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ORIGINAL ARTICLE

INTERNATIONAL LEGAL THEORY

On being companions and strangers: Lawyers and the production of international climate law

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Abstract

International climate law is often represented as a set of rules and institutions that scholars have tracked for nearly 30 years, whether to document them, assess their effectiveness, or prescribe reforms. This article, in contrast, adopts a critical perspective to uncover the everyday life of international climate law. From this viewpoint, international climate law is a purposive endeavour that is grounded in the small places where people create and live out the law. 'International climate lawyers' are among those who produce the law within these sites, and they propagate international climate law across multiple institutions. Using legal-ethnographic description, the article shows how lawyers operationalize the law in the United Nations climate regime, World Bank, and international human rights system. In each case, lawyers effect some overlapping aspirations for the law as well as legal techniques, but they also adapt their practices to the places where they work. In the process, they simultaneously build and diversify their professional community. Both in their field and community then, lawyers generate heterogeneity and homogeneity through the proliferation of international climate law. They do so on multiple registers, in terms of diverging ethical commitments, multivalent legal forms, and relative authority to speak the law, notably between institutions and the Global North and Global South. If lawyers reproduce sameness and difference in international climate law, moreover, this article suggests they may reify analogous traits in the broader field of international law, including persisting power relations.

Keywords: climate change; international legal theory; legal professionalism; practice theory; scholarly praxis

1. Introduction

How are we to understand international law relating to climate change? How are lawyers working in the World Bank, the UN human rights system, and other institutions caught up in its production? Over the years, scholars have responded to only the first of these questions by delineating rules and institutions with a bearing on the climate problem in a search for disciplinary coherence.[1] Sometimes, responses focus on the layout or branches of the law such as the Paris Agreement, custom, and trade rules. Other times, scholars evaluate the law's operative concepts,

*I am indebted to the anonymous reviewers and LJIL editors who provided thoughtful and incisive comments that made this article appreciably stronger. I am also grateful to Jutta Brunnée, Laurence Helfer, Jedidiah Kroncke, and Christina Voigt for their comments on parts or all of earlier drafts; to Karen Alter, Steven Bernstein, Jaye Ellis, Matthew Hoffmann, Frédéric Mégret, Nathan Yaffe, and other participants responding to versions presented at different meetings; and to the 'international climate lawyers' who generously agreed to be interviewed for this article and who gave comments on prior drafts. This article has changed substantially over time with review and reflection, and all views and errors are my own.

[1] J. Peel, 'Climate Change Law: The Emergence of a New Legal Discipline', (2008) 32 *Melb.U.L.Rev* 922; J. Brunnée, B. Mayer and A. Zahar (eds.), 'Special Issue on Climate Law as a New Discipline', (2018) 8(3–4) *Climate Law* 135; D. Bodansky, J. Brunnée and L. Rajamani, *International Climate Change Law* (2017); K. Gray, R. Tarasofsky and C. Carlarne (eds.),

for example, 'effectiveness' and 'transnationalization'. Laws addressing climate change reach across governance arrangements as much as they enable new ones, and the scholarship is likewise capacious. For the most part, however, the literature is doctrinal and policy-oriented.[2] Since after the Cold War when their endeavour began, scholars of 'international climate law' often vacillate between two sensibilities: aspiration and pragmatism.[3]

I offer a relatively critical stance – a distancing from conversations internal to the discipline, while staying intimate. Unlike mainstream scholarship on the topic, and the few critical accounts so far,[4] I embrace a turn in broader international legal theory toward the practices that reproduce law in everyday life. Thus, whereas dominant literature qualifies norms then interprets and applies them or deploys empirical methods to classify, analyse and prescribe, this article describes everyday happenings inside what Sally Engle Merry calls 'the array of small sites in which international law operates'.[5]

To respond to the first question then, international climate law is a field of ideational and material practices.[6] It comprises expectations, routines, discourse, land, carbon, power, and other factors structuring local experiences of law across a constellation of sites. These are the sites of contemporary international law's bureaucratic flourishing – multilateral banks, treaty-based regimes, UN agencies, and so on – where international law operates directly and by shaping plural legal forms. In other words, international climate law gives rise to and underlies assumptions driving organizational mandates, managerial procedures and professional techniques which a range of actors realize on a daily basis.[7]

Following mundane enactments that generate such variable legal forms, I respond to the second question by mapping a group of 'international climate lawyers' who play a role within and across three sites. International climate lawyers emerged in the late 1980s with high aspirations for a treaty-based regime, and they continue to negotiate, advise participants and oversee the 'rules-based order' of diplomatic conferencing. In the 1990s, lawyers prefigured the Kyoto Protocol's carbon market at the World Bank and in law firms, catalyzing a form of private transactional regulation. Finally, I investigate lawyering in activist networks from the mid-2000s that provoked a convergence between international law relating to climate change and human rights.

This article therefore populates institutions with lawyers who operationalize 'multivalent' international climate law practices within them.[8] My principal argument is that these lawyers belong to

The Oxford Handbook of International Climate Change Law (2016); B. Mayer, *The International Law on Climate Change* (2018).

[2]B. Mayer, 'The Critical Functions of Scholarship in Climate Law', (2018) 8(3–4) *Climate Law* 151; S. Humphreys and Y. Otomo, 'Theorizing International Environmental Law', in A. Orford and F. Hoffman (eds.), *The Oxford Handbook of The Theory of International Law* (2016), 800 (commenting on the lack of theoretical accounts of international environmental law). Notable exceptions from different viewpoints include F. Johns, 'Receiving Climate Change', in F. Johns (ed.), *Non-Legality in International Law: Unruly Law* (2013), at 153; J. Dehm, 'International Law, Temporalities and Narratives of the Climate Crisis', (2016) 4 LRIL 167; J. Brunnée and S. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (2010), at 126–219; *infra* note 4.

[3]B. Mayer, 'Climate Change and International Law in the Grim Days', (2013) 24 EJIL 947.

[4]See, e.g., Dehm, *supra* note 2; Johns, *supra* note 2; J. Dehm, 'Reflections on Paris: Thoughts toward a Critical Approach to Climate Law', (2018) RQDI 61; L. Godden, 'Death, Desire, Modernity and Redemption: Climate Change and Public International Environmental Law', 10 MJIL 543; S. Jasanoff, 'A New Climate for Society', (2010) 27 *Theory, Culture & Society* 233.

[5]S. E. Merry, 'Anthropology of International Law', (2006) 35 *Annual Review of Anthropology* 99, 111, cited in L. Eslava and S. Pahuja, 'Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law', (2012) 45 VRÜ 195, 218.

[6]The scant practice accounts on topic are quite diverse. See, e.g., Johns, *supra* note 2; Brunnée and Toope, *supra* note 2; W. Boyd, 'Climate Change, Fragmentation and the Challenges of Global Environmental Law: Elements of a Post-Copenhagen Assemblage', (2010) 32 *U. Pa. J. Int'l L.* 457; M. Tehan et al., *The Impact of Climate Change Mitigation on Indigenous and Forest Communities: International, National and Local Law Perspectives on REDD+* (2018).

[7]G. F. Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (2017), 8; S. Ranganathan, 'Legality and Lawfare in Regime Implementation', in N. Rajkovic, T. Aalberts and T. Gammeltoft-Hansen (eds.), *The Power of Legality: Practices of International Law and their Politics* (2016), 288.

[8]Ranganathan, ibid.

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a loosely knit community befitting diverse sites and forms of law, which they help reproduce. By this I mean international climate lawyers engage in practices of mutual reinforcement that simultaneously diversify their field and the professional community. They do so by seeking out and propagating international climate law within and across sites, each hosting idiosyncratic practices that are historically contingent.

To illustrate my claim, I detail ways in which lawyers realize tendencies of heterogeneity and homogeneity drawing on the sites that I investigate. First, I argue that lawyers generate relative power to state the law between the UN climate regime and external sites of governance that contest, parallel and ultimately legitimize the regime's authority for the benefit of the World Bank and human rights campaigns. International climate lawyers also sustain cores and peripheries that reproduce disparities between the Global North (North) and Global South (South). Institutions where international climate lawyers receive education and training are predominately located in the Anglo-American North, and lawyers from the North appear to be higher in number.

Second, I claim that international climate lawyers manifest heterogeneity and homogeneity through their common yet uneven ethical dispositions. Most lawyers are dedicated to managing the climate problem legally, but they are torn between rationalities of economy and justice when choosing the means to pursue their overarching commitment. How lawyers embody their ethical dispositions is, however, largely a matter of degree since they engage with doctrines, practices and institutions prevailing in the field, in particular international finance.

Third, I argue that lawyers share knowledge, skills and resources, while diverging with respect to others. This naturally results when they effect variable legal forms across sites of governance. Contrary to a standard refrain in the international law discipline, lawyers in the field that I examine are not a group of expert interpreters coterminous with law.[9] Practice theories demand a modest view of this bond: officials, activists, philanthropists and documents, among other people and materials, effect law in a clutter of practices. Nonetheless, lawyering remains distinctive amid the clutter, if mundane and specific to situated places. Professional climate law work ranges from safeguarding institutional procedures, to drafting carbon contracts, and to lobbying governments, depending on the case. Indeed, lawyering is surely more kaleidoscopic, and perhaps more congruent, than examined in this first look at professional practice.

Section 2 of the article describes a relatively small subset of international climate lawyers. In a thick 'legal-ethnographic' style, I describe their aspirations, resources, and activities in the three sites mentioned before.[10] Section 3 explores theoretical claims arising from that description to support my argument that international climate lawyers belong to a loose community marked by the heterogeneity and homogeneity of the field they help produce.

The article concludes in Section 4 with reflections on what is at stake in theorizing international climate law through everyday practices. In foregrounding practices, scholars can dig below the taken-for-granted rules and institutions that scholars are classifying for a discipline to, as Eslava and Pahuja say, 'get down and dirty' with international climate law in the mode of scholarly

[9]See, e.g., M. Koskenniemi, 'International Law in a Post-Realist Era', (1995) 16 AYBIL 1, at 17; contributions in A. Bianchi, D. Peat and M. Windsor (eds.), *Interpretation in International Law* (2015); J. d'Aspremont et al. (eds.), *International Law as a Profession* (2017).

[10]Research for this article involved interviews and archival study. Interviews were conducted with 19 lawyers who work to a degree with international law relating to climate change in private firms, international institutions, a tribunal, government, universities and, in some capacity, the UN climate regime. Of these lawyers, four were based in Africa, three in Europe, three in Asia, three in Australia, and six in North America. Several lawyers also commented on full or partial drafts. The case studies are primarily based on publicly available interviews, CVs, and biographies, and analysis of primary documents (e.g., submissions, official documents, press releases, newspaper articles). Data was interpreted to construct a descriptive narrative. My method is interpretive, rather than empirical, and prioritizes theoretical representation. It oscillates between presenting context, meso- and micro-level practices, resources, epistemic dispositions and theoretical abstraction. See Sinclair, *supra* note 7 (on constructing a 'history of the present'); note 175, *infra* (on descriptive methods).

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praxis.[11] When we do, the proliferation of international climate law across treaty-based regimes, international financial institutions, and international human rights systems appears as a purposive endeavour – one that may reify extant rationalities, institutions, and power in the broader field of international law.

2. International climate lawyers

2.1 Building a specialized treaty-based regime

International climate lawyers became engaged in producing, and later diversifying, their field in the lead up to the 1992 Framework Convention on Climate Change.[12] The Convention was negotiated during the UN Decade of International Law when states sought to revitalize public international law in the aftermath of the Cold War by embedding it in a host of new and old functional spaces including adjudication forums and development institutions.[13] The optimistic sensibility about positive law among some countries during the period is also reflected in the push to manage environmental degradation in treaty-based 'regimes' which encouraged international co-operation through diplomatic conferencing.[14] The Convention established infrastructure for the specialized 'UN climate regime': a set of principles, rules, institutions, and decision-making procedures meant to foster the progressive development of state commitments.

Legal professionals effected the liberal institutionalist rationality of this moment by helping to build the UN climate regime.[15] They entered talks about the regime as civil servants, working as they normally would on a portfolio of government mandates and swept up in shifting priorities, or having studied public international law in elite universities in the Anglo-American North with high aspirations for multilateralism. Hopeful that international law might address environmental damage and relieve geopolitical inequities, some launched hubs in the Global North to host specialized lawyers who contributed to designing the regime. A range of lawyers then maintained the regime through idiosyncratic professional techniques, albeit with disparities between the North and South that persisted from the earliest attempts to draft the Convention.

