

## SYMPOSIUM FOREWORD

Symposium on ‘Global Environmental Law’ held at the Strathclyde Centre for Environmental Law and Governance, University of Strathclyde, Glasgow (United Kingdom), 4–5 September 2017

# *Advancing the Research Agenda on Global Environmental Law*

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This Symposium Collection arises from the international symposium on ‘Global Environmental Law’ (Glasgow (United Kingdom) (UK)), 4–5 September 2017),<sup>1</sup> which aimed to discuss whether and to what extent the emerging concept of global environmental law (GEL) can help in shedding new light on the evolution and challenges of environmental law across different levels and sectors.<sup>2</sup> The symposium spanned theoretical, doctrinal, and methodological reflections. It took as a common point of departure Neil Walker’s *Intimations of Global Law*,<sup>3</sup> considering it as a synthesis of several theories that speak to global law (including global administrative law, legal pluralism, and the constitutionalization of international law). The symposium provided an opportunity in particular to discuss Walker’s argument that global law embodies a commitment to understanding the ‘pattern of heavily overlapping, mutually connected and openly extended institutions, norms and processes’ that are ‘present across and between a range of [legal] sites and purport to cover all actors and activities relevant to its remit across the globe’ and have ‘an endorsement or commitment to a shared purpose or common political morality that may be explicitly invoked or implied’.<sup>4</sup> The symposium also constituted an invitation to engage with the distinctions between GEL and transnational environmental law (TEL).<sup>5</sup> While both notions may

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<sup>1</sup> The symposium website, including video-recording of most presentations, is available at: <https://www.strath.ac.uk/research/strathclydecentreenvironmentallawgovernance/ourwork/research/labsincubators/globalenvironmentallawlab/symposiumonglobalenvironmentallaw>.

<sup>2</sup> The symposium was convened under the aegis of the European Research Council-funded BeneLex project: ‘Benefit-sharing for an Equitable Transition to the Green Economy: The Role of Law’, European Research Council Starting Grant 335592 (2013–2018), details available at: <https://www.strath.ac.uk/research/strathclydecentreenvironmentallawgovernance/benelx>.

<sup>3</sup> N. Walker, *Intimations of Global Law* (Cambridge University Press, 2015).

<sup>4</sup> *Ibid.*, pp. 16, 18–24.

<sup>5</sup> P. Jessup, *Transnational Law* (Yale University Press, 1956), p. 136. For a recent reflection in the environmental law sphere, see V. Heyvaert & T.F.M. Ety, ‘Introducing Transnational Environmental Law’ (2012) 1(1) *Transnational Environmental Law*, pp. 1–11, at 3.

serve to illuminate forms of law *beyond* the state, the discussion sought to focus on whether and to what extent the notion(s) of GEL can serve to understand the interplay between legal systems and between levels of regulation in influencing and supporting the pursuit of global public goods.<sup>6</sup> Related questions included whether global environmental law has a normative content, whether it carries with it certain normative presumptions, and if so what the actual and potential implications are for the legitimacy of law.

During the symposium, participants therefore discussed whether GEL is a research approach, an interpretative approach or a distinct body of law, and the extent to which it adds to existing theories and approaches in international and transnational environmental law. Does GEL come loaded with the weight of normative presumptions? Whose goals is it pursuing? Whose (world)views of the environment, and of the relationship between environment and society, is it based upon? To what extent does GEL engage with theories of justice? These questions led participants to turn their attention to the role and responsibilities of GEL scholars. Walker has emphasized that global law finds itself between settled doctrine and an aspirational approach,<sup>7</sup> with specialist (professional and academic) communities being ‘active players in the fashioning and shaping of global law’.<sup>8</sup> Global legal scholars often engage in advocacy, by identifying emerging and anticipating new normative patterns with the aim of addressing the perceived limits of certain areas of international law through ‘a more selective reading of its sources and areas of impact’.<sup>9</sup> This, in turn, raises a crucial ethical question: Do scholars and practitioners of GEL have responsibilities in how they carry out their work?

