

The Global Legal Environment and its Future Four Scenarios

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Abstract

Both national and international law are created and upheld in a global legal environment that seems to be changing dramatically. Many lawyers and legal scholars have extensively signaled and analysed the internationalisation of law and the rise of private legal and governance regimes. In this article, these trends are used to explore the future of the global legal environment. The use of scenario techniques enables us to systematically scrutinise possible futures. In turn, the scenarios indicate major strategic challenges for both national legislators and international legal institutions.

Keywords

global legal environment; future scenarios; internationalization of law; private legal regimes

1. Predicting and Scanning the Future of Law

Legal futurism is not widespread among lawyers and legal scholars. Instead of writing legal science fiction novels, most lawyers and legal scholars prefer to meticulously scrutinise the law in order to establish what is legally valid. Since the future is too uncertain and anything may happen, why bother about it. The Law of the Future program we have set up attempts to break with this tradition.¹ Whereas predicting the future is impossible, the methodologies that have been developed by the future studies allow us to systematically scan possible futures. Instead of ignoring uncertainty, these methodologies embrace uncertainty by building theories on it. For example, scenario analysis enables us to imagine possible futures that are built

¹ Law of the Future Forum, 'How will law evolve in the next 20 years?' (2012) <www.lawofthefuture.org> accessed 31 July 2012.

on uncertain developments. In this article, we illustrate scenario analysis by applying it to the future of the global legal environment. A scenario refers to a story on what may happen.

All national legislators are confronted with a global legal environment in which authoritative rule making, rule enforcement, and processes of dispute resolution occur. Conceptually the global legal environment does not mean that global rules are made or that these rules are globally enforced. In our definition the global legal environment refers to a multi-layered phenomenon which includes all mechanisms of authoritative rule making, rule enforcement, and dispute resolution that transcend national borders. It emerges out of the actions of both public and private legal actors, the ideas and research of legal scholars, and the initiatives and actions of international institutions. Even though national legislators' behaviour affects the global legal environment, it emerges to a large extent without being directed.

A scenario analysis on the future of the global legal environment starts with mapping the major trends that occur now. These trends are presented in section two. The trends are then used to build future scenarios that picture possible futures of the global legal environment in section three. We conclude with a brief exploration of some implications of these scenarios for national legislators. The timeframe we have used for the scenarios extends to 2030. This timeframe is long enough to allow some imagination while it simultaneously prevents us from engaging in legal science fiction.

2. The Global Legal Environment: Major Trends

In order to map the trends in the global legal environment we have asked a number of legal scholars and lawyers from different disciplines and different parts of the world to write a paper on what they see happening in the global legal environment right now.² These papers indicate two major trends, which can be referred to as the internationalisation of law and the growth of private governance regimes. These trends are not new and have extensively been mapped in the literature. Both trends will be briefly explained.

First, a growing patchwork of international law, international institutions, and transnational cooperation is observed. Increasing international trade

² S Muller, S Zouridis, M Frishman, L Kistemaker, *The Law of the Future and the Future of Law* (TOAEP 2011).

goes along with the internationalisation of contract law, torts, business law, and intellectual property law. Since national laws are not harmonised, conflicts and gaps between national laws are increasingly revealed. These conflicts exert pressure on governments to harmonise their legislation and their legal systems. The internationalisation of law thus refers to growing interdependencies and interchange between national legal systems and the accommodation of national legal systems to these interdependencies and interchange. Internationalisation is a global trend but it is not happening in the same way, with the same depth, and in the same areas across the world. Two important clarifications must be made.

First, legal globalisation does not mean that a coherent corpus of global law is evolving. Legal globalisation is a patchwork both with regard to the legal areas involved and to the extent of internationalisation. For example, the legal globalisation of trade law is mainly located on the regional level. The EU is probably the most far-reaching instance. The patchwork pattern of internationalisation of the global legal environment also extends to the legal areas involved and the pace with which this development is unfolding. For example, the internationalisation of trade law seems to move faster than the internationalisation of criminal procedure. Second, legal globalisation does not imply voluntarism or a consciously built body of global law. Instead, incidents, crises, and the continuous manifestation of new problems are the primary drivers of the process. National legislators all over the world are confronted with political and legal problems that cannot be dealt with without the cooperation of other national legislators or international bodies. Migration, transnational criminal networks, terrorism, illicit trade, financial markets, and monetary crises compel national legislators to find solutions on a transnational level. There is no executive director.