2.1.1 The Maltese proposal to establish a convention

It was an international law professor who persuaded Malta to raise the issue of climate protection before the General Assembly in 1988 and helped draft the Resolution that resulted.[16] Again, preferences for a treaty-based regime were in the air, but the professor's initiative paved the way for action in the UN system. He had a prior history studying international environmental law, having

[11]Eslava and Pahuja, *supra* note 5, at 215.

[12]1992 United Nations Framework Convention on Climate Change 1771 UNTS 107 (FCCC).

[13]For an account of the expansion of the rule of international law and its reach into domestic jurisdictions before and after the UN Declaration of International Law see S. Pahuja, *Decolonizing International Law: Development, Economic Growth and the Politics of Universality* (2011), 172–253.

[14]The term 'regime' in this article reflects a narrow definition used from the 1980s to identify treaty-based infrastructure for diplomatic conferencing. Actors inside regimes habitually use this definition as do international relations and international law scholars. For a review of definitions see M. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (2012).

[15]The push to expand the authority of international institutions after the Cold War was imbricated with elements of 'liberal internationalism', including a renewed interest in political science and democratic governance, as noted in D. Joyce, 'Liberal Internationalism', in A. Orford and F. Hoffman (eds.), *The Oxford Handbook of The Theory of International Law* (2016), 471, at 482.

[16]UNGA, Protection of the Global Climate for Present and Future Generations of Mankind, UN Doc. A/RES/43/53 (1988); Malta Resource Authority, 'Climate Change – Introduction', available at www.mra.org.mt/climate-change/climate-change-introduction/; N. Martinez Gutierrez, *Serving the Rule of International Maritime Law: Essays in Honour of Professor David Joseph Attard* (2010).

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scarcely completed his doctorate at Oxford, and had taken up posts as an Advisor to the Prime Minister and at the University of Malta. Referencing dire scientific and ministerial statements on the state of the climate, he proposed a multilateral strategy.[17]

Specifically, he proposed that Malta sponsor a resolution to declare the climate system the 'common heritage of mankind'. The professor therefore sought to reinvigorate the common heritage principle, which Arvid Pardo tendered on Malta's behalf in a 1967 address to the General Assembly. This principle highlighted effects that the unbridled use of areas beyond national jurisdictions could have on the seabed and high seas and on existing inequalities between North and South, and proposed to share the benefits of resource exploitation.[18] In the new instance of climate protection, Malta took up the professor's framing. Its reasons were not unlike its motivations some 20 years before. Previously, Malta tendered the principle with a 'parochial' drive to insert itself in international affairs as a newly independent state with a 'cosmopolitan' proposal.[19] Now after the Cold War, Malta aligned with states demanding a renewal of international law and asserted, 'smaller States can also validly contribute to the work and efforts carried out by the United Nations'.[20]

However, given the divisive history of the principle, especially its proprietary inferences, states deemed it ill-suited to the nature of climate change, which would require 'global' obligations of 'protection'.[21] The General Assembly instead adopted the professor's more palatable language of 'common concern', which was later included in the Convention and came to signal co-operative approaches to global problems.[22] The General Assembly Resolution also called for the Intergovernmental Panel on Climate Change (IPCC) to recommend elements for a treaty. The professor from Malta then co-chaired that work with a legal advisor from Canada's foreign office and a British diplomat.[23]

This would be the first instance where lawyers were involved in the reproduction of greater North-South dynamics in the emergent field of international climate law.[24] For, soon after receiving its mandate, states in the Global South resisted the IPCC's work. Tensions between the North and South were brewing around the negotiation of environmental agreements since the 1972 Stockholm Conference on the Human Environment, when the North's proposals for environmental protection batted against the rationality of 'development' ascendant since the 1950s and discourse in the South foreshadowing calls for a New International Economic Order.[25] The 1987 *Brundtland Report* manoeuvred a putative compromise in the notion of 'sustainable development' – linking environmental protection to poverty reduction and economic growth.[26] Nonetheless,

[17]He first did so in a letter to the *Times* (London). Malta Resource Authority, ibid.

[18]UNGA, First Committee Debate, UN Doc. A/C.1/PV/1515-1516 (1967).

[19]S. Ranganathan, 'Global Commons', (2016) 27 EJIL 693, at 708–9, 715.

[20]Malta was a member of the Non-Aligned Movement that proposed the UN Decade of International Law shortly after. UNGA, Provisional Verbatim Record of the Thirty-Fifth Meeting, UN Doc. A/43/PV.35 (1988), 7–8.

[21]It is possible the North-South inferences were also a concern. See, e.g., ibid.; A. Cançado Trindade and D. Attard, 'The Implications of the "Common Concern of Mankind" Concept on Global Environmental Issues', in T. Iwama, *Policies and Laws on Global Warming: International and Comparative Analysis* (1991), 8; D. Bodansky, 'The United Nations Framework Convention on Climate Change: A Commentary', (1993) 18 YJIL 451, 465.

[22]Malta then co-ordinated a legal experts' meeting with the UNEP on the concept of common concern: Cançado Trindade and Attard, ibid.

[23]R. Rochon, D. Attard and R. Beetham, 'Legal and Institutional Mechanisms', in Intergovernmental Panel on Climate Change (ed.), *Climate Change: The IPCC Response Strategies* (1990).

[24]Albeit, Malta's status as a former British colony somewhat muddles this dynamic.

[25]On the history of North-South dynamics in early environmental negotiations see L. Rajamani, *Differential Treatment in International Environmental Law* (2006), 13–20, 54–61; S. Bernstein, *The Compromise of Liberal Environmentalism* (2001). On the rationality of development and its deradicalizing relationship with decolonization see Pahuja, *supra* note 13, 44–94 (also dating the modern logic of development to the Truman plan of 1949).

[26]Lawyers were also involved in preparing the *Brundtland Report* on the commission and an expert group that recommended core legal principles. See *Report of the World Commission on Environment and Development: Our Common Future* (1987) (Brundtland Report), Annex 1.

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states in the South arrived late to talks on the climate.[27] Representatives from the North dominated the IPCC and states from the South objected to their monopoly and focus on environmental, rather than development, matters.[28] Indeed, Brazil nearly blocked the IPCC report's approval, insisting that the final version contain a qualification about unequal participation.[29]

Following this controversy implicating the IPCC chairs, states in the South successfully pushed for the General Assembly to establish political negotiations, which it did in 1990.[30] Lawyers then served on the negotiating committee as civil servants, special advisors to delegations, counsel to international organizations and NGOs, and an international law professor advised the committee secretariat. Over just more than a year, they and other members negotiated to secure the Convention's opening for signature at the 1992 Rio Conference on Environment and Development.

2.1.2 Legal representation and public interest lawyers

Among the legal professionals on state delegations was a group of British and American public interest lawyers advising Papua New Guinea, Saint Lucia, and Vanuatu. Some of these lawyers had been canvassing legal remedies to address the adverse effects of climate change, publicly arguing for a specialized regime coupled with litigation before the ICJ that would test novel principles of international environmental law.[31] Yet this subset of lawyers is most notable for having come from two newly minted centres that would become vital conduits for dozens of lawyers working in and beyond the regime, including at the World Bank, in law firms, and in human rights campaigns. Their organizations were the Center for International Environmental Law (CIEL) and Foundation for International Environmental Law and Development (FIELD).

CIEL was founded in 1989 by two British barristers and two American attorneys at King's College Law School, but rapidly spun off into a separate organization in Washington, DC. The centre in England was then renamed FIELD. The British partners had studied at Cambridge under the tutelage of esteemed jurists in public international law and had been re-envisioning possibilities to address transboundary damage in the wake of Chernobyl.[32] Consistent with the rationality of the period, they were inspired by a vision that law might offer redress and curb abuses of power in the context of environmental harms. The barristers' enthusiasm for international law was matched by the grassroots experience of their American counterparts, who were frustrated by weak gains in the US environmental movement. The four met at a conference and agreed, 'international law and diplomacy needed to join forces with the public interest advocacy movement'.[33] The centres they founded inaugurated prominent hubs in the Global North for lawyers to touch down for practical training. And again, by means this article explores, staff and interns dispersed to external sites of climate governance.

The integration of lawyers from CIEL and FIELD into discussions on climate change was perfectly timed to the negotiating committee's mandate. In their prior work exploring state responsibility for climate change, two of CIEL's founders had urged peers to extend *pro bono* services to countries in the South, deploring geopolitical inequalities in the international legal process.[34] They

[27]Bodansky, *supra* note 21, at footnote 125.

[28]Ibid.

[29]Ibid.; Intergovernmental Panel on Climate Change (ed.), *Climate Change: The IPCC Response Strategies* (1990), xxviii.

[30]UNGA, Protection of Global Climate for Present and Future Generations of Mankind, UN Doc. A/RES/45/212 (1990); Bodansky, Brunnée and Rajamani, *supra* note 1, at 101.

[31]D. Zaelke and J. Cameron, 'Global Warming and Climate Change: An Overview of the International Legal Process', (1990) 5 AUILR 249.

[32]See, e.g., L. Mazur and L. Miles, Conversations with Green Gurus: The Collective Wisdom of Environmental Movers and Shakers (2009), 27, 30–7; P. Sands, *Principles of International Environmental Law* (1994), Acknowledgments.

[33]CIEL, '2009 International Environmental Law Award Recipients – CIEL Co-Founders and United Nations Environment Programme', available at www.ciel.org/about-us/2009-international-environmental-law-award-recipients-ciel-co-founders-united-nations-environment-programme; Mazur and Miles, ibid., 35.

[34]Zaelke and Cameron, *supra* note 31.

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had also sought to 'latch' onto countries vulnerable to climate change that had little resources.[35] At the 1990 Second World Climate Conference, they struck up a relationship with officials from small island states, they assisted the states to form a negotiating block (the Alliance of Small Island States or AOSIS, which they would serve for decades), and they drafted a definition of the 'precautionary' principle on behalf of AOSIS, a version of which made it into the Convention.[36] Within a year, a team of CIEL and FIELD lawyers was representing countries in the alliance seated across foreign office lawyers, diplomats, and other delegates negotiating the treaty.

Clearly, the trajectories of the international law professor from Malta and public interest lawyers from CIEL and FIELD do not exhaust how lawyers moved into the UN climate regime. Lawyers from government, universities, and firms also became fixtures, reappearing year after year. However, there is a history of unequal representation in the climate negotiations going back to the IPCC's first report. To the degree these inequalities have been corrected, they were partly addressed through 'imported' representation from organizations such as CIEL and FIELD.[37] Similar to these centres, other specialized hubs that feed the regime with lawyers are located in, and attract, lawyers from the North while serving delegates from the South.[38] In addition, while there are many international climate lawyers from the South, they sometimes pass through the North for education and training, including through universities prized for international law pedagogy such as Cambridge, Oxford, and NYU. Some have also passed through CIEL, FIELD and the schools where they were based, King's College London and SOAS. Notably, lawyers from the South sit on delegations for other countries in the South, redistributing professional capital between middle-income and poorer states.[39]

Consider a lawyer from Sri Lanka who is a respected authority on international climate law. After completing undergraduate studies in Sri Lanka, she taught as a lecturer in environmental law, before obtaining an LLM and PhD on international climate law in the UK. She was a research fellow at an Amsterdam university and the World Bank, then returned to the UK to become the head of the climate policy department at a prominent international thinktank. From her post in Britain, she acts as a legal advisor to the chair of the Least Developed Countries negotiating group at the UN climate regime.

International climate lawyers from the Global South include prominent lawyers who have taken on senior leadership and staff positions at legal advocacy centres including FIELD, held posts at universities, negotiated on delegations, advised the secretariat, and served as the Secretary of the Conference of the Parties (COP). Development agencies are also partnering with seasoned lawyers to increase legal representation from the South.[40] Even so, imported capacity remains a feature of the regime (from North to South and South to South), as does disproportionate under-representation in 'sheer numbers', especially in the poorest countries.[41]

Following the trajectory of lawyers described thus far, though not inclusive, therefore helps us glimpse flows of people through formative spaces and the capital that runs with them. That many international climate lawyers were educated or trained in the Anglo-American North indicates 'the epistemic community is small'.[42] The field also hardens power differentials materially in numbers. Whether lawyering matters is a separate question. There are few lawyers who operate in the UN climate regime relative to other delegates and advisors. The COP adopts decisions on

[35]Mazur and Miles, *supra* note 32, at 35.