‘Global Environmental Law: Context and Theory, Challenge and Promise’, the first article in this collection, by Kati Kulovesi, Michael Mehling and Elisa Morgera, characterizes GEL as a heterogeneous and unfinished, yet substantively ambitious, project preoccupied with globalization and public authority beyond the state.<sup>10</sup> The authors proceed to weigh the risk in GEL scholarship of enabling or strengthening channels of authority that lack legitimacy and accountability, or reflect elitist and hegemonic worldviews, against a promise to expand the breadth and depth of voices reflected in the creation and application of environmental norms, thereby strengthening their legitimacy. They conclude that, at the very least, GEL currently supports self-reflexivity within the environmental law scholarly community, putting into sharper focus our biases and blind spots in understanding how our own work influences the ongoing evolution of environmental law. To maximize this potential for self-reflection, the authors

<sup>6</sup> Walker, n. 3 above; see also E. Morgera, ‘Global Environmental Law and the Comparative Legal Method(s)’ (2015) 24(3) *Review of European, Comparative and International Environmental Law*, pp. 254–63; and N. Walker, ‘Human Rights and Global Public Goods: The Sound of One Hand Clapping’ (2016) 23(1) *Indiana Journal of Global Legal Studies* pp. 249–65.

<sup>7</sup> See Walker, n. 3 above, pp. 2, 26.

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

<sup>9</sup> *Ibid.*, pp. 130, 157–62.

<sup>10</sup> K. Kulovesi, M. Mehling & E. Morgera, ‘Global Environmental Law: Context and Theory, Challenge and Promise’ (2019) 8(3) *Transnational Environmental Law*, pp. 405–35.

call for supportive collaboration among pragmatic, critical, and idealist GEL scholars in identifying and overcoming respective blind spots – and, in so doing, to engage with altogether different epistemic communities. Such exchanges will foster opportunities to draw on respective insights and develop a systematic line of investigation at the intersection of GEL and global justice.

These conclusions chime with the key tenor of the second article, ‘Global Governance, Sustainability and the Earth System: Critical Reflections on the Role of Global Law’, by Antonio Cardesa-Salzmann and Endrius Cocciolo.<sup>11</sup> The authors rely on theories of global law and interdisciplinary perspectives on global governance to question the concept of sustainable development and its capacity to contribute to global justice. After examining the interface between the regulatory regimes of global finance, energy, and environmental protection, the authors argue for a global material constitutionalism to fill the gap between GEL and global justice. They underscore the need for deliberative patterns of transnational governance that are based on the ecosystem approach and human rights as a defence against the environmental and socio-economic pressures of advanced global capitalism.

‘Transnational Environmental Law’s Missing People’, by Natasha Affolder, in turn, contributes to deepening the reflection on self-reflexivity within the environmental law scholarly community.<sup>12</sup> The author focuses on the need to investigate critically the identities and individual contributions of ‘actors’, ‘agents’, and ‘experts’ in GEL, with a view to better understanding which voices are dominant and which voices are excluded. The article delves into the conceptual and methodological approaches needed to research GEL as a lived reality, rather than merely as the study of the text and language of law. Affolder calls for more extensive and nuanced research on how and why GEL evolves, focusing in particular on the contributions from judges, scholars, teachers, and funders. She concludes by acknowledging that such an approach may create anxieties of its own about potential risks of exclusion, but is nonetheless ‘a project worth the peril’ that needs to be undertaken with humility and caution.<sup>13</sup>

‘Reflections on Methods from an Interdisciplinary Research Project in Global Environmental Law’, a research note by Louisa Parks and Elisa Morgera,<sup>14</sup> focuses on the links between methods for local, community-based research on GEL and questions of research ethics that reprise the theme of self-reflexivity explored in the preceding articles. The authors share their own experience of practical challenges in undertaking GEL research with local communities, with a view to underscoring the importance of choosing appropriate methods in order to limit researcher bias. This is particularly important for researchers to keep an open mind about surprising and unpredictable meanings of environmental law concepts that may be understood and

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<sup>11</sup> A. Cardesa-Salzmann & E. Cocciolo, ‘Global Governance, Sustainability and the Earth System: Critical Reflections on the Role of Global Law’ (2019) 8(3) *Transnational Environmental Law*, pp. 437–61.