The growth of private governance regimes for rule making, rule enforcement, and dispute resolution constitutes a second major trend. Both national and international law have firmly rested on public authority and state institutions. Nevertheless new private regimes seem to be booming. These private regimes appear in different shapes. A business sector, sometimes together with NGOs, can set standards, guidelines, or rules concerning governance or liabilities. For example, the Brewers of Europe have enacted the Responsible Commercial Communications Guidelines for the Brewing Industry.³ The timber industry – with the Forest Stewardship

³ The Brewers of Europe, 'Responsible Commercial Communications: Guidelines for the Brewing Industry' (2012) www.brewersofeurope.org/docs/publications/guidelines.pdf accessed 31 July 2012.

Council – produced standards on sustainable logging and the sale of timber.⁴

Sometimes an industry creates a standard contract or agreement. The Model Mine Development Agreement, developed in consultation with mining companies, governments, and civil society within the context of the International Bar Association, is a prime example.⁵ Another facet of this trend is the growing use of alternative dispute resolution mechanisms instead of court systems. The eBay/PayPal resolution centre solves around 60 million disagreements between buyers and sellers every year.⁶ In the EU, a Common Frame of Reference for European Private Law was drafted and freely made available on the web.⁷ This was not a government initiative; instead it sprang forth from European legal scholars. It has now become a point of reference for legislators and courts in the EU.

The trend towards privatisation of law also requires some elaboration to prevent misunderstanding. First, the rise of private regimes does not mean that these are isolated from legal regimes created by public authorities. For example, sometimes the creation of transnational law starts as a private initiative and is later adopted by public authorities. Secondly, here too, we see wide diversity. Private regimes may refer to rules, standards or guidelines but these may also refer to authoritative mechanisms of dispute resolution. The term ‘soft law’ may be used, but in their actual effect, guidelines can sometimes be ‘hard’ as law. Private rule making may or may not include enforcement.

3. Key Uncertainties and Scenarios

There is no logical necessity to assume that these trends will continue in the same direction and at the same pace. These trends should therefore conceptually be regarded as key uncertainties or contingencies which may occur but which may also reverse. Will we witness continued

⁴ Forest Stewardship Council, ‘Forest Management Standards’ (2010) <www.fscus.org/standards_criteria/forest_management.php> accessed 31 July 2012.

⁵ ‘Model Mining Development Agreement Project’ www.mmdaproject.org/ accessed 31 July 2012.

⁶ Innovating Justice Awards www.innovatingjusticeawards.com/View-Idea/165?idea=1265 accessed 31 July 2012.

⁷ ‘Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference’ http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf accessed 31 July 2012.

Table 1. Key Uncertainties and Scenarios

	Growth of private governance regimes	Reversed growth private governance regimes
Internationalisation of law	Legal Internet	Global Constitution
Reversed internationalisation of law	Legal tribes	Legal Borders

internationalisation of rules and institutions or will this trend reverse? Will private governance mechanisms and private legal regimes further expand and become predominant, or will state-connected institutions and legal regimes retain their position?

Taken together, these contingencies conceptually allow four different scenarios (see table 1).

We will briefly sketch these scenarios that picture possible global legal environments that emerge in 2030.⁸ As said, scenarios are defined as stories on what may happen. These stories are both a product of imagination and a result of systematic analysis of the key uncertainties. The scenarios are meant to invite lawyers and legal scholars to picture what the global legal environment will look like if the trends described above either continue or reverse. The scenarios are presented from a future perspective in such a way as if they have already evolved. The scenarios also include the triggers and events that caused these future states of the global legal environment. Regarding the names we have given each of the scenarios, rather than take them for their literal meaning, one ought to bear in mind that they use metaphors meant to convey the central feature of each respective scenarios. Thus, *Global Constitution* does not imply there will actually be a single world constitution, but rather that in this scenario the global legal environment will increasingly resemble a constitutional order. In *Legal Internet*, the name does not mean that this scenario is about the Internet. It rather implies that the global legal environment in this world is characterized as a decentralized transnational network involving a big range of actors. Similarly, *Legal Tribes* does not denote a world that is composed of tribes, rather it hints to a reality whereby the global legal environment is composed of many relatively small ‘communities’ with relatively little contact and coordination and a weaker role for the state. Finally, *Legal Borders* does not imply that legal walls will be built between national legal systems, but