[36]FCCC, Art. 3(3); Mazur and Miles, ibid., at 36.

[37]Interview 14 (March 2017).

[38]Examples include Legal Response International, Baker & McKenzie (headquartered in Australia with various locations in the South), and the Institute for International Environment and Development.

[39]Interview 14 (March 2017).

[40]For example, 'Young African Lawyers (YAL) Programme on Climate Change', available at www.climdev-africa.org/sites/default/files/DocumentAttachments/Young%20Lawyers%20programme%20on%20climate%20change%20EN.pdf.

[41]Interview 14 (March 2017).

[42]Interview 20 (July 2017).

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a consensus basis, somewhat evening out imbalances in bargaining power. Moreover, given contemporary international law's provenance and alignment with the North, countries may not be habituated to, or value, bringing lawyers on board.[43] However, there are distinctive practices that lawyers effect in the UN climate regime, which suggests that professional representation matters.

2.1.3 A 'culture of legality' in diplomatic conferencing

Recall the founders of CIEL and FIELD were inspired to level the playing field for countries in the South. Being lawyers, for that purpose, they wielded legal rhetoric to ensure their positions were heard. As one CIEL founder put it, 'If you're an international lawyer it's a small club: you know who taught me and I know who taught you, so let the games begin.'[44] This invitation to legal jockeying hints at a larger 'culture of legality' that pervaded the UN climate regime once established.[45] As a specialized forum for international law, the regime supplements customary rules and principles with procedures that encourage agreement on local rules.[46] In theory, local rulemaking occurs at a quicker pace than custom and treaties, although the regime upholds state authority to consent to binding law, such as protocols, and to negotiate informal law, such as decisions of the COP.[47] The regime is then buttressed by offices such as the secretariat. Each of these sources makes rules of varying legal forms depending on their mandate, normative authority, and rhetorical techniques. The COP's use of the imperative 'shall' in non-binding decisions exemplifies the regime's fluid legality.[48]

Delegates at the COP, whether lawyers or not, therefore take seriously and negotiate through endogenous legal forms. COP decisions that are not formally binding are cited in recursive processes of legal reasoning. Principles in binding instruments, even if framed imprecisely, underpin the regime's direction. In some measure, legal constraints on diplomatic rivalries are simply a base feature of international climate law's specialization. Therefore, lawyers are not prized for speaking through law, *per se*. Rather, lawyers are distinctive because, apart from conducting themselves as others do, they are presumed to be competent with respect to idiosyncratic practices.

Some lawyering centres on the technicalities of the 'text'. More often than not, negotiations take place over documents, rather than oral arguments alone. Documents are prepared before COP meetings and are edited in prolonged, graduated stages. They are an aggregate of moving parts – paper, computer screens, and voices entangled in nonstop push and pull.[49] Many actors touch documents, including lawyers and non-lawyers. However, for certain matters lawyers are regarded as proficient drafters. Lawyers give expression to the parties' intentions with precision or 'constructive ambiguity'.[50] Particularly when the obligatory form of a provision or instrument is in question, lawyers have authority to channel the parties' intent.[51] Lawyers may also double-check

[43]On this point respecting India see L. Rajamani, 'India's Approach to International Law in the Climate Change Regime', (2017) 57 IJIL 1.

[44]Mazur and Miles, *supra* note 32, at 36.

[45]On the notion of a culture of legality see J. Brunnée and S. J. Toope, 'The Rule of Law in an Agnostic World: the Prohibition on the Use of Force and Humanitarian Exceptions', in W. Werner, M. de Hoon and A. Galan (eds.), *The Law of International Lawyers: Reading Martti Koskenniemi* (2017), 137.

[46]Bodansky et al., *supra* note 1, at 55–6, 68–70.

[47]The COP is the supreme body mandated to advance the Convention's implementation. It issues decisions and can negotiate new instruments binding upon a form of state consent: FCCC, Arts. 7, 15–17.

[48]On the legality of COP decisions see especially J. Brunnée, 'COPing with Consent: Law-making under Multilateral Environmental Agreements', (2002) 15 LJIL 1.

[49]F. Weisser, 'Practices, Politics, Performativities: Documents in the International Negotiations on Climate Change', (2014) 40 *Political Geography* 46.

[50]On drafting techniques see S. Biniaz, 'Comma but Differentiated Responsibilities: Punctuation and 30 Other Ways Negotiators Have Resolved Issues in the International Climate Change Regime', (2016) 6 MJEAL 37.

[51]For a review of legal form in the regime see L. Rajamani, 'The 2015 Paris Agreement: Interplay between Hard, Soft and Non-Obligations', (2016) 28 JEL 337.

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language in a final text before it is confirmed. In Paris there was such a 'comma' committee that went through the agreement for legal and linguistic accuracy.[52]

While lawyers advocate for myriad issues by definition, some are also considered 'intrinsically legal'.[53] These typically comprise anything styled as 'procedural' including compliance, dispute resolution, institutional design, final clauses, and matters of liability and bindingness. In a site where legality is somewhat plastic, why these issues are more legal is unclear: they harken back to boundaries between law and non-law rooted in notions of hardness and enforcement. But when it comes time to negotiate procedural matters, lawyers serve a heightened role. Occasionally they chair meetings on point or break out to negotiate among themselves. Left to convince their fellow professionals, they may elevate rhetoric beyond the regime to exogenous instruments and jurisprudence.

Counsel for the secretariat reinforce these practices. Early on secretariat lawyers were wedded to programs dealing with compliance and procedural rules.[54] However, as the regime grew in size and complexity, a Legal Affairs unit was formed which elevated lawyering to a relatively autonomous practice.[55] Like other lawyers, secretariat counsel answer queries on law, prepare texts, ensure procedures are met, and 'scrub' COP decisions.[56] Entrenched in the melee of negotiations, there might be a secretariat lawyer in the room or on call ready to weigh in.

Unlike their counterparts supporting delegations, secretariat counsel purport to stay above the fray of politics. What is distinctive about all lawyers in the UN climate regime, however, is precisely their pursuit of international law's promise to yield rules-based constraints. Within a fluid culture of legality, lawyers provide advice on, and negotiate procedures for, lawmaking specific to the regime, and they perfect textual elements in documents that constrain future decision-making. In their role as legal guardians, lawyers also organize talks around the COP to frame agendas and counsel governments on implementation. Though few relative to others engaged in diplomatic conferencing, lawyers thus help maintain the regime's institutionalist operations and logic.

2.2 Dealing in carbon

The Convention set off a continuous process of diplomatic negotiations in which international climate lawyers discharge particular functions. Because the main obligations that the Convention imposed on the parties established the regime's institutional framework, once it was running, the parties recognized that more was needed to achieve the objective of preventing dangerous climate change. They subsequently negotiated another instrument to raise substantive obligations. The 1997 Kyoto Protocol was their attempt at a substantive result.

The Kyoto Protocol is best known for setting emission reduction targets among states in the North. But it also spawned a global carbon market when it permitted states to exchange quantified emission reductions – carbon units – to meet their targets. Carbon markets instantiate an economic rationality that prioritizes freedom of choice, efficiency, and the lowest possible costs. Under the Kyoto Protocol, three so-called 'flexible' mechanisms bore out this rationale. States with targets could sell and purchase carbon units among themselves through 'emissions trading'. They could buy carbon units generated from projects across their jurisdictions, which were intended to promote 'joint implementation' between Western Europe and the former Soviet Bloc, where reductions were easier and cheaper. Finally, under the Clean Development

[52]This was referred to as the 'Legal and Linguistic Committee'. The committee checked for formal attributes of the text without adjusting content.

[53]Interview 20 (July 2017).

[54]These were the 'Compliance' and 'Intergovernmental Conference and Affairs' programs.

[55]FCCC, Proposed Programme Budget for the Biennium 2008–2009: Note by the Executive Secretary, FCCC/SBI/2007/8 (2007).

[56]Interview 21 (July 2017). Secretariat lawyers also draft procurement and other contracts.

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Mechanism (CDM), states could buy 'offset' units generated from easier and cheaper projects in the South. The CDM took the Kyoto Protocol's carbon market global.

The global carbon market occupied legion actors in and beyond the UN climate regime. Financiers, project developers, local workers, carbon rights owners, brokers mediating deals, and government and corporate purchasers – all exercised tasks in sprawled out institutions that were more or less linked.[57] Lawyers had contributed to the birth of the Kyoto flexible mechanisms and some were market players too.[58] International climate lawyers advanced and sustained the market through legal arrangements for commercial transactions. Prefiguring, then bolstering, the Kyoto Protocol rules, they propagated new forms of international climate law at the World Bank and in law firms, beginning with the World Bank's Prototype Carbon Fund.

2.2.1 The World Bank's Prototype Carbon Fund

The World Bank has ties with the UN climate regime as trustee of the regime's financial mechanism. The Bank's affair with environmental investments and standards began more generally in the 1970s, growing ever stronger in successive decades.[59] Vocal critiques of damage that the Bank's projects were causing to local environments and people mounted in the 1980s, alongside the rise in multilateral environmental talks. By mid-decade, the Bank accepted that environmental goals were aligned with its constituent instrument, culminating in a managerial directive and organizational restructuring to 'mainstream' environmental considerations across operations.[60] The *Brundtland Report* also took aim at the Bank around that time, prompting it to redirect economic instruments toward sustainable development.[61] The Bank, therefore, approved the Global Environment Facility in 1991 as a centralized fund for multilateral environmental initiatives, including lending for countries in the South to deliver programs with 'global' benefits.[62] The treaties opened for signature at the 1992 Rio Conference, including the climate treaty, accordingly entrusted the facility with their financial mechanisms.[63]

The Bank therefore has a 'two-way relationship with environmental governance' whereby it seeks to buffer negative repercussions of lending practices and to actively influence global and local norms using economic instruments.[64] The Prototype Carbon Fund grew out of the Bank's active entanglement with environmental governance. While talks that led to the Kyoto Protocol were still ongoing, the Bank's president announced to the General Assembly that the

[57]S. Bernstein et al., 'A Tale of Two Copenhagens: Carbon Markets and Climate Governance', (2010) 39(1) *Millennium: Journal of International Studies* 161.

[58]Lawyers contributed to the Kyoto Protocol in several ways. For instance, government and NGO lawyers in the US acquainted with domestic emissions trading schemes advocated for design elements and sat on negotiating delegations. A FIELD partner also helped convert a radical proposal by Brazil to garnish penalties from non-compliant states in the North for redistribution to the South into the CDM. See, e.g., H. Lovell and N. S. Ghaleigh, 'Climate Change and the Professions: the Unexpected Places and Spaces of Carbon Markets', (2013) 38 *Boundary Crossings* 512, 514; M. Mehling, 'Interview with Annie Petsonk', (2017) 11 CCLR 201, at 201; J. Wiener, 'Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law', (2001) 27 ELQ 1295; J. Werksman and J. Cameron, 'The Clean Development Mechanism: the "Kyoto Surprise"', in L. Gómez-Echeverri (ed.), *Climate Change and Development* (2000).

[59]D. Freestone, *The World Bank and Sustainable Development: Legal Essays* (2012), 9; I. F. I. Shihata, 'The World Bank and the Environment: A Legal Perspective', (1992) 16 *Md. J. Int'l L.* 1.

[60]Ibid.; World Bank, 'Environmental Aspects of Bank Work', Operational Manual Statement 2.26 (1984); World Bank, *Environment, Growth and Development* (1987).

[61]See, e.g., Bernstein, *supra* note 25, at 74; Brundtland Report, *supra* note 26, paras. 99, 103, 107.

[62]World Bank, Board of Directors, Resolution No. 91-5 (1991); Freestone, *supra* note 59, at 113–16, 166.

[63]The Green Climate Fund has joined the facility in overseeing the financial mechanism for the UN climate regime. The World Bank is interim trustee and it is independently administered: FCCC, Arts. 11, 21(3); FCCC, Cancun Agreements, Decision 1/CP.16, FCCC/CP/2010/Add.1 (2011), para. 107.