<sup>12</sup> N. Affolder, ‘Transnational Environmental Law’s Missing People’ (2019) 8(3) *Transnational Environmental Law*, pp. 463–88.

<sup>13</sup> *Ibid.*, p. 488.

<sup>14</sup> L. Parks & E. Morgera, ‘Reflections on Methods from an Interdisciplinary Research Project in Global Environmental Law’ (2019) 8(3) *Transnational Environmental Law*, pp. 489–502.

practised differently at various levels (internationally as opposed to locally) by various actors (with different cultural and political sensitivities). The authors thus underscore the need for an iterative approach to the choice of research methods and ethics, which are negotiated with research partners in the moment, rather than neatly laid out in prior plans. They note the potential for this approach to feed back into methodological considerations and to produce new research questions. The authors conclude that flexibility in dialogue with research participants, as well as an explicit engagement with questions of power, enable a reconsideration of research questions and knowledge exchange approaches in ways that might be useful to all research partners throughout the life of a research project, thereby bolstering research ethics.

Zooming into a concrete and controversial area of practice, Claudio Chiarolla's commentary on 'Intellectual Property from a Global Environmental Law Perspective' discusses intellectual property in international biodiversity law from the perspective of GEL and global justice.<sup>15</sup> He explores, in particular, the use of patent disclosure requirements in the context of the Nagoya Protocol on Access to Genetic Resources and Fair and Equitable Sharing of Benefits arising from their Utilization.<sup>16</sup> While the Nagoya Protocol does not require patent disclosure, the author identifies patent disclosure as a tool that may 'facilitate the diffusion', through 'quasi-extraterritorial application' of access and benefit-sharing standards.<sup>17</sup> As such, it may lead to a GEL practice, from the bottom up, that 'aspires to achieve a higher standard of global fairness and justice between countries, and within indigenous peoples and local communities alike'.<sup>18</sup>

The final article, 'Big Data Enters Environmental Law' by Claire Lajaunie, Burkhard Schafer and Pierre Mazzega, returns to questions of methods and normativity in GEL in the novel context of 'big data'.<sup>19</sup> The authors discuss how the mining of massive data sets, regulation through smart environmental targets, and the design of technological artefacts for securing legal compliance make it possible to produce, implement, follow up on and adapt environmental norms defined at various levels of decision making (from international to subnational) in completely new ways. The authors underscore how big data may lead to a legal and technological normativity that brings about practical dangers, as well as the potential to radically alter our understanding of legal legitimacy. This requires 'a novel approach to law making which addresses the challenges of technology, legitimacy, and political-legal theory',<sup>20</sup> and calls into question the current epistemology and ethics of environmental law. Big data, in conclusion, provides not only new powerful methods for the research of GEL, but also additional theoretical,

<sup>15</sup> C. Chiarolla, 'Intellectual Property from a Global Environmental Law Perspective: Lessons from Patent Disclosure Requirements for Genetic Resources and Traditional Knowledge' (2019) 8(3) *Transnational Environmental Law*, pp. 503–21.

<sup>16</sup> Nagoya (Japan), 29 Oct. 2010, in force 12 Oct. 2014, available at: <https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>.

<sup>17</sup> Chiarolla, n. 15 above, p. 512.

<sup>18</sup> *Ibid.*, p. 512.

<sup>19</sup> C. Lajaunie, B. Shafer & P. Mazzega, 'Big Data Enters Environmental Law' (2019) 8(3) *Transnational Environmental Law*, pp. 523–45.

<sup>20</sup> *Ibid.*, pp. 544.

practical, and ethical challenges that could be addressed through self-reflexivity by GEL scholars.

Overall, all the contributions arising from the symposium underscore the need to further develop the GEL research agenda not only from a theoretical, doctrinal, and methodological angle, but also in terms of research ethics, choice of methods and scholarly practice. The authors have pointed at gaps and limitations in current scholarship on GEL, and identified various promising directions to overcome current shortcomings. Taken together, they have charted a cautiously ambitious and self-reflexive way forward for international, transnational, and comparative environmental law scholars and practitioners to contribute to debates on global justice.