⁸ See also S Muller and others, *Law Scenarios to 2030* (Hiil 2012).

instead it emphasizes the increased importance or renaissance of national and regional sovereignty.

a) *Global Constitution*

In this scenario a global constitutional order has emerged in 2030, slowly but surely covering all major legal areas on a global scale – trade, environment, security, crime, finance, markets and competition, intellectual property, labour, taxation, and health – leaving only a few areas untouched by international rules and procedures. Global law has not been driven by a specific set of values or leading legal systems. Instead, the process of blending has to a large extent been eclectic. Whereas global competition law and contract law are primarily driven by free market ideals, global criminal law has been led by retaliation principles. It has therefore become more punitive and strict than European countries were used to.

In the Global Constitution scenario consumers are protected by a global system of consumer law that builds on the old European consumer law. Global consumer law is enforced – mainly via the internet – by a global regulatory agency with offices all over the world. Tort law is largely regulated through a global civil code that was adopted in 2028, which provides general parameters from which regional and national systems may not deviate. Constitutional and (global) administrative law have become hugely important fields. There are constant questions on areas of competence and jurisdiction. The principle of legality – all governments are bound by law – is the broadly accepted principle that underlies the global legal environment. The global constitutional order is not based on one document or charter, but rather on a series of charters and constitution-like documents, in which international regulators, adjudicators, and courts are defined and connected with each other. This multi-layered system is complex, and at times Byzantine.

The rules and institutions that make up this global legal environment are difficult to create and change once formalised. The enforcement of rules is public in nature, or a clear derivative thereof. The International Criminal Court (ICC) may have taken ten years to finally conclude its first case (Lubanga in 2012), but subsequent trials were concluded much more efficiently. The ICC's 'positive complementarity' approach proved successful in enhancing national capacity thus leading to limited ICC involvement. Technological developments have made it easier for enforcement bodies to share information. Criminal records, tax filings, debtor records, and in some instances, even things like employment records can be shared when needed.

How did the global legal environment evolve between 2012 and 2030? First, many challenges became apparent which revealed the global interdependencies. The financial crisis of 2008 is a prime example. Directed by the G-20, which slowly transformed into an effective economic and social global governing board, an impressive body of international regulation, aimed at building a more stable economic system was put in place. This body not only coordinated regulation in the financial area, but it was also able to build a more holistic definition of the notion of economy, which now includes the environment, social cohesion, and sustainability.

In 2016, the drug wars in Central America and Western Africa intensified and spread. This caused intolerable violence, social deprivation, migration, and problems for international shipping and aviation. These problems quickly jumped over to more stable and well-organised parts of the world. The Organisation of American States (OAS) and the African Union (AU) with Economic Community of West African States (ECOWAS) pushed the issue on the global agenda and a global approach was developed in 2018. The scarcity of water and food was also an important driver of change. It required global policies on water redistribution and agriculture. Here too the G-20 proved very effective; food security was placed on the agenda in 2016; water security followed in 2019. The Food and Agriculture Organisation was given a new life; it became a food security watchdog with direct lines to both the United Nations (UN) and regional Security Councils (in cases which involved war), and the Economic Council and its regional bodies.

b) Legal Borders

In this scenario national and regional legislation have become the primary source of rule making in 2030. Regional and sub-regional organisations have become the ultimate defence against what were widely perceived to be out-of-control international institutions and an international environment in which common values are scarce. The international level is for politics, not law. New global powers such as China, India, Indonesia, Brazil, Mexico, South Africa, Egypt, and the Gulf States fundamentally changed the nature of the debate in the global environment. There is lot less talk about universality than there once was. In fact, most would agree that there is no universality.

With regional legal pluralism, the rule of law has also been regionally pluralised. As a consequence context-specific regional and national interpretations of concepts such as fundamental human rights, separation of church and state, balance of powers, and the principle of legality have

become predominant. The international institutions that had developed at the end of the 20th century have slowly eroded and lost their significance. In some instances states have withdrawn ratifications, in others they are being minimally interpreted at best, and otherwise completely ignored. International courts – insofar as they are given adequate funding – face strong pressure to reduce their footprint and the scope of their decisions.

