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3. An Unknown Past, an Unequal Present, and an Uncertain Future: Transnational Environmental Law through Three Research Challenges

Natasha Affolder

INTRODUCTION: TRANSNATIONAL ENVIRONMENTAL LAW AS A VISUAL FIELD

The ecological overshoot of humanity requires us to both zoom into the details of intrahuman injustice—otherwise we do not see the suffering of many humans—and to zoom out of that history, or else we do not see the suffering of other species and, in a manner of speaking, of the planet.¹

Transnational law offers a particularly rich opportunity for zooming in and zooming out. While functioning as a methodology, a discourse and a field of substantive law,² transnational law brings particular dimensions, sites and processes of environmental law and lawmaking into view. Approaching transnational law as a vision field does not downgrade the role of its practitioners and scholars to the status of observers. Rather, transnational law encompasses a project of changing the world by changing dominant ideas about it.

Transnational law has long been seen to function as a mechanism for *illuminating* particular spaces. Such spaces include the empty space left by existing doctrinal perspectives,³ and the particular relationships between, around and outside national laws.⁴ It offers a way of looking at and for law that is alert to spheres of normativity different from the nation state, or that involves distinct ways of conceiving of the nation state. It highlights private actors and the power and

¹ Dipesh Chakrabarty ‘Whose Anthropocene? A response.’ in R Emmett and T Lekan (eds), *Whose Anthropocene? Revisiting Dipesh Chakrabarty’s “Four Theses”* (Rachel Carson Center 2015) 111.

² See Veerle Heyvaert and Leslie-Anne Duvic-Paoli, Chapter 1 of this volume.

³ Gralf-Peter Calliess and Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Cambridge University Press 2010) 11.

⁴ Peer Zumbansen, ‘Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism’ (2012) 21 *Transnat’l L & Contemp Probs* 305, 307.

powerlessness of those actors, informal law and seemingly informal relationships that may defy traditional assumptions of the legal, and movements of law and legal process that may resist geopolitical assumptions about the globe's centre and its peripheries.⁵

The 'transnational' may import a visual field that brings into view each of the above-identified issues. But it may also obscure dimensions of law's relationships with both humans and nature.⁶ This is because the spaces and rhythms of transnationalism favour a visual fix on processes, flows, networks, and governance arrangements that may be only partially tethered to people.⁷ A transnational lens may thus write specific people and particular understandings of nature out of law's past, present, and future.⁸ Thinking about the research challenges posed by a transnational law lens encourages large questions of 'stock taking' such as these, but it also invites critical attention to the particular registers on which transnational legal conversations are *not* proceeding.⁹ A key tension for transnational law indeed emerges from how it navigates between universalist agendas, principles, and prescriptions and the specific and context-based realities of individual places and people brought into view in particular by historians and post-colonial scholars.

Transnational law comes to the task of illuminating environmental problems and prescribing solutions with some heavy weight on its shoulders. The enormous and existential threats of environmental and climate ruin – threats which have prompted *shifts* in the language used to describe current environmental crises¹⁰ – combine with a widely shared view that national and

⁵ On this context, see Horatia Muir Watt, 'The Relevance of Private International Law to the Global Governance Debate' in Horatia Muir Watt and Diego P Fernández-Arroyo (eds), *Private International Law and Global Governance* (Oxford University Press 2014).

⁶ On some little-explored costs associated with the shift to the transnational in feminist legal theory see Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (Routledge 2015) 104.

⁷ *ibid* 106.

⁸ A deeper exploration of this theme can be found in Natasha Affolder, 'Transnational Environmental Law's Missing People' (2019) 8(3) TEL 463.

⁹ Veerle Heyvaert powerfully conveys how the transnational involves shifts in both perception and reality: 'Understanding social transformations as a tight entanglement of shifts in reality and perception is important because it reminds us that, as the spotlight moves on, structures that are now in the penumbra do not cease to exist and continue to merit scholarly attention.' Veerle Heyvaert, *Transnational Environmental Regulation and Governance: Purpose, Strategies and Principles* (Cambridge University Press, 2019) 1, 5.

