
4. Transnational environmental law: the birth of a contemporary analytical perspective

Louis Kotzé and Caiphaz Soyapi

INTRODUCTION

1. Introduction

Environmental law is now a fully recognised and autonomous specialised field of law. It can broadly be considered to include the collection of all legal norms that aim to govern the human-environment interface. Domestic environmental law norms have developed in tandem with, and to a large extent predicated on, the body of environmental law norms that have gradually been developing in the international regulatory arena. Like its domestic counterpart, international environmental law (IEL) has come of age, at least since the Stockholm Conference on the Human Environment in 1972.¹ While much of the analytical focus of scholars has principally revolved around these two bodies of law, a new paradigm of analysis is evolving. It seeks environmental norms in transnational spaces within and beyond the axiomatic confines of domestic environmental law and IEL. This analytical approach focuses on the emergence of transnational environmental law (TEL). TEL is steadily becoming a burgeoning field of analytical inquiry but not yet a fully autonomous taxonomically independent body of law.²

TEL is defined to include the current body of pure juridical and non-legal but law-like norms. These norms are situated at various geographical levels ranging from the local to the international sphere. They are created by state and non-state actors in regulatory spaces within and beyond states. They aim to respond to complex and interconnected global environmental problems. The scope of TEL encompasses considerably more than either domestic environmental law or IEL; it transcends geographical and functional boundaries; and it includes a multifarious range of norms that are created and enforced by multiple actors. Notwithstanding these factors, TEL arguably remains an analytical approach or perspective that seeks to situate and to understand environmental law in contemporary global terms. While it may do so in the

future, TEL has not yet developed taxonomically into a fully autonomous body of environmental law:

[TEL] does not conjure into existence a new, previously unknown layer of jurisdiction that is untrammelled by either the geographical limitations of national/regional law or the legitimacy and authority deficits of international/global law. Nor does it gather and reconfigure legal principles and practices around a new substantive theme, as is currently happening in the field of climate change law. It does, however, offer a powerful new mode of understanding and engaging with environmental law. More than a domain, the concept of transnational environmental law embodies an approach to legal studies and practice.³

Fisher⁴ has argued for a more rigorous understanding of TEL. This chapter addresses this challenge. Accordingly, it seeks to elaborate upon and to unpack the notion of TEL and to understand the steady emergence of TEL as the latest analytical approach focused on those legal norms that govern the human-environment interface in the global sphere. It does so in accordance with this structure:

- by reflecting on the various considerations that are driving the emergence of TEL including globalisation; the shift of focus from ‘government to governance’; the issue of fragmentation of IEL and governance; and the ‘radical’ idea of the Anthropocene and the increasingly urgent need for enhanced global environmental governance that its imagery calls for
- by reviewing the conceptual state of the art by briefly investigating several descriptions of TEL
- by identifying and discussing the various processes of transnationalism that are creating TEL
- by applying the TEL framework to the global environmental rights sphere in an attempt to illustrate practically how, and the extent to which, TEL is emerging as a contemporary analytical approach in this specific domain.

THE TRANSNATIONALISATION OF ENVIRONMENTAL LAW

1. Introduction

A unique characteristic of law is its ability to respond to continuously changing socio-economic, environmental, cultural and political

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circumstances and regulatory realities. The following paragraphs reflect on some of the circumstances and regulatory realities that are driving the emergence of TEL.

2. Globalisation

The most evident consideration related to the rise of TEL is globalisation. This is essentially a process describing the intensification of global interdependence and, as a result, a concomitant increase in vulnerability to regulatory challenges that global governance actors, notably states, are experiencing. It can be understood to mean the exponential increase in the flow of people, capital, goods, services and ideas across the globe. Thus globalisation increases the number, reach and intensity of global institutions, including the law, that regulate these phenomena, while expanded legal and institutional arrangements, such as those apparent in trade law, conversely support and further extend the processes of globalisation.⁵

In these ways globalisation is a reciprocal and mutually re-enforcing process of regulatory growth that feeds upon itself and involves the collection of global norms that are evolving to address regulatory challenges beyond the reach of states.⁶ While globalisation requires the adoption of a global regulatory focus, the effects of globalisation on traditional socio-legal and other systems of order have been and continue to be immense. This is because globalisation and its processes and consequences are not only putting the state and its domestic regulatory mechanisms under strain but also compelling states to cooperate globally and to provide for innovative normative arrangements and governance institutions in spaces beyond the state.⁷

Globalisation is essentially challenging age-old truths about the state, law and governance, visions of global order and anarchy, and ways to co-exist sustainably and peacefully. It has been suggested in this context that:

globalization produces a serious challenge to conventional premises: the axiomatic notion of the nation-state as the cornerstone of the territorial sovereignty of the almost 200 states of the world as it developed over centuries, is rapidly losing definition; the state's perceived dominance as provider of the framework within which law is made, administered, adjudicated and enforced is increasingly being challenged; the potential for integration of legal norms across conventional national and international jurisdictions, is growing exponentially.⁸

In addition, globalisation is questioning the continued prevalence of geographically defined territorial dictates as a crucial consideration in the design and focus of environmental law and governance. Moreover it 'appears indeed characterized by a shift from territorial borders to functional boundaries'.⁹ The world, current social reality, and current perceptions of reality are evidently changing. Lawyers especially require 'a fresh vocabulary, and expanded set of concepts, [and] alternative ways of framing the challenge [to govern and maintain order]'.¹⁰ TEL is seen as one of the 'fresh' and 'expanded' ways of framing and responding to prevailing global challenges.