New legal notions to determine whether something should be regionalized or not have been developed, requiring compatibility with ‘inalienable national values’ and ‘core national legal principles’. They provide a key reference point for all constitutional lawyers, judges, and national lawmakers. The informal, flexible approach pioneered by the G-20 during the Great Crisis of 2008 – 2015 has become the norm and the UN has adapted to it. On global economic issues, the G-20 still runs the show. It is now linked to the R-5, a loose overarching framework built around the five regional groups that developed within the old UN. The previous decade, starting in 2020, witnessed a gradual and deliberate process of de-treatying; international negotiations replacing international regimes with political arrangements, if needed, or even terminating them. These processes sometimes worked out peacefully, but some of this legal disentanglement has ended with violence.

Yet many successful corporations have made their fortunes through legal tourism, taking advantage of the legal differences between states and regions. They are supported by international law firms, which have made huge investments in comparative legal knowledge and have specialized in legal tourism. Sometimes this race to the bottom yields dramatic results. In the environmental realm, it has led to poor states and regions that have become garbage dumps for strong transnational corporations using the legal regime. Enforcement is also a national affair. In some areas enforcement is loosely coordinated on a regional level to prevent natural disasters (e.g. environmental law).

Several trends and events between 2012 and 2030 triggered this scenario. It actually started with the 9/11 attacks. Initially led by the US, but soon followed by others, a common response was to toughen immigration restrictions, make more extensive use of criminal and administrative law to curb freedoms, and introduce restrictions on the movement of goods and capital. The financial crisis that started in 2008 also contributed significantly. It proved very difficult to resolve it internationally. The G-20 and its network seemed successful at first, but when after 2013 worldwide unemployment (especially for those under 30 years old) was still very high – up to 45% – states slowly abandoned the international law route. It also proved difficult

to agree to effective international action regarding transnational crime, illicit trade, cross border fraud, and global terrorism. Legal and other borders gradually emerged. Immigration and the international flow of capital were curbed. Economic growth ended for many years, but security and stability were preferred above wealth.

c) *Legal Internet*

In this scenario, rules – in the sense of ‘law’ – in 2030 are a lot less important than they were in 2010. In the course of the first decade of the millennium the true potential of information technology and relationships supported by social media became apparent. Through cheap laptops, tablets and smartphones, connected by cloud technology and clever search engines, interaction across borders and access to useful and relevant information became accessible for most people around the world. By 2018, this had already radically changed the way people interact on a global scale. By 2030, it is engrained into the global legal environment. New generations became acquainted with new ways of rule making, law enforcement, and resolving disputes. Reputation, trust, transparency, mobilization of voice, and demonstrated effectiveness became the new mechanisms to secure a social and political order. Formal rules and procedures are now considered old-fashioned, too formal, ineffective, too uniform, and too inflexible.

Public rules have gradually been replaced or marginalised by standards developed by private actors. Monitoring and even enforcement are dealt with by private regimes and mechanisms created by the parties involved. Democracy or accountability is less a matter of working through parliaments and more a matter of working through interest groups and loosely organised structures that operate between interest groups. Self-regulation has become the prime source of legitimacy. The 2025 world summit that gathered in New York to celebrate the eightieth birthday of the United Nations was attended by the heads of 228 different states, the leaders of the 100 wealthiest companies, and 100 civil society leaders. Thanks to smart information technology it was possible to have a meaningful debate in the six months leading up to the final event. The leaders adopted the 2045 Good Governance Pact (GGP), which laid down 15 governance standards that the leaders consider fundamental for good governance, wherever it occurs.

Five years afterwards, a dozen measuring tools to assess implementation and compliance with the GGP were fully operational, keeping the leaders focused on the agreements that were made. Leaders, be they from government, business, or civil society, meet at regular intervals to discuss strategic

directions on issues, and people and organisations at the operational level work things out and implement. If you have demonstrable added value, you can join the process. If not, you are no longer involved. The UN has largely been reduced to a web-based Internet forum, run by a relatively small secretariat, on which rule making initiatives are collected, published, and on which expert advice can be sought: the UN Rule and Process Forum (UNRPF). But even for this function it faces tough competition from private initiatives claiming to be faster and better facilitators.

