MARTINUS NIJHOFF PUBLISHERS

Tilburg Law Review 17 (2012) 269–275

Tilburg Law Review

brill.com/tilr

What I Talk about when I Talk about Global Law*

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Abstract
In this contribution I attempt to sketch what I mean when I talk about 'global law', finishing up with a brief consideration of what I think our responsibilities are, as legal scholars, when we engage in such talk.

Keywords
global law; law in context; ethics for global legal voyaging?

How are we to understand the phrase 'global law'? In his recent Montesquieu Lecture, Neil Walker, following Twining, noted the dangers of the phrase 'global law' as a term that simultaneously implies some sort of exaggerated and false coherence or unity between what are many and disparate practices and yet fails to capture the plurality of interactions that we see occurring around us that are not limited to the state but that are not necessarily global either, where global tends to mean spatially all-encompassing.[1]

Given these dangers, and the seemingly irresistible pull of the holistic with 'global law', why do we not simply heed Twining's warning and refuse to acknowledge the phrase altogether? One reason for not doing so is, as Walker suggests, the increasing prevalence of the term; that what should interest us as legal scholars is the first order significance of 'global law'. Yet

* This short paper is based on a talk given in the context of a Tilburg Law School Faculty Seminar dedicated to the idea of global law in April 2012; thanks to all those present for their comments.

[1] Neil Walker, Intimations of Global Law, Montesquieu Lecture delivered in Tilburg on 21 June 2012 (forthcoming with Wolf Legal Publishing); William Twining, *General Jurisprudence* (Cambridge University Press 2009).

DOI 10.1163/22112596-01702016

there is another reason why 'global law' should not only interest us but demands our engagement – as Walker also highlighted, there is a double element to the 'global law' 'project':[2] at the same time that the idea of 'global law' is used, however it is being used,[3] as an analytical tool to understand or map the shifting legal landscape around us, it is also sculpting that landscape. We have therefore (albeit expressed in rather a heavy-handed way) a responsibility to engage.

In this short paper I will attempt to sketch what I mean when I talk about 'global law' and end by considering what I think our responsibilities are, as legal scholars, when we engage in such talk.

1. What Global Law is Not

One way to begin our reflection of what we mean by 'global law' is to consider what we are not talking about; otherwise put, how does 'global law' compare to other labels that are used to either map and/or consciously shape the legal landscape in a global setting? What is global law not? I will reflect on three attempts or descriptive categories to elucidate the most important elements of what 'global law', for me, is not.

Let us begin with international law. International law, put simply, governs relations between sovereign states. Despite a modest opening up of international law to other actors, such as international organisations or natural persons, it remains the case that only states have what we might call primary legal personality within international law. All other international legal personality is derived from the will of states. The continuing dominance of states at the heart of international law is the reason that many assume international law fails to address the changing nature of legal interactions beyond the state; in particular, that international law does not, perhaps cannot, address the shifting nature of power away from states to other actors.

In one of the first monographs to be published on global law, Rafael Domingo suggests that international law is in crisis because the state as a

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[2] To describe 'global law' as a project suggests that those who use 'global law' have a certain destination in mind, albeit that the direction and route is unknown. I wish to reject this use of 'global law'.

[3] Walker has suggested seven helpful categories for the way in which 'global law' is being used or can be viewed; Walker, ibid.

means of organising political and legal affairs is dying a slow death.[4] From this premise, he goes on to suggest that global law – as a people-centred law with human rights at its normative core – is replacing international law, just as international law once replaced the Roman conception of *ius gentium*.

In this characterisation, 'global law' forms part of a narrative of progression, as a system of law in which 'global law' occupies the apex of the legal pyramid. However, one does not need to agree with Domingo's premise that international law is in crisis or with his understanding of global law as progressing beyond and supplanting international law – and I agree with neither – to concur that global law, whatever it is, is not international law.

The term that has most often been used to describe the changes to the legal landscape has been transnational law.[5] Jessup used the term to refer to all law that is used to regulate actions or events that transcend national frontiers; we might think of *lex mercatoria* or *lex sportiva* as examples of systems of law that by their nature are not limited by the territorial boundaries of individual states. Transnational law, unlike international law, recognises the increasing importance of private or non-state and sub-state type actors in cross-border relationships; at the same time, it is not limited to private transactions, but includes the interaction between public and private actors in networks of regulation.