Climate change is a typical example of a global environmental problem that arises as a result of increased globalised human activities. In particular, it strains the regulatory machinery of a state to the extent that climate change cannot be governed only by a single state and its legal and governance order. It is an interconnected global problem that demands a collective global normative response by many states and a diverse range of non-state actors at multiple geographically and functionally defined governance levels.¹¹ This is clearly demonstrated by the current global climate law regime. It consists of multilateral environmental agreements such as the United Nations Framework Convention on Climate Change of 1992, its Kyoto Protocol of 1997, the more recent Paris Climate Agreement of 2015, the domestic climate laws of states,¹² regional climate norms and policies such as those of the European Union,¹³ and non-state climate initiatives.¹⁴ Keohane and Victor properly capture the disaggregated nature of the global climate regime through the term 'regime complex for climate change' which they describe as follows:

When states invest resources in building regulatory regimes, the outcomes can vary along a continuum. At one extreme are fully integrated institutions that impose regulation through comprehensive, hierarchical rules. At the other extreme are highly fragmented collections of institutions with no identifiable core and weak or nonexistent linkages between regime elements. In between is a wide range that includes nested (semi-hierarchical) regimes with identifiable cores and non-hierarchical but loosely coupled systems of institutions. What we are calling 'regime complexes' are arrangements of the loosely coupled variety located somewhere in the middle of this continuum. Regime complexes are marked by connections between the specific and relatively narrow regimes but the absence of an overall architecture or hierarchy that structures the whole set.¹⁵

TEL is primarily concerned with the issue of 'regime complex'. Thus it focuses on the multitude of state and non-state actors, the various formal

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and informal institutions they create to govern this challenge, and the multiple state and non-state rules they produce to address environmental problems.

3. From 'Government to Governance'

Globalisation and the birth of the concept 'governance' go hand in hand. The state's historically central – even almost exclusive – role in regulation and its ability to perform many of its traditional regulatory functions are being significantly altered as a result of the steady emergence of new modes of regulation. These involve 'processes through which collective goals are defined and pursued in which the state (or government) is not necessarily the only or most important actor'.¹⁶ The dwindling central importance of government as the only actor responsible for regulation is well documented.¹⁷ It is now generally accepted that the regulatory landscape is shifting its focus from the overbearingly important role of a centralised, top-down government to more disaggregated, non-centralised and hierarchical regulatory forms of governance in which multiple state and non-state actors are involved.

This shift from 'government to governance' is being caused by the forces of globalisation. These include:

- significant advances in communication technology and social media that are connecting the world
- modes of travel that enable global connectivity
- systems of free trade
- the creation of regional and international superstructures of governance such as the European Union
- the rise of epistemic networks and non-governmental organisations as well as non-state, but law-like, rules
- the emergence of treaty regimes and international norm-producing, functional, non-state organisations such as the World Bank that enable inter-state cooperation around specific concerns
- the steady growth of economically dominant and politically influential multinational corporations that function in an intermeshed transnational setting
- the emergence of global regulatory problems such as climate change that require multi-stakeholder solutions and that are affecting everyone everywhere with scant regard for physical borders or for the sanctity of state sovereignty.

As a result of these impulses, the strict separation between public and private forms of regulation is increasingly blurred, while forms of public and private ordering overlap and become interchangeable.¹⁸ ‘Governance’ is subsequently providing a new regulatory mind-set in the sense that it is more ‘open’ or flexible. This is because it takes up novel forms of permeability of the state that involve less formal bureaucratic government arrangements while relying on informal avenues for norm creation and enforcement. The governance mind-set also provides greater linkages between actors from different institutional levels. It involves a shift of power from orthodox and traditionally well-established actors situated at clearly defined hierarchical levels to organisations or individuals who now must link and coordinate different stakeholders in a non-hierarchical setting. The governance mind-set moves away from hierarchy towards more unstructured consultation, negotiation and ‘softer’ normative regulatory arrangements such as the Equator Principles.¹⁹ While these new governance processes are not necessarily entirely unstructured, chaotic and non-hierarchical, they are conducive to facilitating more adaptive, responsive, productive, multi-actor and decentralised forms of regulation that do not exclusively depend on the state for their legitimacy and effectiveness.²⁰ These new governance arrangements assume increasingly autonomous forms of social orderings that constitute their own cognitive spaces in the regulatory arena.²¹ The rise in particular of non-state entities in the governance realm is opening up hitherto prohibitive closures in government-dominant epistemologies to alternative understandings of regulation. In this way the state has a less pronounced role in promoting social welfare and non-state actors have the potential to assert themselves gradually as co-governors, in varying degrees, alongside the state. TEL essentially aims to respond to these developments and to provide alternative understandings of regulation.

4. Fragmentation

A third consideration that is contributing to the emergence of TEL is the fragmentation of IEL.²² In short, international law is considered to be fragmented as a result of a highly decentralised process of normative and institutional development that responds to specific global problems; often through clustered regimes. These regimes exist in silos as they are centred on separate functional areas such as environment, trade, human rights and humanitarian law. In most instances these functional areas are themselves highly fragmented. IEL, with its separate tracks of climate law and governance, global biodiversity law and governance, and global

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oceans law and governance, clearly illustrates this functional fragmentation. Various governance institutions such as treaty secretariats – for example, the United Nations Framework Convention on Climate Change Secretariat – and international institutions such as the United Nations Environment Programme (UNEP) have been created to enforce the fragmented but burgeoning body of global normative arrangements that must address numerous global environmental problems.²³

As Biermann has illustratively indicated:

Since 1972, when UNEP was set up, the increase in international environmental regimes has led to ... considerable fragmentation of the entire system. Norms and standards in each area of environmental governance are created by distinct legislative bodies – the conferences of the parties to various conventions – with little respect for repercussions and links with other fields. While the decentralized negotiation of rules and standards in separate functional bodies may be defensible, this is less so regarding the organisational fragmentation of the various convention secretariats, which have evolved into quite independent bureaucracies with strong centrifugal tendencies.²⁴

Collectively, in tandem with globalisation and the ‘governance shift’, fragmentation contributes to a continuously evolving and growing body of environmental law and governance rules and institutions that aim to address an entire range of global environmental problems. The end result is the steady growth of a highly complex, diversified and multifarious architecture of global environmental law norms, institutions and governance actors that could conveniently be situated under the umbrella of TEL.