¹⁰ Damian Carrington, 'Why the Guardian is Changing the Language it Uses About the Environment' *The Guardian* (London, 17 May 2019): <<https://www.theguardian.com/environment/2019/may/17/why-the-guardian-is-changing->

international law have failed and are failing to address these crises.¹¹ Moreover, the concept of the Anthropocene effectively rips to shreds many of the analytical categories that have served as frames for much thinking about both the environment and law since the Enlightenment. While social theorists are dismantling the intellectual walls that separate human society from nonhuman nature, the geological and generational, the local and global, and science from politics, an appreciation of these same cleavages is critical to understanding transnational law's history and epistemology.¹²

This chapter seeks to bring into focus three broad research challenges facing transnational environmental law – an unknown past, an unequal present, and an uncertain future. It does so with conviction that the field has an untapped potential to contribute far more significantly to both shaping and elucidating some of the major intellectual debates of our time. What a richer and more plural sense of 'the environment' or 'environmentalisms' rooted in the past and in diverse cultural settings might make room for is an understanding that environmental values do not need to be singular or universal to be powerful.¹³

AN UNKNOWN PAST

The claim that transnational environmental law is characterized by 'an unknown past' is admittedly an exaggeration,¹⁴ but it serves to force attention to the relative lack of historicity in transnational environmental law analysis. In this section, I explore three particular dimensions of transnational law's spotty and uneven historical engagement. The first such dimension emerges

the-language-it-uses-about-the-environment> accessed 7 June 2019 ("Instead of "climate change" the preferred terms are "climate emergency, crisis or breakdown" and "global heating" is favoured over "global warming").

¹¹ Tim Stephens, 'What is the Point of International Environmental Law Scholarship in the Anthropocene?' in Ole W Pederson (ed), *Perspectives on Environmental Law Scholarship* (Cambridge University Press 2018).

¹² Perrin Selcer expresses this as the need to acknowledge 'antiecological environmental history'. Perrin Selcer, *The Postwar Origins of the Global Environment: How the United Nations Built Spaceship Earth* (Columbia 2018) 11.

¹³ *ibid* 5.

¹⁴ For exceptions to a general lack of historicity in transnational environmental law scholarship, see e.g. Peter H Sand, 'The Evolution of Transnational Environmental Law: Four Cases in Historical Perspective' (2012) 1(1) TEL 183; Peter H Sand (ed), *The History and Origin of International Environmental Law* (Edward Elgar Publishing Ltd 2015); Stephen Humphreys and Yoriko Otomo, 'Theorising International Environmental Law', in Florian Hoffmann and Anne Orford (eds), *The Oxford Handbook of International Legal Theory* (Oxford University Press 2016).

in the form of the ‘faceless transnational’ – the adoption of scales and units of analysis that delink humans from legal processes. Secondly, historicizing transnational law requires a deeper appreciation of why it matters that law developed out of a world view that contemplated the nonhuman environment as a resource for human exploitation. And finally, an appreciation of the historical underpinnings of transnational environmental law reveals the co-existence of a plurality of environmentalisms. This poses a challenge to the idea that environmentalism is a singular concept or construct that appeared seemingly out of the blue at a particular time (the 1960s) and in a specific place (the West Coast of the United States (US)) to challenge free market ideologies.

Transnational law has the ability to make room for a more eclectic, post-modern and conflict-ridden conception of the ‘environment’. This in part will come from a robust engagement with history.¹⁵ The denial of history, and the refusal to look back, help produce a situation where environmental degradation can be seen as a historical accident, or rotten bad luck, rather than as the product of human choices.¹⁶

1. The Faceless Transnational

The temporal vision of liberal legalism neatly coincides with a transnational lens.¹⁷ Mariana Valverde locates the temporality of the transnational in its particular ability to combine presentism with a sort of short-term futurism that shifts our gaze towards the abstract, including the non-subjective and non-human scales that measure the flows, assemblages, and networks of transnational law. The transnational lens might be responsible for the select vision of legal processes that emerges from looking for law only in the temporally impoverished narratives of universalism, in the institution of abstract rights and in accounts that favour ‘disembodied legal subjects’.¹⁸ These concerns provide inspiration for approaching transnational law in ways that qualify and individualize the subjects which commonly form part of abstract-leaning studies of

¹⁵ The value of a historical lens is well evidenced by Leslie-Anne Duvic-Paoli’s expansive work on the legal foundations of the prevention principle. She shows why the intellectual grounding of the concept of prevention, not in environmental philosophy, but rather in sovereignty was critical the pragmatic success of this principle. Leslie-Anne Duvic-Paoli, *The Prevention Principle in International Environmental Law* (Cambridge 2018) 18.

¹⁶ Stephen Humphreys, ‘Climate Justice: The Claim of the Past’ (2014) 5 JHRE 134.