But while transnational law as a descriptive category is capable of capturing much of what we see occurring all around us, and while it may, as Zumbansen suggests, work to expose a world that Philip Allott has described as international 'unsociety', it does nothing to address the lack of humanity in the international system that Allott's work so beautifully highlights.[6] Rather there is something soulless about transnational law, denoted by its primary focus on economic interactions. 'Global law' must be something more than this.

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[4] Rafael Domingo, 'The Crisis of International Law' in Rafael Domingo, *The New Global Law* (Cambridge University Press 2010).

[5] See Phillip Jessup, *Transnational Law* (Yale University Press 1956); Michael Likosky (ed), *Transnational Legal Processes: Globalisation and Power Disparities* (Butterworths 2002); Peer Zumbansen, 'Transnational Law', in Jan Smits, *Encyclopedia of Comparative Law* (Edward Elgar Publishing 2006) 738-754.

[6] Philip Allott, *Eunomia. New Order for a New World* (Oxford University Press 1990) 244; Zumbansen, ibid 739-740.

One attempt to carve out a heart amongst the transnational interactions we see going on around us is Ruti Teitel's 'humanity's law'.[7] Teitel uses this phrase to denote what she sees as a discursive paradigm shift to a new rule of law based upon a merger of humanitarian and human rights law that seeks to manage conflict and violence through law. This shift consists in an extended spatial and temporal reach,[8] an extended jurisdictional scope towards obligations *omna erges*, the re-conceptualisation of international personality away from states to persons and peoples, and the institutionalisation of 'humanity's law' in new structures, such as the International Criminal Court.

This globalisation of the law of war, according to Teitel, in the form of international criminal justice has become the basis for an emerging global rule of law. Moreover, it is the operation of this 'humanity's law' through its tribunals, proceedings, and public discussions that forms the source of authority and legitimacy in this legal realm beyond the state. This attempt to bring the legitimacy question front and centre is of course welcome, and Teitel's approach shares much with the many efforts to elucidate forms of global constitutionalism (as well as with Domingo's account); however, such efforts to create a people-centred rule of law with human rights at its heart lacks the normative and moral pluralism that is central to what I talk about when I talk about 'global law'.

So what is 'global law' not? It is not limited by actor. It is not a descriptive term for a more or less neatly arranged hierarchical system with 'global law' at its apex. It is not limited to interactions of a cross-border nature. It must be more than simply what actors do; yet its normative heart is not predetermined and cannot be understood by reference to a single organ. 'Global law' cannot be reduced to 'law' in the singular or to a single 'map'.

2. What does 'Global Law' Mean to Me?

By asking what 'global law' might be, it is important to remind ourselves that what we are of course asking is what it should be, what purpose, or

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[7] See Ruti Teitel, 'Humanity's Law: Rule of Law for the New Global Politics' (2002) 35 Cornell International Law Journal 355-387; Ruti Teitel, *Humanity's Law* (Oxford University Press 2011).

[8] Extended spatial reach in the sense of cross border; extended temporal reach in the sense of 'justice talk' no longer being solely applied to conflicts and violations after they have occurred but assuming a much bigger role prior to conflict occurring. Teitel, ibid 360.

multiple purposes, the rhetorical shift to this phrase serves. Making a positive statement about what 'global law' means is of course a lot harder than saying what it is not and it necessitates a woolly answer at this stage. So what do I mean by 'global law'? I think I understand 'global law' as referring to the relations and interactions between systems of law, all systems of law, whether formal or informal.