5. The Anthropocene and Enhanced Regulation for Global Problems

Today, humanity is confronted by events that, according to various scientific accounts, are set to affect the continuation of life on Earth.²⁵ The climate is changing; biodiversity is being lost at alarming rates; inter-species and intra-species injustices are intensifying; and a host of ecological cycles are being flung into such disarray that the possibility for recovery seems remote. Similar events of ecological upheaval have occurred during earlier stages in Earth’s geological history. But there is one significant difference: the current socio-ecological crisis is being caused not by volcanoes or meteors but by humans. It is in this context that scientists have recently suggested that the Earth system might have entered a new geological epoch called the Anthropocene. The Anthropocene was first introduced in a 2000 publication by Paul Crutzen and

Eugene Stoermer as a term of art expressing the geological significance of anthropogenic change.²⁶ By emphasising the central role of mankind as a major driving force in modifying the biosphere, the term ‘Anthropocene’ suggests that the Earth is rapidly moving into a critically unstable state. Earth systems are gradually becoming less predictable, non-stationary and less harmonious as a result of the global human imprint on the biosphere.²⁷

Globalisation and its impacts exacerbate the type and severity of socio-ecological conditions arising in the Anthropocene as a result of amplified human activity globally. These conditions increasingly impact upon an interconnected Earth system. The Anthropocene and its imagery, supported by evidence of its emergence today, serve as evidence that traditional modes of domestic environmental law and IEL have been unable either to preserve relatively stable Holocene conditions or to prevent human-induced Anthropocene events from affecting Earth system integrity. The deepening socio-ecological crisis requires a radical alternative to the business-as-usual approaches to environmental law and to the way these juridical interventions are perceived. For lawyers and juridical scientists, an alternative mindset is only possible if there is an opening-up of epistemological closures that currently prevent them from thinking differently about environmental law. A possible alternative regulatory mindset, such as TEL, must be directed at two outcomes: to think creatively about the potential of more contemporary juridical constructions to respond better to Anthropocene exigencies; and to counter human domination, create order, and strive for better regulatory outcomes in this new geological epoch.

But the link between the Anthropocene and its potential implications for TEL do not stop there. Part of the imagery that the Anthropocene offers requires an expanded spatial cognition of these factors:

- what the Earth and its systems are
- global Earth system transformations
- how Earth systems are connected globally
- how an increasingly integrated global human society is related to and dependent on the Earth system
- how such a human society impacts upon the Earth system.

The Anthropocene demands not only localised regulatory but also truly global interventions which transcend borders and which are sensitive to cause-and-effect relationships in the Earth system.

While the global imagery of the Anthropocene should not be generalised by implying that the same socio-ecological conditions occur and are

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experienced by everyone everywhere in exactly the same way,²⁸ the arrival of the Anthropocene arguably requires a novel way of thinking about law, politics and social ordering in planetary terms. As Dalby has suggested:

Discussions of the Anthropocene necessarily require thinking at the scale of the biosphere and over the long term. This is a planetary issue, matters at the large scale require some consideration of ethical connection and, perhaps, the implicit invocation of a single polity, however inchoate.²⁹

One way to think about environmental law revolving around a single global polity in planetary terms is through the lens of Earth system science and, more specifically, through the lens of Earth system governance. Recognising the connectivity, nonlinearity and complexity of socio-ecological processes, Earth system science is concerned with the 'study of the Earth's environment as an integrated system in order to understand how and why it is changing, and to explore the implications of these changes for global and regional sustainability'.³⁰ Fundamentally rooted in Earth system science, Earth system governance has been developed as a reactive counter-narrative to localised, state-based and narrowly focused regulatory approaches to environmental issues. These narrow approaches involve the trite application of an issue-specific environmental governance regime that focuses – among others – on pollution control, nature conservation and wildlife and that predominantly employs formal, state-based law and state institutions.

What is contemplated through Earth system governance is a more open, holistic, flexible, multi-scalar and multi-actor regulatory approach. Such an approach would be designed to capture and address, first, the many complex global developments that transform the bio-geophysical cycles and processes of Earth; second, the complex relations between global transformations of social and natural systems; and, third, the multi-scale consequences of ecological transformation. Such a system of Earth system governance has been defined as:

The interrelated and increasingly integrated system of formal and informal rules, rule-making systems and actor networks at all levels of human society (from local to global) that are set up to steer societies towards preventing, mitigating and adapting to global and local environmental change and, in particular, earth system transformation.³¹

Earth system governance clearly is not only concerned with ways to influence and direct the Earth system (the governance of aspects of technological innovations that are able to change the Earth system might

resort under its ambit): '[E]arth System governance is [also] about the human impact on planetary systems. It is about the societal steering of human activities with regard to the longterm stability of geobiophysical systems'.³² Because law is particularly adept at steering human behaviour, it is a crucial aspect of Earth system governance. Any Earth system governance-based regulatory responses, including its juridical elements, must involve a range of functions:

- respond to persistent Earth system uncertainty
- nurture new responsibilities and modes of co-operation as a result of intergenerational and intragenerational, spatial and socio-ecological interdependence between people, countries, species and generations
- respond to the functional interdependence of the Earth system and Earth system transformations
- respond to the needs of an increasingly integrated globalised society
- respond to extraordinary degrees of socio-ecological harm.³³

Because domestic environmental law and IEL on their own will be unable to respond to such complexity and because it takes a more holistic view of law and governance and of the regulatory problem it seeks to address, TEL arguably is a more likely and potentially useful approach to global environmental governance in the Anthropocene.