¹⁷ Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (Routledge 2015) 109.

¹⁸ *ibid* 109-110.

corporations and corporate social responsibility, networks, global value chains, and legal processes. They support a case for writing the sort of histories of the *longue durée* that are both challenging to write and valuable to read.¹⁹

Studying the long-term origins of environmentalism, for example, could enrich transnational environmental law by creating a valuable and plural sense of its biases, blind spots and fundamental assumptions. Scholarship that seeks an understanding of climate crises from study of the very distant past illuminates how it may be a trait of only present-day environmental regulation to look to economists to define the universalizing models that will shape our future.²⁰ Moving beyond ‘postwar presentism’ as the time period relevant to transnational legal inquiries can open many new agendas for research.²¹ These can supplement the valuable historical work that already situates environmental law and environmentalism alongside colonialism²² to illuminate other historical processes and broader intersectional fields of power shaping law as we know it.²³

One such promising direction of historical inquiry illuminates the norm makers falling outside traditional Global North-centered histories of international environmental law. Amitav Acharya thus redirects focus towards the creators of international human rights norms at the Asian-African Conference in Bandung.²⁴ Peter Onyango turns to customary legal norms as a promising

¹⁹ Jo Guldi and David Armitage make a convincing case for the need for longer-term historical narratives of the environment. Jo Guldi and David Armitage, *The History Manifesto* (Cambridge University Press 2014) 14-15.

²⁰ *ibid.*

²¹ The sort of paradigm-shifting thinking prompted by histories of *longue durée* make this quickly evident. See e.g. JR McNeill, ‘Global Environmental History: The First 150,000 Years’ in JR McNeill and Erin Stewart Mauldin (eds), *A Companion to Global Environmental History* (Blackwell 2012).

²² Richard Grove, *Green Imperialism: Colonial Expansion, Tropical Island Edens and the Origins of Environmentalism, 1600–1860* (Cambridge University Press 1995); Tom Griffiths and Libby Robin (eds), *Ecology and Empire: Environmental History of Settler Societies* (Keele University Press 1997); John Broich, ‘British Water Policy in Mandate Palestine: Environmental Orientalism and Social Transformation’ (2013) 19(3) *Environment and History* 255.

²³ Advancing the argument that ‘we are all differently situated and governed, in both constraining and enabling ways, in relationships of division, patriarchy, imperialism, racism, capitalism, ecological devastation, and poverty’ and thus that ‘the failure to illuminate broader and more complex intersectional fields of power was one reason why the colonization/decolonization binary did not lead the way to Third World liberation’, see John Borrows and James Tully, ‘Introduction’ in Michael Asch, John Borrows, and James Tully (eds), *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (University of Toronto Press 2018) 7.

²⁴ Amitav Acharya, ‘Who Are the Norm Makers: The Asian-African Conference in Bandung and the Evolution of Norms’ (2014) 20 *Global Governance* 405, 407.

source of renewal for law reform initiatives in Africa.²⁵ Godwin Dzah seeks to ‘emancipate’ an African concept of environmental rights from universal rights discourse by drawing attention to African legal theorists and sources of law neglected in universal histories.²⁶ These works complement those international law histories that challenge the idea that Westphalia is the unquestioned starting point for the history of international law.²⁷ And they extend the effort to include ‘excluded voices’ in histories of global lawmaking, including those from non-legal disciplines.²⁸

Efforts to understand the intellectual origins of environmental law ideas in countries of the Global North are equally valuable to transnational environmental law scholarship that seeks to understand the genesis of environmental ideas across borders, and the entanglement of these ideas in law. Jedediah Purdy’s *After Nature: A Politics for the Anthropocene* traces distinct versions of the environmental imagination – a providential vision, a romantic vision, a utilitarian picture and an ecological world view – through laws in the United States (US) ‘that channelled human energy to shape the world.’²⁹ Purdy’s intellectual history of the natural world in the US is thus very much a political history of ideas in that country. And it is a history that is understood through law and through particular people who shaped that law. As he explains:

Ways of valuing and inhabiting the natural world have been woven together from the material stuff of land and resources and from the imaginative devices of religion, aesthetics, and rhetoric. Law is the warp and weft that binds the two, shaping the material landscape, guiding human action on it, translating the ideal images of people and nature into concrete regimes of power.³⁰

²⁵ Peter Onyango, *African Customary Law System: An Introduction* (Law Africa Publishing 2013) 7.

