on this status.

The example of Fridays for Future also brings us full circle concerning global law. Indeed, one may argue that the perspective of global law, with its distinct characteristics, suggest two ways in which Menke's proposal could be further developed: first, by extending these counter-rights to collectives, organisations, social movements, and networks, without replacing individual rights to resistance; second, by developing a wide range of counter-rights designed to address various forms of motivational constraints and accumulation imperatives in distinct societal contexts, such as the consolidation of power in politics, the accumulation of profit in the economy, and the accumulation of knowledge in science, and so on.[101]

5. Conclusion

An examination of the relationship between the individual and global law reveals a multifaceted reality that does not lend itself to a single interpretation. However, analysing such a relationship through the frameworks of the three patterns of symbiosis, oscillation, and strategic subjectification helps unveil the individual's *specific* role in an ongoing transformation that is relevant to international law *itself*. At its core, this transformation involves the transition from models of legal production that revolve almost exclusively around the State to models of legal production in which private and hybrid actors, legal pluralism, and various forms of epistemic communities assume a more prominent role.[102]

Indeed, this analysis offers insights to differentiate between global law and its conceptual alternatives. Global law is neither a cosmopolitan law, based on universal political, economic, or other principles of rationality, nor is it simply a transnational law that regulates cross-boundary processes and involves private and hybrid actors. Although the importance of semantic disputes should not be overestimated, one possible reason why global legal processes are indeed 'global' and not just 'transnational' may be that they depend on the individual, who is conceived as a socially constructed entity and as such is potentially relevant *everywhere*, that

[101] *cf.* Gunther Teubner, 'Counter-Rights: On the Trans-Subjective Potential of Subjective Rights', in Paul F. Kjaer (ed.), *The Law of the Political Economy: Transformations in the Functions of Law* (Cambridge: CUP 2020), 372-93.

[102] See, most recently, Martti Koskenniemi and Sarah Nouwen, 'The Politics of Global Lawmaking: A Conversation' *European Journal of International Law* 32 (2021), 1341-52.

is, *regardless* of the attribution of citizenship or the recognition of legal personality in a specific legal system.[103]

Similarly, this analysis may enrich parallel debates in international legal scholarship. First, and more generally, it challenges the common assumption that individualisation and humanisation are equivalent. Furthermore, it may offer evidence to support arguments that have already been developed in some strands of international law scholarship,[104] which suggest that subjective legal rights can differ depending on the specific functional context in which they are invoked or applied. For example, the distinction between international refugee rights and human rights, as well as between international labour rights and human rights, corresponds with the unique strategic requirements regarding legal recognition and entitlements within different global functional systems. This is so whether these systems are focused on governing refugee (and migration) flows, the dynamics of capital and labour that underpin the global economy, or the broader objective of protecting the inherent humanity of individuals. Importantly, this remains true regardless of whether these distinctions tend to emerge and align, as in the first scenario,[105] or diverge and create conflicts, as in the second scenario.[106]

However, within the realm of international legal scholarship, the analysis presented in this chapter may contribute to a shared postmodern 'anxiety',[107] related to the perception that 'global law' deviates from international law, which has traditionally been understood as a legal framework centred on sovereignty and State responsibility.[108] In other words, the study of the relationship between the individual and global law *today* contributes to relativising—at least from a historical perspective—the often too stark distinction between 'international' and 'global'. The conceptual structures and categories underlying international law crystallised in the State-centric nineteenth century in the hands of European powers with imperialist aspirations. These powers *selectively* and *strategically* facilitated and/or limited the cross-border movement of people and capital.[109] What lawyers are observing today and calling 'global law' seems to be influenced by similar trends and dynamics, but involve a significantly larger number of different actors, actors that 'need' the individual more than States do. Indeed, another question to consider is whether and how the *legal* concepts and vocabulary developed by international

[103] This mirrors, for example, the argument made by Çali, 'Global Constitutionalism' (chapter 15), in this volume, whereby the individual and their moral and legal significance play a central and wide-ranging role under the *global* constitutionalist approach to international law.

[104] Peters, *Beyond Human Rights* 2016 (n. 17).

[105] *ibid*, 450-57.

[106] *ibid*, 457-68.

[107] See Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' *Leiden Journal of International Law* 15 (2005), 553-79.

[108] See Koskenniemi and Neuwen, 'The Politics of Global Lawmaking' 2021 (n. 102).

[109] *cf.*, e.g., Inge Van Hulle, 'Nineteenth Century' (chapter 6), in this volume; and, more generally, Giovanni Arrighi, Terence Hopkins, and Immanuel Wallerstein, *Antisystemic Movements* (London: Verso 2012).

lawyers or even the framework of international law itself can or should adapt to such variety as well as to the strategic purposes of militants and activists across the political spectrum who aim to 'use' international law. Once more, a specific focus on the role of the individual may, at the very least, help 'map' the field enabling us to develop—to imagine--normative and strategic options.

This consideration suggests possibilities for further research. Although it was not possible to develop it here, any analysis of the relationship between global law and the individual should explore both the functional *and* the institutional contexts in which different forms of norm arise and interact. In other words, the analytical and normative challenge that global law poses for scholars is to consider such legal processes both as functional systems—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* as systems of collective action/decision that exist alongside States (the individual *and* IOs, networks, TNCs). Legal theory, legal regulation, and even legal disputes must develop elaborate frameworks capable of comprehending the interaction between these dimensions. Only in this way will an authentically normative legal theory contribute to the emancipatory potential of (global) law and strengthen the transformative potential of its institutions.