THE CONCEPTUAL STATE OF THE ART

As an 'emergent system',³⁴ TEL is no longer only an abstract idea but also a fast-developing analytical perspective on environmental law that increasingly demands the attention of scholars. There are various descriptions of this concept, although a generally accepted definition remains elusive. Reasons for this might be attributed to disagreements on what 'transnationality' means; what the parameters of 'environmental' concern could entail; and what 'law' could mean in the context of TEL. As Lin and Scott state, 'the language of the 'transnational' is useful and appropriate, perhaps in part because its meaning is contested and its boundaries unclear'.³⁵ How, then, do scholars understand TEL?

Wiener³⁶ sees TEL – also referred to interchangeably as 'global environmental law' – as 'a marriage of international and national environmental law; something old, something new, something borrowed

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for something blue'. Yang and Percival³⁷ define global environmental law as an emergent system which comprises:

the set of legal principles developed by national, international, and transnational environmental regulatory systems to protect the environment and manage natural resources. As a body of law, it is made up of a distinct set of substantive principles and procedural methods that are specifically important or unique to governance of the environment across the world. It includes: (1) public international environmental law ... (2) national environmental law ... and (3) transnational law, which describes the set of legal principles used to regulate the cross-border relationships between private individuals and organizations.

In terms of the latter description, one of the ways through which environmental law has become transnational is through the internationalisation of environmental law. The internationalisation of environmental law involves not only the actual creation of IEL but also the interactive political and diplomatic process through which state and non-state actors engage to create these laws.³⁸ Presumably, these processes present rich opportunities for cross-fertilisation that has the potential to influence the creation of some common global legal rules. These rules could at least be based on the same ideas and influences, if not on exactly the same content.

However, the internationalisation of environmental law is only part of a much larger project of the transnationalisation of environmental law. The *nationalisation* of IEL, the inter-jurisdictional transplantation of laws or the *inter-nationalisation* of laws, the regionalisation of national environmental laws and the nationalisation of regional environmental laws also play a part in environmental law becoming transnational. Transnationalisation in this context could thus be explained as the 'legal regulation of the full gamut of economic, cultural, social, and, in this context, environmental interaction between and across nations'.³⁹

TEL could also be understood in terms of the geography of environmental law; an approach that corresponds with the idea that environmental law should respond to Earth system science and governance in the Anthropocene (see the discussion above). Kysar explains that 'law contains its own geography':

the geography implicit in law will over time come to resemble that of the earth sciences. As the category of environmental pathways acknowledged by law expands and diversifies, and as the operations of those pathways come to be seen as hemispheric or global in scale rather than national or regional, then eventually, the claims of deep interconnection so prominent in environmental

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science, and so urgently pressed in environmental politics, also will find concrete expression in environmental law.⁴⁰

Arguments for an expanded geography of law to fit more closely the expansive reach and interconnected global nature of the Earth system resonate particularly well with the concept of Earth system governance. Through the lens of Earth system governance, TEL has a more expansive geography and it has the potential to expand even further its geography to resemble more closely that of the Earth system.

More recently Shaffer and Bodansky⁴¹ have explained that TEL is much broader than international environmental law and that it subsumes the latter legal sub-discipline. In their view, TEL most usually involves inter-state cooperation in a transboundary setting. Moreover it relates to the 'migration and impact of legal norms, rules and models across borders ... [and] ... encompasses all environmental law norms that apply to transboundary activities or that have effects in more than one jurisdiction'.⁴² While their focus is on transboundary issues, they seem to imply that transnationalism involves trans-jurisdictionality: a possibility which is reinforced by their reliance on the idea of cross-nationality as used by Holzinger, Knill and Sommerer to study the cross-national convergence of environmental policies.⁴³

As a result of the foregoing analysis of these descriptions of TEL, environmental law is becoming transnational horizontally – between the different national, regional and international levels – and transnational vertically – ranging between nations inter se and between regions inter se. It is becoming transnational in terms of its sources of authority to the extent that it is both private and public due to the numerous state and non-state actors involved. Finally, it is becoming transnational with respect to the expanded geography of law when juxtaposed to the interconnected Earth system to which it applies.

SOME PROCESSES OF TEL

1. Introduction

It is possible to identify a range of processes that contribute to the steady growth of TEL norms, and, more importantly for present purposes, to TEL's analytical agenda. Five of these processes justify a detailed analysis.

2. Transplantation

History is filled with evidence of the interaction of legal systems.⁴⁴ Legal developments in one country can serve as the basis upon which other countries develop their own legal systems through a process of borrowing or transplantation of laws from one country to another. This process of transplantation can happen in diverse ways. For instance, countries with less developed legal systems might import good practice rules or principles into their own legal systems.⁴⁵ Alternatively, scholars from one jurisdiction are exposed to other legal systems through research and other scholarly work and this interaction might result in knowledge transfer. Similarly, transplantation can occur when actors situated at the supranational level borrow from actors at the national level or when actors at the national level borrow from those situated at supranational levels. This is a form of vertical transplantation – also described as trans-echelon borrowing.⁴⁶

Fisher explains that this form of legal transplantation in TEL involves processes of uploading and downloading. For instance, there are some elements of national environmental laws that have been uploaded into IEL and there are international legal norms that have been downloaded into national and regional systems.⁴⁷ One example is that of the development and implementation of environmental impact assessment which originated in the United States. Environmental impact assessment is now widely accepted and operational beyond the United States from where it evolved.⁴⁸ This includes its incorporation in IEL. Thus, environmental laws around the globe could become ‘similar’ because of copying or cross-pollination by one state of another’s legal system, notably to the extent that these are shaped by regional and international law. Interestingly, Shaffer and Bodansky prefer the term ‘mimicry’.⁴⁹

3. Convergence

Convergence is a process whereby environmental laws of some states develop similarly not because of deliberate acts of transplantation or borrowing but as a result of similar external pressures and common functional demands to which these laws must respond.⁵⁰ It could involve the growth of expert networks and the spread of a type of ‘universal’ world culture.⁵¹ Ultimately, convergence is an elaborate process that results in the increased similarity of policies in a certain field across a set of jurisdictions over a period of time in reaction to global regulatory problems such as climate change.⁵² Processes of convergence will normally be driven by states but non-state actor initiatives might also

play a part. The process of convergence allows a more harmonious global regulatory framework to be created when the self-interests of a state are aligned with those of other states or other global governance actors.⁵³ In other words, if there is a convergence of interests, a transnational emergence of norms and principles might occur along the lines of those interests.

