

EDITORIAL

Transnational Environmental Law and 'Other' Environmental Laws

1. INTRODUCTION

As this editorial is being written, the news of the day is filled with discussion of an unfolding environmental crisis: massive forest fires burning in the Amazon rainforest, potentially crossing a crucial ‘tipping point’ for the ecosystem,¹ and endangering global climate change mitigation efforts.² In August 2019, more than 27,400 fires were detected in the Amazon, burning on a scale not seen since 2010.³ The deforestation that fuels the fires has been encouraged by the policies of the new Brazilian government of President Jair Bolsonaro, which has hobbled environmental law enforcement designed to control land clearing by farmers, loggers, and others.⁴ Pledges of aid from the international community to fight the fires in Brazil have poured in, including from the G7 summit states convening in Biarritz (France),⁵ as well as from non-governmental organizations (NGOs) such as the Earth Alliance co-funded by the high-

¹ T.E. Lovejoy & C. Nobre, ‘Amazon Tipping Point’ (2018) 4(2) *Science Advances* online articles, available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5821491>.

² See Intergovernmental Panel on Climate Change (IPCC), *Climate Change and Land: Special Report on Climate Change, Desertification, Land Degradation, Sustainable Land Management, Food Security, and Greenhouse Gas Fluxes in Terrestrial Ecosystems – Summary for Policymakers*, approved draft, 7 Aug. 2019, available at: https://www.ipcc.ch/site/assets/uploads/2019/08/Edited-SPM_Approved_Microsite_FINAL.pdf. The IPCC Special Report finds that most modelled pathways, limiting warming to 1.5°C or well below 2°C, require land-based mitigation and land-use change, with most including different combinations of reforestation, afforestation, reduced deforestation, and bioenergy (at para. B7).

³ E. Londoño & L. Casado, ‘With Amazon on Fire, Environmental Officials in Open Revolt against Bolsonaro’, *New York Times*, 28 Aug. 2019, available at: <https://www.nytimes.com/2019/08/28/world/americas/amazon-fires-brazil.html>; A. Borunda, ‘See How Much of the Amazon is Burning, How It Compares to Other Years’, *National Geographic*, 29 Aug. 2019, available at: <https://www.nationalgeographic.com/environment/2019/08/amazon-fires-cause-deforestation-graphic-map>.

⁴ S. Rodrigues, ‘Governo corta R\$ 187 milhões do MMA. Saiba como o corte foi dividido’, (*O)eco*, 7 May 2019, available at: <https://www.oeco.org.br/noticias/governo-corta-r-187-milhoes-do-mma-saiba-como-o-corte-foi-dividido> (in Spanish; detailing massive funding cuts to the Brazilian environmental protection agency, IBAMA, under President Bolsonaro, including a R\$17.5 million reduction in fire-fighting funds). See also J. Spring, ‘Explainer: Why Are the Amazon Fires Sparking a Crisis for Brazil – And the World?’, *Reuters*, 26 Aug. 2019, available at: <https://www.reuters.com/article/us-brazil-environment-amazon-explainer/explainer-why-are-the-amazon-fires-sparking-a-crisis-for-brazil-and-the-world-idUSKCN1VF0TX>.

⁵ J. Watts, ‘Amazon Rainforest Fires: Brazil to Reject \$20m Pledged by G7’, *The Guardian*, 27 Aug. 2019, available at: <http://www.theguardian.com/world/2019/aug/27/amazon-fires-brazil-to-reject-20m-pledged-by-g7>.

profile actor and celebrity, Leonardo DiCaprio.⁶ The Bolsonaro government has reportedly rejected the G7 aid package as an attempt to interfere in Brazilian sovereignty,⁷ but has said it wants to work with other Amazonian states to develop a regional approach for the protection and development of the forest.⁸

The Amazonian crisis provides a stark illustration of the limits of a binary national/international law perspective as a means to understand the role of law in responding to global environmental issues. The fires, and the response to them, involve elements of national environmental law, international environmental law, and regional environmental protection efforts, as well as legal norms that extend across and beyond these categories. It was with the aim of capturing and providing a better understanding of the role of law in these types of legal interstice and intersection that the journal *Transnational Environmental Law (TEL)* was born. *TEL*, and the transnational environmental law scholarship it has fostered, expands the realm of possibilities for investigating the role of law in dealing with environmental crises such as the burning of the Amazon, from purely national or international actions to those ‘beyond the state,’ and from a focus only on state actors to a range of other non-state actors, public and private, located at multiple levels of governance, who play different roles.⁹

The continuing growth and impact of *TEL* attests to the relevance and importance of transnational environmental law as a field of study and practice that can help us better understand the legal response to global environmental problems. However, as the Amazon example illustrates, conceptions of transnational environmental law continue to coexist and rub shoulders at different points with a range of other notions of environmental law. These include local, customary and national environmental law, international environmental law, regional environmental law, comparative environmental law, and global environmental law (GEL), the last of which is the focus of the symposium articles included in this issue. In introducing these symposium articles, as well as a further article on shark conservation, this editorial reflects on the question of the relationship between transnational environmental law and such ‘other’ environmental laws, most particularly notions of GEL.