²⁶ Godwin EK Dzah, ‘Theorizing the Right to Environment: An Africological Typology’ (2019) 27(1) *Afr J Intl Comp L* 25.

²⁷ Robert Kolb, *Esquisse d’un droit international public des anciennes cultures extra européennes* (Paris: Pedone, 2010).

²⁸ Martti Koskenniemi, ‘Law of Nations and the Conflict of the Faculties’ (2018) 8 *History of the Present: A Journal of Critical History* 4.

²⁹ Jedediah Purdy, *After Nature: A Politics for the Anthropocene* (Harvard University Press 2015) 8.

³⁰ *ibid* 229.

Other examples of historical work place the spotlight firmly on individuals. Raf de Bont highlights the role of individual scientists, life scientists and library intellectuals, and experts present at early 20th century conservation conferences.³¹ Luigi Piccioni explores the Catholic Church's stance towards the early environmental movement, a rare perspective on a neglected but important actor in environmental thought.³² Moving beyond human histories, scholars such as Lauren Benton offer quasi-ethnographic accounts of the lives of particular geographical features such as rivers, islands and mountain ranges to illuminate how physical space and cultural imagination interact.³³

New histories of transnational legal processes will continue to upset present-day understandings of the forces shaping environmental law. This can be witnessed up close in scholarship unpacking the complex relationship between environmental regulation and legal liberalism. Efforts to expose modern liberalism's role in protecting capitalism from democracy call into question received wisdom on neoliberal nature and the institutions which law has forged to protect markets.³⁴ Legal history offers a battleground for challenging assumed narratives of how and why laws for environmental protection have developed and moved across borders.³⁵ Post-colonial critique, in particular, challenges the quiet universalisation of environmental law's movements across time and space, illuminating the particularity and historicity of human

³¹ Raf de Bont and Geert Vanpaemel, 'Editorial Introduction to Special Section, 'The Scientist as Activist: Biology and the Nature Protection Movement, 1900-1950'' (2012) 18(2) *Environment and History* 203; Raf de Bont and Rajesh Heynickx, 'Landscapes of Nostalgia: Life Scientists and Literary Intellectuals Protecting Belgium's 'Wilderness', 1900-1940' (2012) 18(2) *Environment and History* 237.

³² Luigi Piccioni, "Only One Earth: The Holy See and Ecology" in Jan-Henrik Meyer and Wolfram Kaiser (eds), *International Organizations and Environmental Protection: Conservation and Globalization in the Twentieth Century* (Berghahn Books 2017).

³³ Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (Cambridge University Press 2009).

³⁴ Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press 2018).³⁵On the battle lines of such debates, see Douglas Campbell and Ju Hyun Pyun, 'The Diffusion of Development: Along Genetic or Geographic Lines' (2017) 29 *J Int Dev* 198.

³⁵On the battle lines of such debates, see Douglas Campbell and Ju Hyun Pyun, 'The Diffusion of Development: Along Genetic or Geographic Lines' (2017) 29 *J Int Dev* 198.

experience and the importance of the past for understanding the ‘here and now of Western law’.³⁶

2. *A Resource Ripe for the Taking: The Enduring Legacy of Law’s Greedy Gaze*

The vision of nature as something to be exploited for human use can be traced through international law’s development to contemporary contexts where the transnational gaze often focuses.³⁷ Quinn Slobodian’s history of neoliberalism, for example, documents the resilience of a world view that perceives ‘the earth as a vast territory of varying natural endowments that needed to be exploited as thoroughly as possible through the mobility of capital, labor, and commerce’.³⁸ This ‘severance’ model that distances the concept of the human world from the natural world directly traces to European romanticism.³⁹ It is a view that continues to inform a present-day environmental agenda established by and around the priorities and concerns of affluent countries.⁴⁰

Studying how concepts of the environment evolved within non-European thought and outside the tradition of Enlightenment humanism reveals alternative visions to the severance model.⁴¹ It is here that the points of connection between a reductionist and commodified view of the environment that emphasizes human separateness from and superiority over nature and the gaps and black holes surrounding non-Western contributions to international environmental law

³⁶ For an exploration of transnational law’s place in postcolonial theory see Peer Zumbansen, ‘Can Transnational Law be Critical? Reflections on a Contested Idea, Field and Method’ in Emiliios Christodoulidis (ed) *Research Handbook on Critical International Theory* (2019, forthcoming); on environmental literatures see Elizabeth DeLoughrey and George B Handley, *Postcolonial Ecologies: Literatures of the Environment* (Oxford University Press 2011).