[64]It also has this two-way relationship with human rights. See A. Anghie, 'International Financial Institutions', in C. Reus-Smit (ed.), *The Politics of International Law* (2009), 217; Bernstein, *supra* note 25, at 74–5; World Bank, *World Development Report 1992: Development and the Environment* (1992).

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Bank would create the Fund should the parties to the UN climate regime support it.[65] Part of the concept behind the Fund was that rules agreed upon in Kyoto could be 'grafted' onto energy projects already in the Bank's portfolio or pipeline.[66] The Bank's managerial policies and techniques governing terms of lending would be used for the Fund as well. For instance, the Global Environment Facility would provide experience using 'baselines' for projects to ensure financial transfers from North to South were limited to 'incremental costs' needed to yield 'global' benefits above what a project would normally cost (known as 'additionality').[67]

The Prototype Carbon Fund differed, however, from the Bank's prior models because it generated a *market*.[68] The Fund was not only envisioned for governments, but corporate investors for whom 'the development of a new commodity – an emission reduction – which is an asset with a saleable value', would make sustainable development projects 'bankable'.[69] The Fund was also meant to be a 'trail blazer' for other financial institutions and corporate actors that might someday mediate transactions.[70] In short, the Prototype Carbon Fund prefigured a global carbon market that was conceived to entice state and corporate investors in sustainable development projects that would deliver 'additional' global benefits with a green light from the UN climate regime.

Of course, parties to the UN climate regime established market mechanisms. When they did, the Kyoto Protocol permitted them to apply carbon units generated under the CDM from 2000 onward to obligations in a future commitment period.[71] The Executive Directors of the Bank promptly approved a resolution to establish the Prototype Carbon Fund a year before that start date to pool contributions from investors for compliance purposes down the line.[72]

The Kyoto Protocol lacked information to operationalize its market provisions, leaving the COP to flesh out the details over subsequent meetings. Protracted negotiations to confirm a 'rulebook' lasted until 2001 and the Kyoto Protocol did not come into force until 2005.[73] However, the mere potential of a market created a value for carbon units and the Bank moved to 'lead from behind' with its 'prototype' before the Kyoto rules were confirmed.[74] Indeed, the Bank faced hostilities because it was perceived to be 'attempting to usurp the negotiating process, to assume a dominant role in the emission reductions market, and to impose its own practices on projects under the Kyoto Mechanisms'.[75]

Because the Kyoto Protocol was vague as to how carbon units should be treated legally, counsel at the World Bank and in law firms spearheaded the legalization of carbon units and terms for their exchange to kick-start the market.[76] Distinctive lawyering practices of 'carbon contracting' thus emerged to manage transactions between the World Bank, host countries, and investors.

[65]However, groundwork to establish the fund at the World Bank had already been laid before the announcement: Freestone, *supra* note 59, 173–4.

[66]Ibid.

[67]Ibid.; C. Streck, 'Ensuring New Finance and Real Emission Reduction: A Critical Review of the Additionality Concept', (2011) 2 CCLR 158, 162.

[68]Of course, Bank-led reforms to domestic institutions influence market structures: Anghie, *supra* note 64.

[69]Freestone, *supra* note 59, at 86; D. Freestone, 'The UN Framework Convention on Climate Change, the Kyoto Protocol, and the Kyoto Mechanisms', in D. Freestone and C. Streck (eds.), *Legal Aspects of Implementing the Kyoto Protocol Mechanisms* (2005), 19.

[70]Freestone, *supra* note 59, at 174.

[71]Kyoto Protocol, Art. 12(10).

[72]Freestone, *supra* note 59, at 173–4; IBRD, Amended and Restated Instrument Establishing the Prototype Carbon Fund, Resolution 99-1 (1999).

[73]S. Mason-Case, 'Kyoto Protocol', in J. d'Aspremont and C. Brölmann (eds.), *Oxford International Organizations* (2018).

[74]D. Freestone, 'The International Climate Change Legal and Institutional Framework: An Overview', in D. Freestone and C. Streck (eds.), *Legal Aspects of Carbon Trading: Kyoto, Copenhagen and Beyond* (2009), 1 at 18; Freestone, *supra* note 59, at 93.

[75]Freestone, *supra* note 59, at 93.

[76]M. Wilder and L. Fitz-Gerald, 'Carbon Contracting', in Freestone and Streck, *supra* note 74, 295, at 296–9; M. Mehling, 'Interview with David Freestone', (2017) 11 CCLR 196, at 196.

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2.2.2 Emission reduction purchase agreements

It was a team led by counsel at the World Bank that drafted the first 'Emission Reduction Purchase Agreement' (ERPA).[77] Contrary to expectations that the Bank's routine legal practices would be used for carbon markets, as discussions progressed between the Bank and Latvia for the first funded project, the Bank decided that a direct investment, modelled on Global Environment Facility practices, would not incentivize market activity.[78] Consequently, 'the agreement was transformed from a traditional project finance agreement into a totally new instrument' – the ERPA.[79]

The original ERPA was a 'forward contract', meaning it made funding to Latvia conditional on the delivery of certain actions and emission reductions. Under a forward contract, the purchaser is all but relieved of risk: since payment is contingent on outcomes, the risk is borne by the carbon seller.[80] The ERPA required independent verification of the emissions abatement as required for some Kyoto project-based credits.[81] It was also underwritten by a pledge of carbon units that Latvia would be allocated under the protocol (as a state in the former Soviet Bloc with targets) in the event of failure to deliver. Incipient ERPAs, such as this, were thus 'bespoke bilateral agreements' with *sui generis* legal rights attached to details including verification, delivery of carbon units, and flexibility for eventual concordance with the Kyoto Protocol.[82]

Lawyers might typically sit down to negotiate terms of contract with a counterparty over several days, then revise the documentation and tweak remaining issues.[83] In essence, the terms would assign ownership over a right and mitigate risks to the transfer of legal title. Carbon contracts pose risks similar to other large-scale commercial transactions such as failure to deliver, political disruptions, *force majeure* scenarios, and conflicts of laws when resolving disputes. The latter risk lawyers resolved with arbitration clauses.[84] The others were generally accounted for in the negotiated price, though contracts might also provide for risk-sharing arrangements, including upfront loans and progressive revenue disbursements.[85] Still, while ERPAs were initially being drafted, carbon markets were brand new: particular risks arising from dealing in carbon were unknown and, above all, the rights at stake were not classified in legal terms. In other words, '[t]he key issue parties faced was defining what was being purchased'.[86]

In the 1990s, most states did not classify carbon in domestic legislation and lacked provisions for its commodification, purchase and sale. Without direction from the UN climate regime, moreover, the legal nature of carbon in a global market was liable to be framed variously. Arguably, the solidification of carbon as an 'object' of international law dates back to the Convention since it commits parties to report national emission inventories.[87] However, imagining carbon as a legal object representing a bundle of activities and rights that is measurable as a unit to be exchanged for an equivalent bundle somewhere else in the world was an 'essential precondition' for the carbon market that the Kyoto Protocol envisioned.[88]

[77]Mehling, ibid.

[78]The Prototype Carbon Fund included joint implementation projects, but these decreased as the eligibly of credits from the year 2000 under the Kyoto Protocol was unclear. Freestone, *supra* note 59, at 21–2.

[79]Ibid.

[80]C. Streck, 'World Bank Carbon Finance Business: Contracts and Emission Reductions Purchase Transactions' in D. Freestone and C. Streck (eds.), *Legal Aspects of Implementing the Kyoto Protocol Mechanisms* (2005), 361.

[81]Kyoto Protocol, Art. 12(7).

[82]Wilder and Fitz-Gerald, *supra* note 76, 297.

[83]Interview 17 (September 2016).

[84]D. Ratliff, 'Dispute Settlement in "Flexible-Mechanism" Contracts', in D. Freestone and C. Streck (eds.), *Legal Aspects of Implementing the Kyoto Protocol Mechanisms* (2005), 396.

[85]Streck, *supra* note 80.

[86]Wilder and Fitz-Gerald, *supra* note 76, at 296.

[87]FCCC, Art. 4(1). On objects of international law see J. Hohmann and D. Joyce (eds.), *International Law's Objects* (2019).

[88]J. Dehm, 'One Tonne of Carbon Dioxide Equivalent (1tCO2e)', in J. Hohmann and D. Joyce (eds.), *International Law's Objects* (2019), 305.

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ERPAs were an experimental 'technology' that gave an unprecedented commodity legal definition.[89] Carbon units may resemble a property right, financial instrument, administrative permit, or further legal artefact, and their classification depends on the context in which they are created and exchanged. In drafting purchase agreements to capture novel legal relations, lawyers fashioned an elaborate patchwork of public international law (from the Kyoto Protocol), domestic contract, tax and property law (from host and investor states), and private international law (choice of laws and forum). To paraphrase one transactional lawyer, for many years they basically made the law up.[90]

During the World Bank's move to environmental programming in the 1980s, it began to appoint lawyers specialized in environmental law and trained operational lawyers to manage legal aspects of environmental issues raised by lending.[91] Legal professionals at the forefront of ERPAs included a former international environmental law professor from the UK who was Chief Counsel of the World Bank.[92] He and another Bank lawyer, an environmental law specialist from the US, had been delegates for the Bank in the Kyoto negotiations. The Bank also hired a former CIEL trainee to work on carbon finance. Furthermore, it sought advice from external counsel who had recently founded a climate change practice group at a firm headquartered in Australia, Baker & McKenzie. Having been involved in negotiating the CDM, and anticipating the market would engage the private sector, one of FIELD's founders branched out to establish the climate practice group with another friend who studied international environmental law at Cambridge.

Apart from their work for the Bank, these lawyers partnered with other early mover funds to develop contracting practices, some with different nomenclature and terms. They advised on regional and domestic emissions trading systems. Moreover, they published texts considered 'bibles' for the market.[93] In the process, lawyers forged new modes of international climate law through transactional practices adapted to the routines of established institutions. With increased activity, contractual terms also crystallized in model agreements becoming private regulation that 'paralleled' the UN climate regime rules.[94] Transactional lawyers at the World Bank and in law firms prefigured the Kyoto Protocol when they gave carbon a legality identity. In doing so, they bolstered the UN climate regime's authority to sanction market mechanisms and reified the Kyoto Protocol's economic rationality for the treatment of carbon.

2.2.3 Boom, bust, reboot

Between the Prototype Carbon Fund's effective date in 2000 and the end of the decade, carbon markets boomed. The Netherlands earmarked a significant budget to purchase carbon units and followed its own approach in partnership with and coincidental to the World Bank.[95] The EU Emissions Trading System was approved in 2003 as a cornerstone of the region's climate policy and ascended to the largest market to date.[96] A 'voluntary' carbon market surfaced to deliver CDM and makeshift project-based credits. As it had done previously, the Bank also 'pushed the

[89]Comments by M. Wilder in International Emissions Trading Association, 'From Kyoto to Paris: An Oral History of the Carbon Market', available at www.ieta.org/kyototoparis.

[90]P. Manning, 'Bringing Law into the Right Environment', *Sydney Morning Herald*, 18 August 2012.

[91]Shihata, *supra* note 59, at 8.

[92]He was also a legal advisor to the Vice President for Environmentally and Socially Sustainable Development.

[93]Aside from practitioner manuals cited throughout this article, Baker & McKenzie published the 'CDM Rulebook' (no longer available): Lovell and Ghaleigh, *supra* note 58, at 514.

[94]A.-M. Klijn, J. Gupta and A. Nijboer, 'Privatizing Environmental Resources: The Need for Supervision of Clean Development Mechanism Contracts?', (2009) 18 RECIEL 172, at 176; K. Kulovesi, 'Exploring the Landscape of Climate Law and Scholarship: Two Emerging Trends', in E. Hollo, K. Kulovesi and M. Mehling (eds.), *Climate Change and the Law* (2013), 31, at 40; Wilder and Fitz-Gerald, *supra* note 76, at 295–7.

[95]D. van der Weerd, 'CERUPT and ERUPT Contracts', in D. Freestone and C. Streck (eds.), *Legal Aspects of Implementing the Kyoto Protocol Mechanisms* (2005).