2. GLOBAL ENVIRONMENTAL LAW

In their leading 2009 article on the ‘emergence’ of GEL, Tseming Yang and Robert Percival describe GEL as ‘the set of legal principles developed by national, international, and transnational environmental regulatory systems to protect the

⁶ A. Falkenstein, ‘Amazon Fires: Leonardo DiCaprio Gives \$5m for Rainforest’, *BBC News*, 26 Aug. 2019, available at: <https://www.bbc.com/news/newsbeat-49472920>.

⁷ Watts, n. 5 above.

⁸ L. Paraguassu & R. Viga Gaier, ‘Brazil Looks to Neighbors for Amazon Support, Defends Record’, *Reuters*, 28 Aug. 2019, available at: <https://www.reuters.com/article/us-brazil-environment/brazil-announces-south-american-meeting-on-amazon-accepts-chiles-help-idUSKCN1V11D7> (although more recent news suggests that President Bolsonaro may miss or postpone the summit because of surgery).

⁹ See generally V. Heyvaert & T.F.M. Etty, ‘Introducing Transnational Environmental Law’ (2012) 1(1) *Transnational Environmental Law*, pp. 1–11.

environment and manage natural resources'.¹⁰ In this early work, Yang and Percival conceived GEL largely in descriptive terms as a new way of capturing the polycentric development of the field. Writing in a later article for the inaugural issue of *TEL*, Yang posited GEL as the product of various globalizing trends that have created greater integration and convergence between previously separate systems of national and international environmental laws.¹¹ This development, Yang argued, was relevant not only as a theoretical concept, but also for 'the actual practice of environmental law'.¹² However, even in these early conceptions, GEL appeared to have a normative underpinning through its emphasis on global-level responses as ideal or at least necessary for both substantive and moral reasons.¹³

Later contributions on GEL, including several featured in this journal, have fleshed out its normative dimensions through discussion of topics such as global environmental constitutionalism.¹⁴ The Symposium Collection on GEL in this issue continues this tradition, deepening our understanding of this field. As explained in Elisa Morgera's Foreword, the symposium sought to discuss 'whether and to what extent the emerging concept of global environmental law can help in shedding new light on the evolution and challenges of environmental law across different levels and sectors'.¹⁵ In the symposium articles and commentaries, the authors explore questions such as whether GEL is a research approach, an interpretative approach or a distinct body of law, and to what extent it adds to existing theories and approaches in international and transnational environmental law. As Morgera notes, '[t]he symposium also provided an opportunity to engage with distinctions between global environmental law and transnational environmental law'.¹⁶

3. RELATIONSHIP BETWEEN GLOBAL AND TRANSNATIONAL ENVIRONMENTAL LAW

How then does GEL relate to or overlap with transnational environmental law, and the multiple other notions of environmental law that now populate the field?

As discussed in 'Introducing Transnational Environmental Law', the editorial to *TEL*'s inaugural issue, there are similarities between transnational and global environmental law. For example, both are 'interested in the manner in which and the extent to which environmental law responds to the global nature of most of today's

¹⁰ T. Yang & R.V. Percival, 'The Emergence of Global Environmental Law' (2009) 36(3) *Ecology Law Quarterly*, pp. 615–64, at 616.

¹¹ T. Yang, 'The Emerging Practice of Global Environmental Law' (2012) 1(1) *Transnational Environmental Law*, pp. 53–65.

¹² *Ibid.*, p. 54.

¹³ Yang & Percival, n. 10 above, p. 624.

¹⁴ See, e.g., L.J. Kotzé, 'Arguing Global Environmental Constitutionalism' (2012) 1(1) *Transnational Environmental Law*, pp. 199–233; and L.J. Kotzé, 'A Global Environmental Constitution for the Anthropocene?' (2019) 8(1) *Transnational Environmental Law*, pp. 11–33.

¹⁵ E. Morgera, 'Advancing the Research Agenda on Global Environmental Law' (2019) 8(3) *Transnational Environmental Law*, pp. 399–403, at 399.