Private rule making, enforcement, and dispute resolution mechanisms are usually flexible and efficient, whereas public regimes are more bureaucratic and rigid. The absence of clear, all-encompassing organising principles (like the principle of legality, the UN definition of the rule of law, or state sovereignty) makes the global legal environment complex, often confusing and most of the time unstable. The verb 'to regulate' is rarely used. The art is now known as R&O – Regulate & Organise. The pattern is usually the same: close to a problem or a challenge – be it local or international – a need for regulation emerges.

Actors confronted with a problem build a coalition to resolve it. Most enforcement takes place outside the scope of the state, or at the very least with the involvement of powerful private actors concerned. For example, global pharmaceutical corporations have not only adopted rules of conduct with regard to intellectual property, but they have also built an organisation that monitors counterfeit medicines and acts against the networks that make and distribute these medicines.

What chain of events triggered this scenario? The failure of formal inter-governmental organisations to prevent the financial crisis of 2008- 2015 and to quickly recover from it caused a tectonic shift in international governance. The networked G-20 system proved more effective in handling the crisis, but in general the loss of trust in state and state-based institutions had pushed corporations, NGOs and communities away from the state. The standards that were developed during the difficult years between 2008 and 2015 gained traction through civil society organisations and public private partnerships, and were helped by information technology. Most governments were caught by surprise. National courts could not handle the number or the complexity of transnational cases, national court decisions could not be enforced, and states or international legal institutions could not agree on norms. As a consequence private actors created their own regimes.

The substantial growth of powerful global private players after 2015 also played a role. Transnational corporations and civil society organisations continued to grow and became more powerful, both with regard to creating

norms and with regard to enforcement. The legitimacy crisis in which many states found themselves after 2015 was also an important factor. Self-regulatory regimes were widely seen as more legitimate.

d) *Legal Tribes*

Whereas this scenario seemed least plausible in 2012, it has become a reality in 2030. The global legal environment witnessed a severe loss of relevance of the state combined with a loss of interest in internationalisation. In 2030, the global legal environment consists of a largely unconnected group of communities that govern themselves. In many ways states have become failed states. Global security is a serious issue and law has been completely abandoned as a way to achieve it. Local security, which is mainly self-organised, is the main basis for ordering. Besides, order is local and mainly privatised. It comes from small-scale networks of security corporations, communities and civil society organisations, and is supported, where possible and useful, by small public structures. The state and the international global legal environment have withered away, mainly as a result of the security and economic crises of the first two decades of the millennium. International organisations have lost their relevance and have closed due to lack of interest, funds, effectiveness, and legitimacy.

The scenario of Legal Tribes has not been too good to multinational companies either. Seen as remnants of failed internationalization, they had to change to survive. Many of them have broken into local or national entities. Very few have real global coverage; it is simply too risky economically, in terms of manageability, and even security. Wealth, effort, labour, profit are all generated at the local level and flow back to the local level. Security can really only be organised locally; at least then you know who you can trust. The dream of globalisation has been destroyed. Next to state borders, the global legal environment also witnesses religious borders, borders organised around economic activities, ethnic borders, and political borders. The old regional organisations have lost much of their economic *raison d'être*. The successful ones have transformed into security alliances: public-private regional fences within which smaller communities can conduct economic activity on a larger than local scale.

The main role of the public realm is to deal with the link between the huge variety of private self-regulatory regimes. But with a greatly reduced tax base, resources are limited. As a leading principle the rule of law has become an anachronistic concept. Enforcement is also a local and mostly private affair. In the most developed communities the public arena only

plays an enforcement role in the area of crime, IT infrastructure, health, and linkages between private regulatory regimes. Again, local is good. In other communities, the public enforcement circle is even smaller. Social control, groups taking justice into their own hands, and militias maintaining order are predominant in many parts of the world, whereas religious or public authorities take up these tasks in other regions.

How did this all come about? First, states and international organisations did not prove to be effective in restoring stability and economic recovery after the 2008 crises. The severe budget cuts that were made from 2013 onwards by many governments around the world proved to be the beginning of the end of the state. It was a last 'win or lose' effort by states to deal with massive unemployment, debt levels, and inequalities, but it failed. As a result, trust in government and the international system diminished. Conflict was widespread. Health systems broke down. Food and water became scarce. In many parts of the world life expectancy decreased. States and businesses failed to deal with the global crisis and were also seen to be responsible for a number of other issues such as major failure to protect data and massive fraud on a global scale. This has given rise to great suspicion about all things global and international. The anti-globalisation movement attracted more supporters than ever before.