[96]European Commission, 'EU Emissions Trading System (EU ETS)', available at www.ec.europa.eu/clima/policies/ets_en.

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envelope' on speculative funds: the BioCarbon Fund and Forest Carbon Partnership Facility bypassed Kyoto Protocol rules to prefigure a finance scheme for avoided deforestation in the South. It was (and remains) controversial in the UN climate regime, albeit a version was later accepted and given the acronym REDD+.[97]

Unsurprisingly, the influence of international climate lawyers who spearheaded ERPAs was challenged at the height of the carbon market. Commercial and financial services lawyers dealing in cross-border investments jumped into the mix. Carbon units were packaged into sundry derivative products and traded on secondary markets involving major transnational firms such as Morgan Stanley, Merrill Lynch, and later JP Morgan and Norton Rose. As the market ballooned, purchase agreements matured to reflect sophisticated transactions, such as 'spot' contracts for pre-verified CDM units which could be delivered in fixed volumes instantaneously.[98] Financial institutions and corporations familiar with the International Swaps and Derivatives Association master agreement turned to it for streamlined exchanges.[99]

Perhaps because purchase agreements are confidential or because they circulate in the background of international climate law, they have received scant examination. Select accounts suggest that, despite standardization, purchase agreements may have been technically burdensome for sellers in the South.[100] Furthermore, agreements may have predominantly applied English law and rarely the law of host countries.[101] An initiative of the Inter-American Development Bank involving lawyers from the North and South sought to shift this balance by disseminating an open-source template in multiple languages with guidance for sellers in the South.[102] This may have balanced the bargaining power of contracting parties, yet must also be added to multivalent legal forms that sustain a particular economic rationality.

In any case, due to a confluence of events – intractable negotiations over the future of the Kyoto Protocol, crashing prices in the EU Emissions Trading System, and the global economic crisis – the bubble burst.[103] Lawyers who were brokering carbon transactions followed the market; they retreated into a monopoly that now supports few firms. Aside from dealing in carbon markets, persisting transactional lawyers offer technical legal services to the corporate sector focused on climate risks and benefits. Their training has evolved to include 'true' securities and corporate lawyers, turned climate specialists, addressing issues such as mergers and acquisitions, infrastructure projects, energy regulation, corporate social responsibility, and securities disclosures.[104] Meanwhile, they stay apprised of and persist in defining international climate law in the UN climate regime, being legal advisors to administrative bodies and delegations as well as to government actors putting international commitments into domestic legislation.

It merits remarking that carbon markets are far from obsolete. The Paris Agreement inaugurated new approaches somewhat akin to emissions trading and the CDM.[105] The former, called 'internationally transferred mitigation outcomes', will function without the UN climate regime's formal oversight, meaning it will attract yet more institutions and standards. These markets are

[97]Freestone, *supra* note 59, at 176–8. For a review of REDD+ practices see Tehan et al., *supra* note 6.

[98]Wilder and Fitz-Gerald, *supra* note 76, at 298–304.

[99]Ibid., at 300.

[100]Klijn, Gupta and Nijboer, *supra* note 94, at 175–8.

[101]Ibid., at 177.

[102]Ibid.; Inter-American Investment Corporation, 'At the Carbon Expo in Germany IIC Launches a New Open-Source Agreement for the Sale and Purchase of Carbon Credits', available at www.iic.org/en/media/news/carbon-expo-germany-iic-launches-new-open-source-agreement-sale-and-purchase-carbon#.XKagmJgzaUk.

[103]See, e.g., World Bank, State and Trends of the Carbon Market (2009); World Bank, State and Trends of the Carbon Market (2010); World Bank, State and Trends of the Carbon Market (2011); World Bank, Mapping Carbon Pricing Initiatives (2013).

[104]Interview 11 (September 2016); Interview 12 (September 2016).

[105]Paris Agreement, Art. 6.

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embryonic and may not look the same as prior iterations, but they will no doubt require legal transactions.

2.3 Advocating for a climate-human rights link

If transactional lawyers branched out and diversified the field of international climate law to prefigure the Kyoto Protocol's carbon market, those engaged in human rights activism have done so to remedy the UN climate regime's deficits. Much like development projects 'gone wrong', sustainable development projects in the South feeding into the CDM have a record of grievous consequences.[106] They may involve infrastructure developments and land use change that displace local communities and indigenous peoples, and compromise their ties to land and water, livelihoods, culture, and safety. This has occurred visibly in the construction of large hydroelectric dams.[107] However, the CDM has scant due process requirements that might thwart or redress negative repercussions of projects and activists feared this would be likewise with REDD+.[108]

More generally, while the Convention and its protocol use rhetorical language to acknowledge the impacts that climate change has on people, they refrain from stipulating associated duties that states owe to individuals and groups.[109] Civil actors are afforded little influence in diplomatic negotiations since lawmaking at the COP is rooted in state reciprocity.[110] The UN climate regime also lacks a dispute resolution forum where arguments could be made about the harms that individuals and groups suffer in the absence of state action.[111]

In this context, activists have fought for the recognition of human rights that reframe international climate law.[112] Lawyers belong to the ranks of these networked campaigns. Quite distant from the lawyering practices examined so far in the UN climate regime and World Bank, their focus has been on provoking a convergence between two apparently separate branches of international law.[113] Given the deep involvement that a range of actors have with human rights practices, and that lawyers engaged with human rights activism take on traditional strategies of activists, the distinctiveness of their lawyering practices is messy and difficult to isolate. However, lawyers perform characteristic functions as both 'technicians' and 'campaigners':[114] lawyers identify rather abstruse knowledge about hitherto disparate legal rules and institutions, and strategies to tie them together.

2.3.1 The relative autonomy of climate and human rights

International law relating to human rights and climate change developed as two functional branches of international law with seemingly distant norms, discourses, routines, and actors institutionalized in relatively autonomous material sites. Although rights-based approaches did not

[106]Interview 16 (October 2016).

[107]S. Duyck, 'The Paris Agreement and the Protection of Human Rights in a Changing Climate', (2015) 26 YIEL 3, at 30–1.

[108]See, e.g., J. Schade and W. Obergassel, 'Human Rights and the Clean Development Mechanism', (2014) 27 CRIA 717; Duyck, ibid.; J. Dehm, 'Indigenous Peoples and REDD+ Safeguards: Rights as Resistance or as Disciplinary Inclusion in the Green Economy?', (2016) 7 JHRE 170.

[109]Bodansky, Brunnée and Rajamani, *supra* note 1, at 93.

[110]Ibid., at 299–300.

[111]The Convention's dispute resolution mechanism applies to parties: FCCC, Art. 14.

[112]A. Schapper, 'Local Rights Claims in International Climate Negotiations: Transnational Human Rights Networks at the Climate Conferences', in S. Duyck, S. Jodoin and A. Johl (eds.), *Routledge Handbook of Human Rights and Climate Governance* (2018); M. Mueller, 'Climate Change and Human Rights: Agenda-Setting Against the Odds', (2017) *UCL Global Governance Institute Working Paper Series No. 2017/01*.

[113]A. Schapper and M. Lederer, 'Introduction: Human Rights and Climate Change Mapping Institutional Inter-Linkages', (2014) 27 CRIA 666; A. Savaresi, 'Climate Change and Human Rights: Fragmentation, Interplay and Institutional Linkages', in Duyck, Jodoin and Johl, *supra* note 112.

[114]Interview 16 (October 2016).

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make their way into instruments of the UN climate regime until recently, debates about their inclusion have followed a meandering path dating back to the Convention's negotiating committee.[115] In the earliest instance, states in the South had argued for language in the Convention recognizing 'the right to development is an inalienable human right', which states in the North resisted as it could imply a right to financial assistance or to emit.[116] Meanwhile, states in the North pushed for the term 'sustainable development', which those in the South resisted because it could make financial assistance contingent on indicators of 'sustainability'.[117] The negotiating committee settled on proclaiming that parties 'have a right to, and should, promote sustainable development', which elevates sustainability and removes any teeth that a protected human right might have through the qualifying term 'promote'.[118]

Whether the proposed human right to development would have transformed the field of international climate law is anyone's guess. One way or another, the two fields have been largely disconnected. This is not to suggest there is an ontological break between issue areas or an inevitable 'fragmentation' of international law according to some historical progression. From the viewpoint of everyday practices, climate law and human rights law are purposive enterprises that actors realize more or less intentionally in the 'patterned activities' of daily life.[119] The histories and structures by which we recognize fields of law are products (and productive) of people doing things with law contingent on aspirations, acquired and modified techniques, and materials at their disposal.

Paradoxically, while international human rights law can be 'decentred' in this way, and is therefore 'non-universal', one of the hallmarks of human rights practices is to claim universality.[120] The discourse of human rights is also pragmatic, accessible, and used by widespread grassroots, subaltern, and elite peoples. International human rights practitioners therefore constantly move beyond institutions designated for the field's elaboration in UN, regional and domestic systems. Activists reconceptualize various matters through rights framing, transplant rights discourse across 'global' and 'local' places, and work on specific cases while highlighting grievances arising in those cases as a mode of transnational persuasion.[121] All of which is to say that human rights activists are 'translators' who occupy a position of 'betweenness' from where they 'vernacularize' international human rights law in plural spaces, while they also redefine whatever issue is being characterized as militating rights protection.[122]

As for international climate law, activist lawyers have sought to vernacularize human rights in this field, and to redefine extant climate law norms and institutions, motivated by an ethical commitment to justice. In promoting a convergence across fields of international law, they have thus sought to remedy perceived deficiencies of the UN climate regime mentioned above.[123] Lawyers advising small island states began explicitly calling for these types of human rights-climate links in

[115]For a history of state submissions see L. Rajamani, 'The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiation on Climate Change', (2010) 22 JEL 391.

[116]The US has been opposed to any right to development more generally: Bodansky, Brunnée and Rajamani, *supra* note 1, at 129, 310.

[117]Ibid.

[118]Ibid.

[119]Johns, *supra* note 2, at 23.

[120]M. Goodale, 'Introduction: Locating Rights, Envisioning Law between the Global and the Local', in M. Goodale and S. E. Merry, *The Practice of Human Rights: Tracking Law between the Global and the Local* (2007), 1 at 3–4, 10, 22.

[121]S. E. Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle', (2006) 108 *American Anthropologist* 38.

[122]Ibid.; Goodale, *supra* note 120, at 22–4.

[123]There is abundant literature addressing human rights and climate change on which this section draws, but only some examines practices and alludes to public advocacy centres. For general sources see Savaresi, *supra* note 113; Duyck, Jodoin and Johl, *supra* note 112; Bodansky et al., *supra* note 1, at 296–313; J. Knox, 'Linking Human Rights and Climate Change at the United Nations', 33 (2009) HELR 477; T. Koivurova, S. Duyck and L. Heinämäki, 'Climate Change and Human Rights', in K. Kulovesi and M. Mehling (eds.), *Climate Change and the Law* (2013); Rajamani, *supra* note 115.

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the late-2000s through a two-pronged campaign. They hedged their bets by seeking to persuade delegates in the UN climate regime to adopt human rights language, while they also undertook a 'boomerang' strategy characteristic of human rights activism by soliciting external actors – in this case human rights bodies – to prod the UN climate regime.[124]

2.3.2 Tying branches of international law together

The precursor to this campaign was a 2005 petition to the Inter-American Commission on Human Rights, which alleged that US failures to regulate emissions violated the human rights of Inuit people.[125] Two US-trained public interest attorneys had conceived the claim and raised it with the main petitioner a few years prior. One was a long-time Director of the Climate Change Program at CIEL and the other the Managing Director of the International Program at Earthjustice, who had formerly practiced international human rights law.[126] Lawyers at both environmental NGOs had already been working toward linking human rights with environmental matters at the World Bank and in the UN and Inter-American human rights systems.[127] The attorneys approached Inuit leader Sheila Watt-Cloutier to propose a collaboration with the Inuit community in an effort to refocus the linkages they had been making on climate change.[128]

The attorneys pitched a petition to the Inter-American Commission, in part because an NGO or individual could claim standing.[129] Through the regional system they could target the US which had only just rebuffed the Kyoto Protocol and was then the world's highest emitting state.[130] A petition might also generate publicity that could 'shift the debate' about climate change to a 'human story', as human rights activism purports to do for other matters.[131] It might even have precedential value for further litigation.[132]

With Sheila Watt-Cloutier taking charge of leadership in the community, the lawyers drafted the petition with her legal counsel.[133] Watt-Cloutier and her team gathered stories from hunters and elders so that 'the lifeblood of the document became the Inuit voices'.[134] The final petition wove together these stories with scientific reports and international law doctrines from heterogenous sources including custom, human rights instruments, and the climate Convention. In the end, the Commission declined to assess the petition without prejudice; however, it granted a public hearing to Watt-Cloutier, her counsel, and attorneys from CIEL and Earthjustice.[135] The petition also served as an example of 'creative lawyering' for future strategies: it brought civil

[124]Knox, ibid., at 483. See also Schapper, *supra* note 112, at 50–3 (for a detailed analysis of boomerang strategies, characterized somewhat differently here); M. Keck and K. Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (1998) (coining the term in the context of human rights networks).