³⁷ On the embedding of such a view of nature in the legal concept of territory see Karin Mickelson, ‘The Maps of International Law: Perceptions of Nature in the Classification of Territory’ (2014) 27 LJIL 621, 639. See also Kishan Khoday and others, ‘Locating Nature: Making and Unmaking International Law: Introduction’, (2014) 27 LJIL 571. Stephen Humphreys and Yoriko Otomo, ‘Theorising International Environmental Law’, in Florian Hoffmann and Anne Orford (eds), *The Oxford Handbook of International Legal Theory* (Oxford University Press 2016).

³⁸ *Slobodian* (n 34) 107.

³⁹ See Stephen Humphreys and Yoriko Otomo, ‘Theorising International Environmental Law’, in Florian Hoffmann and Anne Orford (eds), *The Oxford Handbook of International Legal Theory* (Oxford University Press 2016)

⁴⁰ See Shawkat Alam and others (eds), *International Environmental Law and the Global South* (Cambridge University Press 2015) 2.

⁴¹ Cait Storr, ‘Islands and the South: Framing the Relationship between International Law and Environmental Crisis’ (2016) 27(2) *European Journal of International Law* 519.

slowly materialize.⁴² Through such connections it becomes possible to locate the foundations of an environmental ethic that departs from the dominant conceptions of nature underlying Western law.⁴³

African scholars, for example, have drawn attention to the pre-colonial period and prevailing conceptions of environmental ethics to draw out the significant communal dimensions of environmental practices.⁴⁴ Part of this environmental ethic translated into careful natural resource use practices that fail to easily translate into Western law. For example, in precolonial Akan and Ewe communities (present-day Ghana) there was a non-farming day in each week. No one was allowed to go to the farm on these days. The rationale was to allow mother Earth to rest. A similar rule was applicable to fishing communities.⁴⁵ Totemism, a central feature of African religious practice, also ensured that certain animals and plants were not hunted. Anyone who flouted these socially accepted rules risked grave punishments including being banished from the community.⁴⁶

Knowledge of these practices and beliefs helps dismantle the idea of a singular and universal ‘environmentalism’ informing the legal order’s engagement with environmental protection,⁴⁷ just as it challenges the assumption that it is ‘the state’ that will necessarily administer such a legal

⁴² Matthew Craven, ‘Theorising the Turn to History in International Law’ in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 22; William Twining (ed), *Human Rights, Southern Voices: Francis Deng, Abdullahi An-Na’im, Yash Ghai and Upendra Baxi* (Cambridge University Press 2009).

⁴³ This involves challenging dominant terminologies and binary world views. Indigenous law scholars are using the vocabularies of reconciliation and resurgence, for example, as ‘appropriate English terms for the unique, place-based, kin-centric and relational ways Indigenous people conceive and enact transformative change, at least in comparison to Western theories of colonization/decolonization’. John Borrows and James Tully, ‘Introduction’ in Michael Asch, John Borrows, and James Tully (eds), *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (University of Toronto Press 2018) 7.

⁴⁴ Sussy Gumo and others, ‘Communicating African Spirituality through Ecology: Challenges and Prospects for the 21st Century History of the African Ministerial Conference on the Environment’ (2012) 3(2) *Religions* 523.

⁴⁵ I thank Godwin Dzah for these reflections and insights on practices in pre-colonial Ghana.

⁴⁶ CVO Eneji and others, ‘Traditional African Religion in Natural Resource Conservation in Cross River State, Nigeria’ (2012) 4(2) *Environment and Natural Resources Research* 45; Francis Diawuo and Abdul Karim Issifu, ‘Exploring the Traditional Belief Systems in Natural Resources Management in Ghana’ (2015) 9(8) *The Journal of Pan African Studies* 115.