¹⁶ *Ibid.*, p. 399.

environmental problems'.¹⁷ Equally, both seek to understand the role of norms that are neither purely national nor international but arise 'beyond the state'.¹⁸ However, while GEL is generally conceived in holistic terms as the development of globalized environmental law principles, norms and regulatory approaches that seek some larger normative end such as global environmental justice, transnational environmental law tends to be presented as 'an *approach* to legal studies and practices'.¹⁹ The primary preoccupation of a global environmental lawyer, as the symposium articles indicate, is thus with questions of legitimacy and accountability, voice and exclusion, ethics and epistemology. These questions may also motivate transnational environmental legal research and practice, but the general goal of such work is to generate a new, richer understanding and application of environmental law that elucidates its many layers, interconnections and dynamic interactions.

4. DO DISTINCTIONS BETWEEN TRANSNATIONAL AND 'OTHER' ENVIRONMENTAL LAWS MATTER?

A reader might reasonably ask whether the creation of these different categories of environmental law is helpful in either a descriptive or normative sense. Does it aid us in understanding and responding to environmental crises?

Erika Techera's article – apart from, but related to, the symposium articles – on shark conservation provides a practical illustration of the value of multiple notions of environmental law, as well as what they may help to illuminate or potentially to conceal. In particular, her contribution reminds us that globalized accounts sometimes overlook the significance of cultural variables, which remain of crucial import especially in developing states.²⁰ This coheres with the warning in Natasha Affolder's symposium article regarding the potential 'perils' of the GEL approach, which may create its own anxieties about the potential risks of exclusion. Affolder thus calls for globally focused studies to be undertaken with humility and caution.²¹

Techera's analysis of shark conservation in the island states of the Indo-Pacific region concludes that the diverse histories of these states, stretching back across thousands of years of transoceanic settlement, led to broadly divergent beliefs about aquatic life generally and sharks in particular. Contemporary attitudes, far from homogenizing in a modern and globalized melting-pot, remain distinctive and continue to exert contrastive pressures on both state and non-state approaches to shark management. While some Pacific cultures have mythologized sharks and attributed spiritual powers to them, others – such as island societies in the Indian Ocean – have regarded sharks with spiritual indifference, allowing economic factors to drive patterns of shark utilization. 'Shark

¹⁷ Heyvaert & Etty, n. 9 above, p. 3.

¹⁸ *Ibid.*, p. 8.

¹⁹ *Ibid.*, p. 2.

²⁰ E. Techera, 'Legal Approaches to Shark Conservation and Management across the Indo-Pacific Small Island States' (2019) 8(3) *Transnational Environmental Law*, pp. 547–74.

²¹ N. Affolder, 'Transnational Environmental Law's Missing People' (2019) 8(3) *Transnational Environmental Law*, pp. 463–88.

sanctuaries' have emerged in a number of Indo-Pacific island states, but Techera cautions that this common label, often employed in media accounts, obscures a great deal of variation in shark management. A 'sanctuary' typically denotes the operation of a stringent area management regime, yet most of the states in Techera's study eschew area-specific rules, choosing instead to address shark management and conservation through fisheries regulation. Here the variation is substantial. Fisheries laws across the region reflect considerably different strategies, evidenced in disparate finning and bycatch rules as well as equipment restrictions. 'The variances in the laws', Techera writes, 'are likely to relate at least in part to underlying cultural diversity, given the history of customs and practices surrounding sharks in the Pacific and the history of shark fishing in the Indian Ocean'.²²

Following the approach of transnational environmental legal research, Techera's study extends beyond formal, black-letter fisheries rules to consider non-consumptive shark-related policies, including those pertaining to marine tourism and human safety, as well as the issues of implementation, compliance, and enforcement that are crucial to the actual impact of a given management approach. Although Techera takes comfort in the fact that 'concern for sharks is becoming more widespread', she acknowledges that the effectiveness of protective policies is still very much in doubt: 'paper parks and unenforced protection', she cautions, 'are of little value'.²³ Thus subsequent research and policy work must continue to examine the relationship between cultural values and their enhancement of or derogation from conservation objectives.

5. CONCLUSION

The conclusion that transnational environmental law, alongside 'other' notions of environmental law, provides valuable pluralism in understanding the complexities of contemporary environmental problems and legal responses may seem an obvious one for editors of a journal like *TEL*. Nonetheless, the application of a transnational environmental lens, complemented by other environmental law perspectives, offers a fuller picture of issues like the Amazonian forest fires or shark conservation in the Indo-Pacific than conventional categories of state and international law can present. The view that emerges as a consequence is kaleidoscopic, fragmenting and changing with every turn, simultaneously drawing our eye to the whole as well as to distinctive individual parts.

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²² Ibid., p. 566.

²³ Ibid., p. 574.