[125]Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States, No. P-1413-05 (7 December 2005).

[126]S. Watt-Cloutier, *The Right to Be Cold: One Woman's Fight to Protect the Arctic and Save the Planet from Climate Change* (2015), 222–3.

[127]J. Cassel, 'Enforcing Environmental Human Rights: Selected Strategies of US NGOs', (2007) 6 NJIHR 104; E. Gertz, 'Inuit Fight Climate Change with Human-Rights Claim against US', 26 July 2005, *Grist*, available at www.grist.org/article/gertz-inuit/; D. Goldberg and M. Wagner, 'Human Rights Litigation to Protect the Peoples of the Arctic', (2004) 98 *ASIL Proceedings* 227.

[128]Watt-Cloutier, *supra* note 126, at 222–3.

[129]Cassel, *supra* note 127, at 114–17

[130]Watt-Cloutier, *supra* note 126, at 224.

[131]Cassel, *supra* note 127, at 116.

[132]Ibid.

[133]Watt-Cloutier, *supra* note 126, at 227–8.

[134]Ibid., at 237.

[135]Letter from Assistant Executive Secretary, Organization of American States, to Legal Representative for Sheila Watt-Cloutier et al., Petition No. P-1413-05 (16 Nov 2006).

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experiences into the domain of international climate law.[136] As well, by evoking doctrines from ostensibly separate branches of international law, lawyers heralded possibilities for interplay and convergence.

Following the Inuit petition, campaigns shifted away from adjudication toward getting 'the issue on the UN agenda'.[137] The Inuit petition was successful in its goal of publicizing the human rights-climate link and, in 2007, the Maldives contacted CIEL to help prepare a declaration on human rights for small island states.[138] CIEL then assisted in drafting the *Malé Declaration*, which contained the boomerang strategy.[139] Their eventual target in the UN climate regime would be a new stream of negotiations on an agreed outcome, apart from the Kyoto Protocol, which the COP launched in 2007.[140] By then it was clear that parties were divided as to whether there should be further targets under the Kyoto Protocol after 2012 when its initial commitment period would expire, primarily due to conflicts over burden-sharing between North and South. With the US especially pressing for an alternative, the COP decided to negotiate a novel agreement. The COP's negotiations were set to conclude in Copenhagen in 2009, but they were divisive and prolonged, lasting until 2015 in Paris.

For almost a decade until Paris, lawyers played multiple roles as the boomerang strategy unfolded. In 2008, consistent with the strategy, the Maldives sponsored a resolution at the Human Rights Council requesting the Office of the High Commissioner for Human Rights (OHCHR) prepare a report on the relationship between human rights and climate change that would be made available to the COP.[141] That would be the first in series of resolutions, workshops, reports, and statements from arms of the UN human rights system, which on occasion prodded the UN climate regime explicitly.[142] Lawyers engaged in activities such as advising states and drafting submissions as well as making representations on behalf of their organizations.

For example, CIEL and Earthjustice assisted states obtain a resolution from the Human Rights Council establishing an Independent Expert on Human Rights and the Environment (whose mandate was extended and renamed , Special Rapporteur).[143] States pushed for a special procedure on human rights and environment, rather than climate, to placate concerns the climate agenda 'was premature'.[144] The lawyer appointed to the role, an American international environmental law professor, had nonetheless published, acted as special counsel to CIEL, and advised the Maldives, respecting that very agenda. In his words, the 'position provided a focal point for discussions' on climate and human rights.[145] During the mandate, he issued reports, attended the UN climate regime, and championed statements from Special Procedures mandate-holders urging the COP to anchor climate actions in human rights obligations.[146]

[136]H. Osofsky, 'The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples' Rights', in W. Burns and H. Osofsky (eds.), *Adjudicating Climate Change: State, National and International Approaches* (2009), 272.

[137]Knox, *supra* note 123, at 482; UCL Global Governance Institute, 'The UN Special Rapporteur's Perspective on Agenda-Setting in Climate Change and Human Rights: Interview with John H. Knox', 16 February 2016, available at www.ucl.ac.uk/global-governance/ggi-interviews/interview-john-knox.

[138]D. Macgraw and K. Wienhofer, 'The Malé Formulation of the Overarching Environmental Human Right', in J. Knox and R. Pejan (eds.), *The Human Right to a Healthy Environment* (2018), 215, at 221.

[139]Ibid.; Malé Declaration on the Human Dimension of Global Climate Change (14 November 2007).

[140]Knox, *supra* note 123, at 482–3; FCCC, Bali Action Plan, Decision 1/CP.13, FCCC/CP/2007/6/Add.1 (2008), para. 1.

[141]Human Rights Council, 'Human Rights and Climate Change', UN Doc. A/HRC/RES/7/23 (2008); Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights, UN Doc. A/HRC/10/61 (2009).

[142]A list of activities and documents is available at the Office of the United Nations High Commissioner for Human Rights, 'Climate Change', available at www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/ClimateChange.aspx.

[143]Human Rights Council, 'Human Rights and the Environment', UN Doc. A/HRC/RES/19/10 (2012).

[144]UCL Global Governance Institute, *supra* note 137.

[145]Ibid.

[146]See *supra* note 141.

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The strategies of lawyers in the UN climate regime were met with equal success. The year before negotiations were set to expire in 2009, a group mainly comprised of lawyers founded a network that would push to embed human rights in the agreement. Some of these lawyers had previous experience with international human rights law and were working for environmental NGOs such as CIEL, Friends of the Earth, and the Asociación Interamericana para la Defensa del Ambiente. When they attended the COPs, public interest lawyers knew who their likeminded peers were. Lawyers collaborating on projects or working independently would gather at an annual dinner on the sidelines of the meetings. Seeing the need for broad-based collective mobilization, public interest lawyers served a convening role by helping to propel an even greater network, the Human Rights and Climate Change Working Group, which welcomed a large swath of actors from the North and South: civil actors, state delegates, NGOs, and international organizations.[147]

After the climate talks failed to reach an agreed outcome in 2009, the Working Group, among other networks, persuaded states to integrate human rights language the following year in a COP decision that reached beyond the UN climate regime's instruments to reference a Human Rights Council resolution.[148] In the same decision, members were also influential in obtaining procedural 'safeguards' to guide REDD+.[149] Beyond the COP negotiations, members filed communications with administrative bodies of the UN climate regime, for instance requesting due process measures for CDM projects. They also provided direct support to communities with allegations of human rights violations arising from the CDM.

Momentum kept building as Paris drew near. The Working Group helped mobilize influential actors, such as the OHCHR, the Special Rapporteur, and the Mary Robinson Foundation and enlisted major human rights organizations, such as Human Rights Watch, and Amnesty International.[150] Representatives of CSOs, informal caucuses (for Indigenous, youth, and women and gender constituents), and other groups then drafted text they could all buy into. Several months before the COP, they were able to maneuver the text into the draft outcome prepared for the negotiations. Finally, they persisted in raising the text with state delegations. Working hand-in-hand with allied states, they attended informal gatherings and closed-door meetings. They peddled the text, modifying it as needed, doing damage control to keep it in, until it rose to an issue for the COP's last 24 hours. In the end, the group was unable to persuade states wary of rights-based approaches to adopt an operative provision – members of the group believed such a provision could force parties to streamline human rights into the treaty's implementation. This setback notwithstanding, the amended text made it into the preamble of the Paris Agreement.

2.3.3 Lawyering through legal hybrids

The preambular endorsement of human rights is ambiguously circumscribed to generate a 'hybrid' terrain between climate change and human rights law.[151] For instance, the usual duties to 'respect', 'protect' and 'fulfil' human rights are reframed with the terms 'promote' and 'consider' replacing the latter two duties, thereby avoiding positive obligations to prevent violations and take steps toward the realization of human rights.[152] Duties apply to the parties' response measures, such as CDM projects, but not to their ambitions to reduce emissions. They are also attached to the 'respective obligations' of the parties, frustrating any interpretation that the Paris Agreement imposes new duties, for example on parties that oppose human rights.

[147]Schapper, *supra* note 112.

[148]Ibid., at 46–7; FCCC, *supra* note 63, preambular recital 7, para. 8.

[149]Schapper, ibid.; FCCC, *supra* note 63, Appendix 1.

[150]See, e.g., Schapper, ibid.

[151]Eslava and Pahuja, *supra* note 5, at 213.

[152]For a detailed interpretation of the preambular recital see L. Rajamani, 'Human Rights in the Climate Change Regime: From Rio to Paris and Beyond', in J. Knox and R. Pejan (eds.), *supra* note 138, 236, at 245–7.

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Regardless of careful drafting, activist lawyers have begun to extend the normative force of the preambular recital beyond formal delimitations. Lawyers have also added to the treaty's perceived legitimacy insofar as they cite it as an authoritative source for the human rights-climate link when transporting international climate law elsewhere. A recent petition against the oil industry before the Philippines Commission on Human Rights offers an example.[153] The petition was drafted before Paris but lawyers have since cited the preamble in amicus briefs supporting the petitioners.[154] Recalling the creative lawyering used in the Inuit petition, they evoke custom and human rights instruments along with new sources such as the Paris Agreement, principles regarding corporate liability, and the string of UN human rights system documents that activists obtained.

In other instances, lawyers cite the Paris Agreement and further outcomes of the boomerang strategy in litigation that is spreading the 'global' recognition of the human rights-climate link to 'local' courts.[155] There has been a resurgence and diversification of the rights-oriented litigation that the Inuit petition ushered in.[156] International climate lawyers are branching out into transnational litigation networks, partnering with local NGOs and sharing accrued knowledge.[157] They are also expanding public advocacy centres that normally serve delegations from the Global South to 'support meritorious climate cases aimed at holding fossil fuel companies and other climate polluters liable'.[158] All the while, lawyers are making submissions in the UN climate regime to embed human rights into rules that will operationalize the Paris Agreement's carbon markets, as they did with the CDM and REDD+, provoking a further convergence and legitimation.[159]

3. A loose community befitting the field

Returning to the questions posed at the outset of this article, seen from the viewpoint of everyday practices, international climate law is an enterprise realized more or less according to people's aspirations for the world and the law, the routines they emulate and modify, and their unequal capital, among other social and material conditions. Lawyers sought to chart out international climate law as a functional domain with a sense of optimism about novel forms of public international law during the aftermath the Cold War. Their motivations and experiences varied but many were committed to ideals of liberal institutionalism that a rationally designed regime might perfect. After the climate Convention institutionalized principles and managerial arrangements for state negotiations, lawyers set out to propagate international climate law in multivalent forms that enacted divergent rationalities about how the climate problem should be handled legally. These they adapted to fit historically contingent practices in established sites of governance such as the UN human rights system and World Bank.

Over three decades, international climate lawyers thus spread from a tight club to a diffuse group effecting practices of mutual reinforcement that simultaneously diversified their field and community across bureaucracies of international law. My legal-ethnographic description

[153]CIEL also assisted with the petition: *In re Greenpeace Southeast Asia et al.*, Philippines Commission on Human Rights, Case No. CHR-NI-2016-0001.

[154]Client Earth, Amicus Brief: Philippines Commission on Human Rights, Case No. CHR-NI-2016-0001 (2016); Joint Summary of the Amicus Curiae: Philippines Commission on Human Rights, Case No. CHR-NI-2016-0001 (2018).