An example of convergence is the Strategic Approach to International Chemicals Management (SAICM) that is partly being driven UNEP. One of the objectives of SAICM is to respond to several regulatory challenges in the international chemicals governance regime. The challenges include these:

- the international law and policy framework for chemicals is fragmented and inadequate and needs to be further strengthened
- implementation of international laws and policies is uneven
- coherence and synergies between existing institutions and processes are not fully developed and should be improved
- several countries lack the capacity to govern chemicals adequately at the national, sub-regional, regional and global levels.⁵⁴

The foregoing are problems shared by states and they result in various functional demands and regulatory challenges faced by them.

This initiative – SAICM – does not aim to create one multilateral environmental agreement with a single governing body that should be responsible for global chemical governance. What it does aim to do, in a bottom-up way, is to facilitate greater synergies between the normative and institutional machinery processes of a number of international arrangements such as:

- the Montreal Protocol on Substances that Deplete the Ozone Layer 1987
- the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal 1989
- the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade 1998
- the Stockholm Convention on Persistent Organic Pollutants 2001
- the International Labour Organization's Convention No.170, 1990, concerning safety in the use of chemicals at work.⁵⁵

The approach that SAICM foresees in order to achieve its objectives is very much a 'softer' bottom-up one that includes, among others, an

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enabling phase to build necessary capacity; to develop a national strategic approach implementation plan for participating countries; and to develop regional strategic approach implementation plans. It also includes a drive to encourage intergovernmental organisations, international financial institutions and private actors to support these activities and to consider the development of their own action plans as appropriate.⁵⁶

4. Integration and Harmonisation

Integration and harmonisation refer to multi-country efforts that result in similar approaches or regulatory diffusion to various regulatory issues such as transboundary water governance.⁵⁷ This might include cooperative action among states mutually to recognise each other's environmental permitting systems.⁵⁸ Integration and harmonisation usually play out at the regional governance level. Regional environmental governance is now a fully recognised manifestation or aspect of global environmental governance. It has emerged as a response from regionally grouped states to shared environmental problems and as a means to exert greater influence as a regional collective in global environmental diplomacy, law making and governance. To this end, regional environmental governance is especially desirable:

when the global seems to fail (or, at least, is not an appropriate level to deal with collective action problems) and states simply cannot solve their own environmental problems through unilateral action or where scaling up has the potential to deliver more effective outcomes, then the 'goldilocks principle' kicks in; regionalism becomes attractive as it is neither 'too hot' nor 'too cold' but 'just right'.⁵⁹

Other benefits are the potential for regional environmental governance to provide for enhanced commonalities to address a particular environmental challenge; greater familiarity with key actors; the ability to tailor mitigating and adaptation actions to a smaller global constituency; and the ability to focus on ecologically defined regions such as river basins rather than on political-administrative entities.⁶⁰

There are various examples of regional organisations that have been constituted on the basis of the need for integration and harmonisation. For example, the African Union as a regional body seeks to foster regional integration. So too does the European Union with its elaborate environmental law and governance regime. There is usually a link between the desired goals and the harmonisation and integration efforts that drive the pursuit of those goals. However, in some instances one state takes the lead in the development of norms by adopting rules unilaterally

that other states are forced to adopt. Hegemons like the United States and regional bodies like the European Union have been described sometimes as acting in such a manner as to require other states to adopt similar approaches to theirs.⁶¹

As an example of this approach, many countries had to improve their regulations regarding chemicals after 2006 in order to access the European market after the European Union introduced stringent measures in the form of Regulation (EC) No.1907/2006 of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH).⁶² However, where processes of integration and harmonisation occur, it does not mean that the laws of states have become uniform or similar in every aspect.⁶³ States, as a result of sovereignty, will always have some leeway over the framing and implementation of rules, norms or laws within their jurisdictions.⁶⁴

5. Networking

The creation, sharing and dissemination of ideas by networks of like-minded and influential individuals or groups are essential and significant to the development of TEL.⁶⁵ At a conceptual level, Benford prefers the term 'transnational social movements' to describe networks or groups of civil society that seek to impact the outcomes of global governance. Chirico and Larouche present a persuasive economic argument for networking. For them, 'network effects' occur when the value of certain products to individual users increases as the number of users also increases.⁶⁶ They apply this theory to law where they first lay out a general proposition that the market for legal ideas is also subject to network effects.⁶⁷ The result is that 'the more members of the legal epistemic community subscribe to a given opinion, the more attractive it becomes, sometimes irrespective of its inherent validity'.⁶⁸ As such, these epistemic communities are also perceived to contribute to the development of TEL by facilitating the exchange of knowledge that could indirectly affect normative development.⁶⁹ When these non-state actor networks are actively involved in environmental issues, they are able to influence legal processes by being 'transnational norm entrepreneurs'.⁷⁰

Networking especially occurs through the work of transnational epistemic communities which are groupings of people around a specific issue such as environmental law. The IUCN Academy of Environmental Law is an example of a globally representative transnational epistemic community. Through regular interaction, research and capacity-building events, it seeks to develop environmental law norms in the global domain.⁷¹ Non-governmental organisations play an equally important role