For example, an individual asserting a right in a local context, whether before a juridical instance or not, is an example of global law, again whether or not in so doing this individual refers to a document or decision from another legal system, such as an international or regional human rights treaty or constitutional jurisprudence from another system. By simply asserting a right, this individual, consciously or not, is speaking to the history and sociology of rights-talk, and it is this that makes it an instance of 'global law'. Her actions in asserting a right have an effect far beyond the given circumstance in which the claim is made. The recent decision by the Landgericht Köln, where the rights of the child to bodily integrity trump the rights of the parents to religious freedom in relation to whether circumcision can be permitted, is perhaps an example of a local decision that is at the same time 'global law'.[9] In this sense, 'global law' is everywhere.[10]

While locating 'global law' everywhere is clearly rather unhelpful, I think it is nonetheless a necessary starting point in order to embed into the idea of 'global law', at this early stage, a radically pluralistic approach: to actors, to the idea of what law is and to the purpose(s) of law. Refining the concept can and will come later. So 'global law' is a way of thinking about, an analytical tool for framing, the inter-connectedness of actors, of relationships and of concepts and/or legal tools. Yet there is something else that 'global law' must be: in approaching the inter-connectedness and relationships between actors and legal systems it must concern itself explicitly with power relations, with domination, with questions of justice. Moreover, 'global law' necessarily, for me at least, must speak to the 'public-ness(es)' of law, and bring the virtues of public space to the global (as defined above).

Talking about what 'global law' might *be* only takes us so far, of course, at the outset of the journey. The real question at this stage concerns what the look and feel of global legal scholarship should be.

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[9] 'Beschneidung von Jungen aus religiösen Gründen ist strafbar', *Süddeutschen Zeitung*, 26 June 2012; available at: <süddeutsche.de> accessed 29 July 2012.

[10] The sense of 'global law' suggested here is very close to Twining's idea of general jurisprudence; Twining (n 1).

3. The Look and Feel of Global Legal Scholarship

If global legal scholarship must primarily be concerned at present with mapping the flux of interconnections and relationships in the 'global' space in the context of ideas about justice and public virtue, global legal scholarship needs to consist of a law in context approach. This may require the involvement of multiple disciplines, but it may not, and we should not prize inter-disciplinarity for its own sake. Further, such scholarship needs to take as a starting point that law is a social practice – it is *not* a market mechanism – and begin from the premise that there is something of the sacred about the social functions of law that are non-reducible to criteria like efficiency.

In place of a primary focus on questions of what works, therefore, global legal scholarship should instead concern itself with questions of what regulation works for *whom*, *when* and in *what way*, using the idea that there are always winners and losers in any legal 'moment' as points by which to navigate through the legal terrain. We need to be suspicious of the language and thinking of economics and cautious about the use of indicators as a technology of governance. At the same time, while good legal research is necessarily knowledge-driven, what constitutes 'knowledge' must be radically open. 'Knowledge' cannot mean something that we can measure solely by quantitative analysis, and must include alternative epistemologies and forms of legal reasoning.[11]

What might this mean for legal scholars interested in exploring 'global law'? More specifically, what might our responsibilities be as legal scholars exploring, mapping and sculpting this new legal landscape?

As a young human rights researcher, I was sent to South Africa to accompany and provide advice to a large Romani delegation to the 2001 UN World Conference Against Racism. Once there, the delegation voted to include a demand for non-territorial nationhood in the NGO declaration presented to the main conference. I worked hard to persuade the group that this was a bad idea, given that such status does not exist under international law, and counselled that they would be ridiculed for including it. I was right about the ridicule. I was wrong to attempt to prevent the presentation of an

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[11] See for example, Boaventura de Sousa Santos (ed), *Another Knowledge is Possible: Beyond Northern Epistemologies* (Verso 2007); Karin Mickelson, 'Rage and Rhetoric: Third World Voices in International Legal Discourse' (1998) 16 Wisconsin International Law Journal 353-419.

alternative way of seeing the world because it was strange and because it did not fit within the realm of existing legal possibility.

An ethical code for voyaging through the global legal terrain requires that we consciously reflect on and take responsibility for the choices that we make in framing our research and, in so doing, carving the global legal landscape from the world around us. For me, the ethical starting point of the voyage must be two principles: that we must listen to all the voices that we encounter on our legal travels, whether we like the message or not, whether we understand it, and even where it makes us deeply uncomfortable; and that we must be careful not to use the tools of our trade – our legal 'knowledge' – to close down or exclude strange and alternative perspectives or visions. In this way, the 'global law' voyage has the potential to be a genuine voyage of discovery.