[155]See, e.g., *ENvironnemnet JEUnesse v. Attorney General of Canada*, Motion for Authorization to Institute a Class Action, No. 500-06 (filed 26 November 2018).

[156]Although pleadings do not consistently draw on 'human' rights, but also rights under constitutions and private law see, e.g. J. Peel and H. Osofsky, 'A Rights Turn in Climate Change Litigation', (2018) 7 TEL 37.

[157]Interview 6 (March 2017); Interview 16 (October 2016); Interview 19 (October 2016); Interview 8 (September 2016).

[158]Institute for Governance and Sustainable Development, 'The Center for Climate Integrity', available at www.igsd.org/initiatives/the-center-for-climate-integrity/.

[159]See, e.g., Rules, Modalities and Procedures for the Mechanism Established by Art. 6, para. 4 of the Paris Agreement, Submission by Sabin Center for Climate Change Law, Columbia Law School (2016).

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of a few small sites where lawyers helped produce the law cannot capture every facet. There are lawyers, for instance, who conduct 'technical assessments' of domestic laws and institutions in the South for UN agencies and World Bank funds to determine whether these countries are 'ready' to receive REDD+ payments.[160] The International Bar Association is drafting a model statute for a unified legal framework for climate litigation that would reach into domestic jurisdictions, based on the precedent of harmonized investor-state arbitration laws.[161] UN Environment is also cataloguing legislation to facilitate law reforms that implement the Paris Agreement, while providing related 'technical legal advice' for 'capacity building' to countries in the South.[162]

These few examples support my primary contention, which the sites that I investigate throw into relief: there is a base tendency among international climate lawyers to manifest similarities and differences across their field in ways that are meaningful to power dynamics between institutional and geopolitical cores and peripheries, to the ethical commitments of international lawyers, and to proliferating forms of international law. I consider these permutations of heterogeneity and homogeneity in turn before reflecting, in the last sections of this article, on what is at stake in theorizing international climate law through practices.

3.1 Reproducing cores and peripheries

International climate lawyers reproduce cores and peripheries along two axes constituting hierarchies of power to 'speak the law'. Along one axis, institutions have relative authority to settle doctrine and practices in the field; and along the other, there are North-South dynamics that channel the flow of lawyers to these institutions. The two axes work together to consolidate power in the UN climate regime's state delegations which have uneven North-South legal representation. External lawyers nonetheless intentionally bolster the authority of the UN climate regime to serve their purposes.

The UN climate regime is the original site for international law relating to climate change and it has maintained authority to decide state obligations and legitimize derivative norms taken up by courts, international organizations, corporate firms, and domestic jurisdictions. As this article has shown, whereas international financial institutions and human rights activists have their own expectations about what the law should say, lawyers have helped them effect a 'double movement' whereby they generate rivalling norms in external spheres of authority before referring to, animating or otherwise bolstering the UN climate regime's authority to legitimize any such norms.

On more than one occasion, lawyers assisted the World Bank to lead the UN climate regime from behind on finance schemes by spearheading the Prototype Carbon Fund and later forest sector funds through technical carbon contracts. When the UN climate regime authorized a global carbon market, transactional lawyers persisted in shoring the market up through ERPAs, which they adjusted to Kyoto Protocol rules but otherwise managed untouched in their proper domain. Activist lawyers making a human rights-climate link used a boomerang strategy that solicited the UN human rights system to pressure the UN climate regime, while also targeting the regime with direct lobbying efforts. Now, they cite the Paris Agreement among other outcomes of their efforts as authoritative sources of law in domestic courts.

Peripheries stay tethered to the UN climate regime because lawyers use legitimated doctrines and practices in this way and also because they engage in 'role splitting'.[163] That is, international climate lawyers assume multiple roles in the field, jumping inward and outward from sites of governance, especially the UN climate regime. Take for example the American international environmental law professor who became the Special Rapporteur fighting for a human rights-climate link

[160]See, e.g., UN-REDD Programme, UN-REDD Support and Country Examples on Legal Preparedness for REDD+ (2014).
[161]International Bar Association, Achieving Justice and Human Rights in an Era of Climate Disruption (2014).
[162]Interview 21 (July 2017); Interview 3 (August 2016).
[163]On role splitting see O. Schachter, 'The Invisible College of International Lawyers', (1977) 72 NULR 217.

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after advising the Maldives during the boomerang strategy as special counsel to CIEL. Or consider one of FIELD's partners who advised AOSIS at the COPs, then launched Baker & Mackenzie's climate finance group, which advised the World Bank on carbon transactions. Lawyers also continue to advise and negotiate on behalf of delegations, and to consult bodies of the UN climate regime, even as they switch professional affiliations. Through role splitting, during a period or lifetime, lawyers move transnationally across the field, consolidating authority in institutions where they enjoy professional cachet.

Role splitting brings me to the second axis along which international climate lawyers reproduce cores and peripheries: lawyering practices in the field replicate power disparities between North and South (and between poorer and richer countries in the South). From the push to establish a treaty-based regime, tensions between North and South have defined international climate law. The field is characterized by opposing understandings of responsibility and by material inequalities, both tied up with the legacy and reincarnations of colonialism. The practices examined in this article suggest that lawyers have embodied these dynamics at times. For instance, when drafting legal options for a convention on the IPCC, exporting legal representation to the COP (from North to South and South to South), soliciting plaintiffs for test litigation, and facilitating conditional and investor-friendly transactions.

There has been resistance to such practices, such as where lawyers drafted a rival contract template to balance the bargaining power between carbon sellers and buyers. Recently, the employment of Northern consultants by a small island state responsible for hosting the COP also became a flash point for geopolitical contestation.[164] The predominance of education and training in elite universities and public advocacy centres in the Anglo-American North, through which lawyers from the Global South also flow, speaks to and muddles these tensions.[165] For, irrespective of where lawyers come from, their practices accomplish a 'structural homology' that binds international climate law to parochial knowledge and mercurial concepts, such as sustainable development.[166]

Accepting that lawyering practices may well be motivated by 'good intentions' – as lawyers transfer professional capital and funds from richer to poorer peoples – it is possible that what appears beneficial, can obscure inequalities that go unaddressed.[167] Of course, there are nuanced geopolitical dynamics within institutions and specific areas of activity that problematize sweeping claims about binary power. The case of human rights-climate activism justly illustrates how lawyering practices may at least result in *ambivalent* consequences. From the small narrative presented here, activist lawyers appear to have come from or are closely allied with diverse places and institutions. These lawyers seek to embed human rights in diplomatic negotiations and finance schemes to prevent and redress harms that local people experience. However, to the extent that lawyering techniques ameliorate, and

[164]M. Darby, 'Fiji Climate Lead Challenged Consultants' Influence before Losing Job', *Climate Home News*, 6 March 2018, available at www.climatechangenews.com/2018/03/06/fiji-climate-lead-lost-job-challenging-consultants-influence/.

[165]See, e.g., A. Roberts, *Is International Law International?* (2017).

[166]I thank an anonymous reviewer for suggesting lawyering practices may exhibit Bourdieu's notion of structural homology, whereby the apparently shared predilections and behaviours of different social classes reproduce hierarchies that those commonalities supposedly transcend. An account from the Director of Environmental Affairs at the World Bank during early international environmental negotiations is perhaps illustrative. Referring to the 'population-poverty-environment nexus', which creates a 'pessimistic' dilemma for the future, he explains, 'The notion of sustainable development gained currency in the late 1980s as the philosopher's stone which would enable practitioners of development economics to resolve [this dilemma] … It is important when considering the role of the development institutions to note that while industrial countries were to display a more vigorous form of "green politics" over this period, there was nevertheless a world-wide progression in the acceptance (and acceptability) of environment as a serious factor in economic planning and administrative practice. So the developing countries which borrow from the World Bank have been part of the overall trend, although they may have moved more slowly (at least to begin with) and they do have a different agenda.' See Kenneth Piddington, 'The Role of the World Bank', in A. Hurrell and B. Kingsbury (eds.), *The International Politics of the Environment: Actors, Interests, and Institutions* (1992), 212–13.

[167]See, e.g., S. Pahuja, 'Global Poverty and the Politics of Good Intentions', in R. Buchanan and P. Zumbansen (eds.), *Law in Transition: Human Rights, Development and Transitional Justice* (2014).

therefore maintain, practices with contested structural effects, such as North-South project finance, lawyering is concurrently transformative and reifying.[168]

3.2 Diverging ethical commitments

A second manner in which lawyers reproduce heterogeneity and homogeneity in their field and community is through shared yet uneven ethical commitments. International climate law is often said to be caught between rationalities of environmental protection, economy, and justice. Most legal professionals working in the field are dedicated to tackling environmental protection legally. They may diverge, however, over ethical commitments to economy and justice when deciding the means to pursue their overarching commitment in day-to-day activities.

Recall that human rights activists know who the likeminded lawyers are and organize gatherings to strategize among themselves on the sidelines of the UN climate regime. Activists are far removed from the mega firms of speculators, or 'climate capitalists', who parachuted into the field, then left when the carbon market cooled off.[169] International climate lawyers run in separate circles because they adhere to an ethic that colours how they perceive themselves, the world, and the law. In turn, they enact idiosyncratic practices in places where they accomplish rationalities aligned with their ethical predilections.

Needless to say, economy and justice evoke different understandings that may be congruent or antithetical. The intergovernmental negotiating committee drafted the Convention on the heels of calls for redistributive economic policies and institutions for a New International Economic Order, which were rendered into norms in the UN climate regime for conditional North-South finance and an (ever shifting) sharing of geopolitical burdens to reduce emissions.[170] The CDM is also a tempered version of a radical proposal that Brazil made in the run up to Kyoto, which would have reallocated economic penalties garnished from non-compliant parties in the North to the South.[171] A commitment to economy in the field of international climate law thus has open potential to mean different things, but it has roughly settled on the Kyoto Protocol's rationality of efficiency, freedom of choice, lowest possible costs, and the liminal concept of sustainable development.[172]

This article explored how lawyers operationalized these understandings through market finance and official development assistance when they represented COP delegations, made submissions to the CDM governing body, and counselled the World Bank. The range of lawyers participating in these endeavours suggests that notions of justice are equally changeable and bound up in definitions of economy. Justice in international climate law alternately means correcting disparities between North and South, safeguarding people from laggard states, and fixing the symptoms of these pathologies appearing in detailed rules. Activist lawyers as well as those serving delegations in the UN climate regime advance these notions of justice when they seek compensation from states and corporations most responsible for damage, procedural fairness, and stronger ambition, sometimes using human rights discourse. Nonetheless, just as rationalities of economy and justice are imbricated in the international climate law field, as mentioned before, human rights and other lawyers who prioritize justice engage with ruling economic doctrines,

[168]On the 'ambivalences and contradictions' of human rights practices, including how human rights may be 'a tool of strategy and mobilization for oppressed groups', while also re-enacting statist and market-oriented practices relating to development see B. Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (2003).

[169]P. Newell and M. Paterson, *Climate Capitalism: Global Warming and the Transformation of the Global Economy* (2010).

[170]See generally Rajamani, *supra* note 25.

[171]See *supra* note 57.

[172]The Convention also enshrines principles relating to an 'open international economic system', 'economic growth', and 'sustainable development': FCCC, Art. 3.

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practices and institutions, which they help legitimize and reproduce. Ethical commitments to economy and justice may therefore be passionate, but they tend to work by degree.

3.3 Accomplishing plural legal forms

Finally, mapping the everyday practices of international climate law reveals that lawyers operating in the field share knowledge, skills and resources, while they separately accomplish plural legal forms. Lawyers have some basic competence dealing with the law, for example, drafting text, and being aware of, interpreting, and applying legal instruments. But multivalent legal forms proliferate unevenly across sites of governance: any single locality contains overlapping treaties, directives, policies, decisions, vocabularies, and techniques that lawyers and non-lawyers reproduce. Lawyers further deepen this complexity when they address matters that are perceived to have attributes that are exceptionally 'legal' or to benefit specifically from professional capital.

The UN climate regime is the clearest example. Again, perhaps all international climate lawyers share knowledge about and refer to the UN climate regime's doctrines. They are not, however, equally familiar with the self-referential and layered rulemaking of the treaty-based regime. The UN climate regime is imbued with a culture of legality that values custom and treaties in addition to fluid legal reasoning, which binds diplomatic negotiations to rules that conceivably promote quicker lawmaking and international co-operation. In this context, where everyone argues through law, lawyers guard the regime from the potential for unruliness when they uphold idiosyncratic understandings of law equated with textual rigour and procedural constraint.