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in networking and in the 'creation' of TEL. Salamon and Anheier believe that the reason:

these organizations have attracted so much attention in recent years is due in large part to the widespread 'crisis of the state' that has been underway for two decades or more in virtually every part of the world, a crisis that has manifested itself in a serious questioning of traditional social welfare policies in much of the developed North, in disappointments over the progress of state-led development in significant parts of the developing South, in the collapse of the experiment in state socialism in Central and Eastern Europe, and in concerns about the environmental degradation that continues to threaten human health and safety everywhere.⁷²

The environment has clearly become a proper concern of global civil society actors and it is beginning to appeal gradually to social movement energies and to energetic global solidarities. Acting outside of the formal government setting, environmental non-governmental organisations 'affirm values that are universally recognized but politically manipulated in their own interest by political agencies'.⁷³ Aiming to 'undo evil or to do good',⁷⁴ non-governmental environmental organisations are popular and enjoy broad based public support. Their activities focus on practical and current matters, specific cases and concrete expressions of human solidarity. While global non-state actors remain unable to participate fully in global environmental law making and diplomacy as a result of their lack of international legal personality, these actors increasingly influence the outcomes of the more formal global juridical processes, thereby indirectly contributing to the development of global environmental norms and structures beyond the state.⁷⁵

In addition to their broader global policy influence at a strategic political and advocacy level, global environmental civil society actors, through their respective networks, sometimes engage in the development of softer, law-like norms that aim to bolster environmental protection. One example is the voluntary ISO 14000 environmental standard that has been developed by the International Organization for Standardization (ISO) as a means to enhance the environmental performance of businesses. ISO is an independent, non-governmental international organisation with a membership of 162 national standards bodies.⁷⁶ Today there is little doubt that ISO 14001 'has become the international benchmark by which corporations can voluntarily develop and assess their environmental practices'.⁷⁷

6. Judicial Comparative Borrowing

Judicial bodies play an important role in the emergence of TEL. Comparative judicial reliance on foreign and international law has been referred to as judicial cross-fertilisation, judicial dialogue, constitutional borrowing, judicial importation and judicial migration.⁷⁸ Through these processes, different legal systems are able more generally to mirror each other. This contributes, however minimally, to some normative uniformity either between two or more countries, in a region or across the globe. One particularly pertinent example of judicial borrowing in the environmental context is the South African Constitutional Court's significant reliance on the burgeoning body of international law pertaining to sustainable development that guided its interpretation of this environmental law concept in South Africa's domestic legal regime in a landmark decision in 2007 – namely the *Fuel Retailers* case.⁷⁹ The court ultimately concluded, first, that 'sustainable development is an evolving concept of international law' and, then, that it:

has a significant role to play in the resolution of environmentally related disputes in our law. It offers an important principle for the resolution of tensions between the need to protect the environment on the one hand, and the need for socio-economic development on the other hand.⁸⁰

TRANSNATIONAL ENVIRONMENTAL RIGHTS IN THE CONTEXT OF TEL

1. The Context

The emergence of TEL is evident in various focus areas of environmental law. One illustrative example is that of environmental rights.⁸¹ These rights have emerged as a continuous and fast-developing body of law globally. This is evident because the environment was not a concern during the first significant global constitutional moment that saw the almost universal adoption of human rights following the Universal Declaration of Human Rights in 1948.⁸² Environmental rights only began to feature in domestic constitutional orders following the United Nations Conference on the Human Environment in Stockholm in 1972. The text of principle 1⁸³ of the Stockholm Declaration provided the impetus for couching environmental concerns in rights terms. It took only a relatively short period of time for the current world-wide adoption of human rights to a healthy environment, of environmentally related procedural rights, of

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other substantive political and socio-economic human rights bearing on environmental interests and, more recently, of the right of nature.⁸⁴ Today, approximately three-quarters of the world's constitutions – 150 out of 193 – include some reference to environmental rights, to environmental responsibilities or to both.⁸⁵ This is a surprisingly large number given that the right to a healthy environment is one of the few rights widely recognised in constitutions today that have no 'ancestral claim' in the International Bill of Rights.⁸⁶

Despite these domestic developments, there is neither a universally applicable global treaty that explicitly provides for an environmental right⁸⁷ nor has such a right been accepted into the corpus of customary international law.⁸⁸ Regionally, however, in addition to the environmental rights in the African Charter on Human and People's Rights and in the San Salvador Protocol to the American Convention on Human Rights, article 3(2) of the Asian Human Rights Charter 1998 provides for the right to a 'clean and healthy environment'.⁸⁹ The Arab Charter on Human Rights 2004 includes a right to a healthy environment as part of the right to an adequate standard of living that ensures well-being and a decent life.⁹⁰

Surprisingly, none of the constituting treaties of the European Union provides for an explicit environmental right. Neither does the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 provide for an explicit environmental right.⁹¹ Rather, environmental entitlements are raised and protected incidentally through the assertion of other rights.⁹² The European Court of Human Rights has been very active in protecting environmental interests in the context of the right to privacy in article 8 of the 1950 Convention and its rich jurisprudence on human rights in the environmental context.⁹³ On the other hand, although the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998 – the Aarhus Convention – provides an environmental right, this right is non-justiciable.⁹⁴ Despite this phenomenon, the Convention significantly strengthens the force of substantive regional environmental constitutional claims because it provides for communications to be brought before its Compliance Committee by one or more members of the public about compliance by any party to the Convention with the Convention.⁹⁵