4. A Quest for Legal and Justice Strategies

After reading these scenarios many lawyers will wonder why this kind of legal science fiction is being practiced. The answer is quite easy. Systematically, building future scenarios on current trends help national legislators to improve their legal and justice strategies. The effectiveness of all national legal and justice strategies highly depends on which scenario will evolve. Since scenarios do not rule out uncertainty, national legislators have to take into account all scenarios. So how can national legislators use these scenarios? First, the scenarios indicate future challenges. Second, taken together the scenarios constitute a wind tunnel that enables each national legislator to test whether its legal and justice strategies are future proof.

Imagine a national legislator that pursues a rule of law strategy. Its legal order is based upon the principle of lawfulness that requires that all public authorities have to comply with law and which forbids arbitrariness. This imaginary national legislator has also adopted human rights. How future-proof are its legal strategies if confronted with the scenarios sketched

above? This legislator first has to establish what happens if a specific scenario unfolds. If the Global Constitution scenario unfolds the main challenge in this scenario will be to institutionalise the rule of law in the evolving global constitutional order. Our imaginary national legislator is thus confronted with two strategic challenges.

First, how to institutionalise these principles in the evolving global constitutional order? This will certainly not be easy because of the complexity of the order the limited power of both national and international courts in this scenario, and the limited role that national and international parliaments play. Second, it certainly does not speak for itself that even in this scenario a global consensus will evolve with regard to rule of law principles. Instead, the global constitutional order will probably be a compromise. Our imaginary legislator therefore also has to develop a strategy on securing compliance to rule of law principles and a strategy on securing consensus on these principles.

In order to define its main future challenges, our imaginary national legislator should also explore an opposite scenario. If the Legal Internet scenario unfolds the major rule of law, the challenge in this scenario will be to institutionalise the rule of law in the evolving global self-regulatory frameworks. How to secure the principle of lawfulness, the universality of norms, democratic accountability, the separation of powers, and checks and balances in self-regulatory frameworks? In order to address this challenge, this national legislator first needs to find out how these self-regulatory frameworks actually work and how they deal with rule of law issues. Second, the national legislator has to connect with these frameworks in order to secure rule of law mechanisms. This will not be easy because of the diffuse nature of these frameworks. It remains to be seen whether these frameworks will actually allow regulation by international institutions and nation states simply do not have enough power to regulate these frameworks.

The imaginary national legislator should also explore the Legal Tribes and the Legal Borders scenarios in order to define its main challenges. This national legislator may also choose to use the scenarios as a wind tunnel to test whether a chosen legal strategy will survive different global legal environments. Using the scenarios as a wind tunnel teaches our imaginary national legislator at least two lessons. First, the scenarios demonstrate that national legislators should both be prepared for further internationalisation and renationalisation. At least two preparatory measures seem sound.

First, national legislators should think twice before giving up on national law and national constitutional principles. Adding international law is not a problem from the scenario point of view, but a substitution strategy may

prove to be unwise. Second, national legislators should match their legal orders with evolving international or global legal principles. By removing inconsistencies and contradictions between the national legal order and the global legal order, national legislators will be better prepared in case of gradual or sudden further internationalisation.

Taken together, the scenarios also teach our imaginary national legislator that it is wise to preserve a complete legal order that at the same time allows self-regulatory frameworks. At least two preparatory measures seem sound. First, national legislators should not consider self-regulatory frameworks and standards as irrelevant from a legal point of view. Whenever possible, national legislators should connect self-regulatory frameworks and standards with formal state law. Second, the formal state legal order should allow self-regulation and create possibilities for self-regulatory frameworks. For example, the legal figure of an order declaring a collective agreement binding can be a suitable way of providing legal status for self-regulatory frameworks and at the same time securing the values embodied by the rule of law.

By using these scenarios national legislators can improve their legal strategies and prepare for a world in which global law becomes predominant. The real value of the scenarios though may be that they also force national legislators to consider a global legal environment in which global law will not evolve.