Lawyers affiliated with external institutions, such as the World Bank, law firms, and public advocacy centres, discharge similar functions when they 'split' professional roles to represent or lobby states. But outside the regime, proficient lawyering is tangential. Activist lawyers are technicians and campaigners who provoke a convergence between 'universal' human rights and international climate law. Human rights activists occupy a place of 'betweenness' from where they perform boomerang strategies, vernacularize rights in domestic courts, and expose local cases globally. In the attempt to tie seemingly remote branches of international law together, lawyers occupy this same place and enhance campaigns by reframing technical legal sources and doctrines.

Transactional lawyers leverage different jurisdictions as well, suggesting a common aptitude for creative lawyering among professionals in the field. On the other hand, lawyering for the World Bank takes managerial forms said to fit with the Bank's constituent instrument. These include operational directives, direct lending agreements, and market-based ERPAs, which expanded to match the Bank's mandate of active environmental governance. Specific terms in model contracts for arbitration, conditional payments, and 'additionality' require distinctive creativity: the transactional imaginary is concentrated in micro-level terms that depoliticize the interests and bargaining power of the Bank, buyers, and sellers in sequestered forms of confidential regulation. Human rights lawyers would not be expected to manage these flat, bricolage techniques, nor would transactional lawyers be expected to rally a civil network. Instead, international climate lawyers discipline markets, regimes, international organizations, and courts through endless configurations of legal form, effecting arcane law work with a modicum of professionalized competence and reciprocity.

4. Everyday international (climate) law practices

What is at stake in theorizing international climate law through everyday practices? My claims about lawyering in the field offer second order reflections for the practice of international law scholarship. I mentioned at the beginning of this article that scholars have been systematizing rules and institutions to scope a discipline. The irony of this pursuit is that scholars classify

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and analyse international climate law, while generally agreeing it transcends coherence.[173] Their assessment began in the mid-2000s with analogies to international law's 'fragmentation', borrowing from the International Law Commission's report on the topic.[174] The scholarship grew to consider plays on fragmentation involving 'regime interactions', 'multilevel governance', and 'transnational climate law' often with attention to a purported lack of hierarchy.[175] The focus in this article on multiple sites of governance is, therefore, not novel. Rather, I suggest that the proliferation of international climate law is purposive and effectively reifies extant rationalities, institutions and power in the broader field of international law.

The ample scholarship on international climate law's complex normative and institutional landscape invites us to decentre assumptions about the sources, content and qualities of law. Emerging disciplinary re-classifications of law 'beyond the state' thus aggregate varied legal forms around different territorial jurisdictions and institutions. However, with rare exceptions, they do so without interrogating the mundane practices in newly taken-for-granted configurations that make and remake the law. Perhaps as a result, scholars also tend to represent the proliferation of international climate law as something that has 'happened' – a structural inevitability that mirrors sources of emissions or an ineluctable consequence of history, following bleak multilateral pledges and US disengagement, when I propose that everyday practices obtain the law's diversity.

There is no unified theory of international law practices, rather an orientation toward reflexive and engaged scholarship that explores what people and materials do, and have done, to effect law in patterned activities of daily life. International law scholars have long called for this mode of praxis which, above all, adopts a descriptive style to capture how law is made and remade in plain view. This, Anne Orford restates as the attempt 'to make visible precisely what is visible' and 'to arrange what we have known'.[176]

Relevant insights from critical legal theory, Third World Approaches to International Law, actor-network theory, constructivist, Bourdieusian, and other approaches that describe everyday practices are distinct, sometimes clashing.[177] Their tensions notwithstanding, beyond a preference for description, scholars concerned with practices arguably share generic commitments. For example, turning to practices means rallying around the notion that international law does not follow a linear progression toward fragmentation or improvement; nor are its structures fixed. Historical and structuralist narratives of international law are congruent with a practice-orientation when they 'arrange' situated choices over trajectories of time and place.[178] Hence, practice scholars refuse to essentialize international law's latest components (be they state-centric

[173]Despite this acknowledgment, scholars still generally argue that regulatory cohesion should be promoted where possible.

[174]See, e.g., H. van Asselt, F. Sindico and M. Mehling, 'Global Climate Change and the Fragmentation of International Law', (2008) 30 *Law & Policy* 423; M. Young, 'Climate Change Law and Regime Interaction', (2011) 1 CCLR 147; Study Group of the International Law Commission, Report on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682 (2006).

[175]For examples in the legal discipline see, e.g., Young, ibid.; van Asselt et al., ibid.; J. Peel, L. Godden and R. Keenan, 'Climate Change Law in an Era of Multi-Level Governance', (2012) 1 TEL 245; Boyd, *supra* note 6; T. Etty et al., 'Transnational Climate Law', (2018) 7 TEL 191; Bodansky, Brunnée and Rajamani, *supra* note 1, at 258–94; S. Humphreys, 'Climate Change: Too Complex for a Special Regime', (2016) JENRL 51.

[176]A. Orford, 'In Praise of Description', (2012) 25 LJIL 609, at 617–18, citing respectively M. Foucault, 'La philosophie analytique de la politique', in D. Defert and F. Ewald (eds.), with J. Lagrange, *Dits et ecrits, 1954-1988* (1994), Vol. 3, 540–1; L. Wittgenstein, *Philosophical Investigations* (1958), 47. See also Eslava and Pahuja, *supra* note 5, 218 (on 'legal-ethnography'); Johns, *supra* note 2, at 21–3 (on 'quasi-ethnography').

[177]For examples of diverse practice approaches to international law see G. Sullivan, '"Taking on the Technicalities" of International Law – Practice, Description, Critique: A Response to Fleur Johns', (2017) 111 *AJIL Unbound* 181; Eslava and Pahuja, *supra* note 5; A. Riles, *Collateral Knowledge: Legal Reasoning in the Global Financial Markets* (2011); Johns, *supra* note 2; Brunnée and Toope, *supra* note 2; F. Mégret 'Practices of Stigmatization', (2013) 76 LCP 287; Y. Dezalay and B. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (1996); Rajkovic, Aalberts and Gammeltoft-Hansen, *supra* note 7; Goodale, *supra* note 120.

[178]For example, Hilary Charlesworth exhorts us to turn away from discourses about recurrent crises toward examining how structural injustices are reproduced in everyday life: H. Charlesworth, 'International Law: A Discipline of Crisis',

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or not) and its stasis or teleological development. However, they refrain from discounting the force of structural inequalities and the contingency of ideational pursuits.

International law, as a practice, is at base a performance with epistemic and material conditions.[179] Practices are fuelled by dispositions that are 'intentional and unintentional' and coloured by relatively shared experiences of the world.[180] While aspirations are therefore basic to action, they are grounded in the small places where people create and live out the law and, as such, are qualified by material existence. Documents, bodies, sustenance, and information technologies moderate our predilections and trouble the tidy stories of causal and doctrinal accounts.[181] In turn, international law concepts of sovereignty, human rights, common concern, and sustainable development approximate the characteristics and routines of the material world, which are then partially reconstituted by our presumed ability to 'shape and control' nature.[182]

Practice-oriented scholars thus refuse to succumb to oppositions between the ideational and material and similar oppositions between stability and change, the international and national, structure and agency, and the natural and positive, to name a few. Analytic dichotomies serve disciplinary claims to relevance, are fictitious or, at best, are mediated by the unfolding of practices – a constant, generative process wherein binaries are mutually produced.[183] While this kind of transgression might descend into conceptual flatness, international law is not everything and nothing.[184] It is recursive, banal, messy, personal, and reifying of longstanding and consequential power imbalances, yet fundamentally open to struggle and change. And, for the scholar of international law, collapsing the divide between practice and theory entails a critical distancing and return to intimacy, a yielding to the openness praxis.[185]

This article has sought to reimagine international climate law in a critical mode that describes a field of complex, situated practices through which lawyers help reproduce and resist the law. Extending our sights across the field, we can visualize the law's already visible operation in institutions that scholars have been cataloguing for a discipline. Among them are the very same bureaucracies and networks whose practices are more studied for their imbrication with other fields: official development assistance agencies, UN Environment, multilateral banks, the Food and Agriculture Organization, the UN Development Programme, and environmental and trade regimes, for example. If international climate law gives rise to and underlies instruments and techniques within these localities, there are people and materials caught up the process.

This purposive quality of practices troubles assumptions that international law relating to climate change is automatically 'mainstreamed'. Raising the climate as a special issue for the UN system and framing it as a common concern of global scale – implicating the North and South and presuming the commensurability of emissions wherever and however they occur –

(2002) 65 MLR 377. See also Orford, *supra* note 176. For one example of histories of international law that foreground practices see Anghie's account of positivist techniques in Anghie, *supra* note 64.

[179]Eslava and Pahuja, *supra* note 5, at 202–3, 214–15; E. Adler and V. Pouliot (eds.), *International Practices* (2011).

[180]Johns, *supra* note 2, at 23.

[181]See F. Johns, 'Data, Detection, and the Redistribution of the Sensible in International Law', (2017) 111 AJIL 57; A. Riles, 'The Anti-Network: Private Global Governance, Legal Knowledge, and the Legitimacy of the State', (2008) 56 AJCL 605. On material agency see Hohmann and Joyce, *supra* note 87.

[182]K. Khoday and U. Natarajan, 'Locating Nature: Making and Unmaking International Law', (2014) 27 LJIL 573, at 586.

[183]See, e.g., B. Latour, *Reassembling the Social: an Introduction to Actor-Network Theory* (2005) (on rejecting the divide between material and social), 75–6; Rajkovic, Aalberts and Gammeltoft-Hansen, *supra* note 7, at 13 (on refusing axiomatic juxtapositions); Anghie, *supra* note 64 (on the disciplinary construction of the natural and the positive, and the international and national); Riles, *supra* note 181 (on sets of institutions, actors, doctrines, ideas and documents as sets of knowledge practices); Eslava and Pahuja, *supra* note 5 (on the ideational and material, and theory and practice); Adler and Pouliot, *supra* note 179.

[184]Eslava and Pahuja, *supra* note 5, at 220; Concerning the reconstruction of flat ontologies using concepts such as 'assemblages', 'actor-networks', 'fields', 'communities', see C. Bueger and F. Gadinger, *International Practice Theory* (2018), 106–10.

[185]U. Natarajan, J. Reynolds, A. Bhatia and S. Xavier, 'Introduction: TWAIL – on Praxis and the Intellectual', (2016) 37 *Third World Quarterly* 1946.

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cannot be detached from Malta's initiative, stretching back to its prior elaboration of the common heritage principle. Nor can terms of payment for CDM projects and snowballing model contracts be isolated from lawyers designing ERPAs for the World Bank. The preambular reference to human rights in the Paris Agreement, now being cited in transnational litigation, equally would not have crystallized without the Human Rights and Climate Change Working Group.

It also follows from the purposive nature of international climate law that its proliferation is anything but neutral. International climate lawyers sought out and propagated their trade by tweaking practices aligned with the demands of places where they worked. Whether they oversaw the rules of diplomatic conferencing, drafted commercial agreements, or transported human rights to and from the UN human rights system, lawyers breathed new life into prevailing institutions of international law. In doing so, they sustained the driving rationalities of liberal institutionalism, economic efficiency, and the universalism of human rights, along with legal concepts of nature that manifest in the distribution of benefits and burdens among peoples.

To summarize, the corollary of my proposition that international climate lawyers help reproduce similarities and differences in their field and community is that they reify analogous traits in the broader field of international law: institutional and geopolitical cores and peripheries, ethical commitments, and multivalent international law practices. Climate change may be 'legally disruptive', as scholars contend, or it may well justify renewed faith in longstanding institutions.[186] Either way, as the discipline matures, and as international lawyers respond to the climate 'crisis', being sensitive to agency, historical contingency, and the structural effects of everyday practices may complement discussions about assimilating international climate law into facets of governance and the desire for continuity.

[186]E. Fisher, E. Scotford and E. Barritt, 'The Legally Disruptive Nature of Climate Change', (2017) 80 MLR 173.

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