2. The Emergence of Transnational Juridical Processes

The development of environmental rights globally is not occurring in isolated spaces that are disconnected from one another. Processes of

transplantation, convergence, regional integration and harmonization, networking and judicial comparative borrowing are collectively at play. This suggests the emergence of transnational juridical processes. Through these processes of cross-jurisdictional learning, comparative analysis and legal transplantation – including transnational migration, cross-pollination and sharing of ideas – it is possible to observe the emergence of transnationality in the environmental rights domain. Boyd has indicated that the 1976 Portuguese formulation of a ‘healthy and ecologically balanced human living environment’ is now found in 21 other constitutions and that the decisions on environmental rights by the Supreme Court of India have significantly influenced courts in Bangladesh, Pakistan, Sri Lanka, Uganda and Kenya.⁹⁶

Regional judiciaries are also increasingly borrowing from one another. This suggests that these global judicial conversations are not the exclusive domain of domestic courts. In the *SERAC* case⁹⁷ the African Commission on Human and Peoples’ Rights delivered the first substantive interpretation of a regional environmental right.⁹⁸ Recognising that certain provisions of the African Charter on Human and Peoples’ Rights 1981 were adopted as a reaction to the ‘aftermath of colonial exploitation [that] has left Africa’s precious resources and people still vulnerable to foreign misappropriation’,⁹⁹ the Commission, relying on European Court of Human Rights and Inter-American Court of Human Rights jurisprudence, confirmed that governments have a duty to protect their citizens not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by foreign oil companies.¹⁰⁰ Within an increasingly interconnected globalised world, it is to be expected that transnational comparative environmental conversations such as these will increase. It is clear that ‘the increased citation of judgments and borrowing of legal doctrines from international and foreign courts by domestic judges is a concrete sign of a developing transnational legal culture’.¹⁰¹

These domestic and regional initiatives together with their relatively active judicial oversight bodies are set to be bolstered by the increasingly vocal and influential global civil society movements that champion environment-related rights protection. Working from their domestic jurisdictions and beyond, it is especially global civil society actors that indirectly contribute to cementing, strengthening and further expanding environment-related rights at the global level through their core functions.¹⁰²

An example of a global non-state actor initiative that contributes to the transnational development of environmental rights is the International Rights of Nature Tribunal. In its own words, this people’s tribunal:

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gives a vehicle for re-framing and adjudicating prominent environmental and social justice cases within the context of a Rights of Nature based earth jurisprudence. It gives people from all around the world the opportunity to testify publicly as to the destruction of the Earth – destruction that governments and corporations not only allow, but in some cases encourage.¹⁰³

Civil society actors created the Tribunal in 2014. To date it has been convened thrice: in Ecuador, Peru, and more recently in Paris for the 2015 global climate negotiations. It is based on a methodology that allows concerned citizens to ‘testify’ even in the absence of an ‘accused’ party, such as a state, that has allegedly infringed the rights of nature. While it is by no means a traditional court, it serves an important educational and awareness-raising function.

A second example is the Permanent Peoples’ Tribunal – the successor to the 1967 Bertrand Russell-Jean Paul Sartre Vietnam War Crimes Tribunal that exposed war crimes during the Vietnam War. Similarly, it functions as a public opinion tribunal because its judgments have no binding force. Nevertheless, it could significantly raise global awareness of environmental issues. In March 2017, the Permanent Peoples’ Tribunal will hold a session on hydraulic fracturing. This is an initiative that was initiated by the Global Network for the Study of Human Rights and the Environment, the Environment and Human Rights Advisory, and the Human Rights Consortium.¹⁰⁴ Initiatives such as these, while they cannot strengthen or expand the more traditional global judicial functions, do provide a forum for global civil society actors not only to voice their concerns in non-state spaces but also to contribute, however minimally or indirectly, to the transnational development of environmental rights law.

CONCLUSION

It is relatively clear from the foregoing analysis that TEL is the most recent contemporary analytical tool to try and understand global environmental problems from a regulatory perspective. It is at once also an attempt to respond better to these challenges:

The complexity of the governance landscape presents a challenge for both scholars and for policy-makers. This is a descriptive (or data) challenge and a normative (or legitimacy) challenge as well. For lawyers, the phenomenon of transnational governance is exciting but also destabilizing. We are not quite as certain today that we know what to count as law or that law is inherently tied to the state. Our methodologies for identifying and constructing law have also started to change. In the world of trans-national law and governance, we can

no longer simply read law off the statute book or case report. We have to examine multifarious institutional practices as well.¹⁰⁵

TEL provides an excitingly novel analytical lens for environmental lawyers in their attempts to address the increasingly urgent socio-ecological crisis of the Anthropocene in an interconnected and globalised world. It is suggested that, based on the foregoing analysis, there are sufficient reasons to believe that the TEL project will continue to mature as an alternative approach to scrutinising and to developing further the global panoply of norms that aim to mediate the human-environment interface.

NOTES

1. See for a detailed discussion, Beyerlin and Marauhn (2011, pp. 1–29).
2. In 2012 a specialized peer reviewed journal, *Transnational Environmental Law* (Cambridge University Press), was created that specifically focuses on contemporary developments in TEL.
3. Heyvaert and Etty (2012, p. 2).
4. Fisher (2012, p. 46).
5. Dunhoff and Trachtman (2009, pp. 5–6).
6. Fombad (2012, p. 440).
7. Peters (2005, p. 536).
8. Venter (2010, p. 20).
9. Paulus (2004, p. 1048).
10. Boyd (2010, p. 466).
11. See most recently, Lyster (2015).
12. Climate change is increasingly regulated by states through domestic laws. For an example of the burgeoning body of domestic laws and policies in the South African context, see Humby et al. (eds) (2016).
13. See, for a list of European Commission decisions, directives and regulations, European Commission (2016).
14. See, for example, the work that is being done by the International Council for Local Environmental Initiatives (ICLEI) in this regard at ICLEI Europe (2016). In the initial document, this was referenced <http://www.iclei-europe.org/topics/climate-change-adaptation/>.
15. Keohane and Victor (2011, p. 8).
16. Betsill and Bulkeley (2006, p. 144).
17. See Bellamy and Palumbo (eds) (2010).
18. Ladeur (2004, p. 17).
19. Coen and Thatcher (2008, p. 50).
20. Ladeur (2004, pp. 10–1).
21. Kjaer (2014, p. 4).
22. See, for a discussion of fragmentation of global environmental law and governance, Kotzé, 'Fragmentation Revisited' (2014, pp. 548–83).
23. See generally, Beyerlin and Marauhn (2011).
24. Biermann (2005, p. 120).
25. See for a detailed discussion, Kotzé (2016), especially ch.2.

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26. Crutzen and Stoermer (2000, pp. 17–18).
27. Kotzé, 'Rethinking Global Environmental Law' (2014, pp. 121–56).
28. Whitehead (2014, pp. 4219/5354).
29. Dalby (2004).
30. Ignaciuk et al. (2012, p. 147).
31. Biermann et al. (2010, p. 203). See also for a more detailed conceptual analysis, Biermann (2007, p. 326); and more recently, Biermann, *Earth System Governance* (2014).
32. Biermann, 'The Anthropocene: A Governance Perspective' (2014, p. 59).
33. Biermann (2007, pp. 329–30).
34. Yang and Percival (2009, p. 617); Kotzé, 'Fragmentation Revisited' (2014, p. 566); Heyvaert and Etty (2012, p. 7).
35. Lin and Scott (2012, p. 23).
36. Wiener (2001, p. 1371).
37. Yang and Percival (2009, pp. 616–17, 619 et seq).
38. *Ibid.* (p.646).
39. Ong (2010, p. 44).
40. Kysar (2010, pp. 123–4).
41. Shaffer and Bodansky (2011).
42. *Ibid.*
43. Holzinger, Knill and Sommerer (2008, pp. 553–87).
44. Twining (2009, p. 52).
45. Yang and Percival (2009, p. 617); Percival (2013, p. 2).
46. Wiener (2001, p. 1297).
47. Fisher (2012, p. 46).
48. Sand (1991, p. 256).
49. Shaffer and Bodansky (2011, p. 33).
50. Yang and Percival (2009, p. 627).
51. Shaffer and Bodansky (2011, p. 33).
52. Holzinger, Knill and Sommerer (2008, p. 556).
53. Cremades and Plehn (1984, p. 319).
54. UNEP (2007, p. 12).
55. *Ibid.* (p.20).
56. *Ibid.* (p.21).
57. Yang and Percival (2009, p. 627).
58. Shaffer and Bodansky (2011, p. 33).
59. Elliot and Breslin (2011, p. 4).
60. Balsiger and VanDeveer (2012, p. 3).
61. Shaffer and Bodansky (2011, p. 34); Yang and Percival (2009, p. 648).
62. Shaffer and Bodansky (2011, p. 34); Yang and Percival (2009, p. 620).
63. Fisher (2012, p. 48).
64. Holzinger, Knill and Sommerer (2008, p. 557).
65. Boyd (2011, p. 109); Kotzé (2012, p. 145).
66. Chirico and Larouche (2013, p. 13).
67. *Ibid.*
68. *Ibid.* (p.14).
69. Young (1994, p. 96); Haas (2007, p. 792).
70. Shaffer and Bodansky (2011, p. 35).
71. IUCN Academy of Environmental Law (2016).
72. Salamon and Anheier (1999, p. 4).
73. Castells (2008, p. 84).
74. *Ibid.* (p.85).

75. The number of non-governmental environmental organisations at global United Nations conferences has steadily increased, notably since the Stockholm Conference on the Human Environment in 1972. See United Nations (1972, p. 43).
76. See ISO (2016).
77. Rondinelli and Vastag (2002, p. 499).
78. Dupre (2009, p. 107).
79. *Fuel Retailers* case (paras 46–56).
80. *Ibid.* (paras 46, 57).
81. Environmental human rights are generally understood to include: rights to the environment; incidental substantive rights such as the rights to life and dignity that bear on the environment; and concomitant procedural rights such as rights of access to information and access to courts that are used to enforce substantive environment-related entitlements.
82. Kotzé (2015).
83. Principle 1 states, among others: '[M]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.'
84. See articles 10, 71–74 of the Constitution of Ecuador (2008). Bolivia is similarly exploring the possibility to enact a 'Mother Earth Law', which draws on the indigenous concept of *Pachamama* (Mother Earth) and which aims to provide nature rights including the right to life, regeneration, biodiversity, water, clean air, balance and restoration. See Buxton (2016).
85. Boyd (2015, pp. 171–5).
86. May and Daly (2015, pp. 691/11268).
87. See generally, Turner (2013).
88. At most, environmental entitlements are inferred indirectly from the provisions of other human-focused but environment-related rights treaties, such as the International Covenant on Economic, Social and Cultural Rights (1966) (arts 7(b), 10(3), 12); the Convention on the Rights of the Child (1989) (art.24); and the International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (1989) (arts 2, 6, 7, 15). See Shelton (2010, pp. 266–7).
89. Asian Human Rights Commission (1998).
90. Article 38. Notably, neither the Asian Human Rights Charter nor the Arab Charter on Human Rights has enforcement mechanisms.
91. Council of Europe (2006).
92. Pedersen (2008, pp. 73–111).
93. See for a summary of environment-related cases the summary in European Court of Human Rights (2015).
94. See generally, Kravchenko (2007, pp. 1–50).
95. UNECE (2016).
96. Boyd (2011, p. 108).
97. *SERAC* case.
98. See art.24 of the Charter.
99. *SERAC* case (para.56).
100. *Ibid.* (para.57); *Honduras* case; *Netherlands* case.
101. Ip (2010, p. 644).
102. Gemmill and Bamidele-Izu (2002, pp. 77–100).
103. Global Alliance for the Rights of Nature (2015).
104. See Short (2015).
105. Lin and Scott (2012, p. 24).

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