⁴⁷ Agrarianism provides another example of an alternate vantage point for understanding environmental sustainability. See Paul B Thompson, *The Agrarian Vision: Sustainability and Environmental Ethics* (University Press of Kentucky 2010).

order.⁴⁸ The climate crisis is prompting a new willingness to look to alternative places and spaces of ‘environmental’ governance, past and present, for the possibility that they might offer scientists, policy makers, and lawyers working on the ground new inspiration of where to look for possible futures.⁴⁹

3. *The Co-Existence of Plural Environmentalisms*

Many histories of environmental law pivot around an unchallenged assumption that the environmental issues of concern to transnational processes appear seemingly out of the blue in the 1960s to suddenly challenge the ascendant economic logic of the free marketplace.⁵⁰

Powerful creation myths thereby locate environmental law’s origins in the context of the rise of a particular environmentalism on the West Coast campuses of the US, energized by the 1962 publication of Rachel Carson’s *Silent Spring* and the first Earth Day on 22 April 1970.⁵¹

The point here is not one of contesting the starting point of the ‘period’ of modern environmentalisms, nor is it to deny the absolutely fundamental importance of the US-based environmental movement and the ideas of particular American environmentalists to the spread of environmental ideas transnationally.⁵² Rather, it is the very practice of periodization in the history of transnational law ideas that demands critical attention: ‘periodization is inevitable, but never innocent’.⁵³ Accounts of modern environmentalism and its spread tend to quietly universalize a particular version of environmental protection, assuming a temporal starting point in the 1960s and a geographical birthplace in the United States.

⁴⁸ ‘There are fundamental defects in presenting the state as the reservoir of cultural heritage. Many states have been alien to their populations and it is questionable whether they represent those populations or whether they are little more than internationally recognized cartels for the sake of maintaining power and access to resources.’ Makau wa Mutua, ‘Politics and Human Rights: An Essential Symbiosis’ in Michael Byers (ed) *The Role of Law in International Politics* (Oxford University Press 2000) 166-7.

⁴⁹ See Jo Guldi and David Armitage, *The History Manifesto* (Cambridge University Press 2014) 66-71.

⁵⁰ See e.g. Zygmunt JB Plater, ‘From the Beginning, a Fundamental Shift of Paradigms: A Theory and Short History of Environmental Law’ (1994) 27 *Loy LA L Rev* 981.

⁵¹ Fabien Locher and Grégory Quenet, ‘L’histoire environnementale: origines, enjeux et perspectives d’un nouveau chantier historique’ (2009) 56(4) *Revue d’histoire moderne et contemporaine* 7.

⁵² Robert Blomquist outlines the role of individual scholars, writers and government figures in shaping American environmental law from 1960 to 1990. Robert F Blomquist, ‘Clean New World: Toward an Intellectual History of American Environmental Law, 1961–1990’ (1990) 25 *Val U L Rev* 1.

⁵³ Teemu Ruskola, ‘Raping Like a State’ (2010) 57 *UCLA L Rev* 1477, 1485. For an excellent discussion of the overlooked role that periodization plays in the history of international law, see Ignacio De La Rasilla, ‘The Problem of Periodization in the History of International Law’ (2019) 37(1) *Law and History Review* 275.

Along with greater scientific awareness of the negative long-term consequences of human activity, this environmentalism was undoubtedly a force that gave momentum to the development of much US domestic and modern international environmental law. Yet, starting the history of transnational legal processes at the point when or immediately before such law appears overlooks the existence of longer patterns of human-nature relations of transnational legal significance. Indeed, several historians are working to correct this oversight by producing *longue durée* histories revealing other environmentalisms emerging from how different cultures have perceived and interacted with nature, and by acknowledging the deeper cultural foundations of the environmentalist movement that began in the 1960s in the US.⁵⁴

Historians are thus working to identify other periods and sites of foundational transnational environmental lawmaking. This work involves illuminating the place of environmental ideas prior to the 1972 United Nations Stockholm Conference on the Human Environment, the first intergovernmental conference to focus on environmental problems. Iris Borowy thus examines who was in charge ‘of the global environment’ in the years before this conference.⁵⁵ Paul Sabin illuminates the concept of environmental law in the interwar period through a study of early environmentalist legal organizations.⁵⁶ Perrin Selcer traces how the United Nations constructed the idea of a ‘global’ environment requiring protection.⁵⁷

Such attempts to acknowledge the existence of other starting points for investigating transnational environmental law’s birth, and indeed of other intellectual inspirations for global environmental protection, run parallel to historical work challenging the thesis that the US invented the concept of the environment, and hence environmental history.⁵⁸ This thesis is, and was, contested but has been influential in encouraging a purposeful transnationalization of

⁵⁴ See e.g. Peter A Coates, *Nature: Western Attitudes Since Ancient Times* (University of California Press 1998); WM Adams, *Against Extinction: The Story of Conservation* (Earthscan 2004); *Grove* (n 22).

⁵⁵ Iris Borowy, ‘Before UNEP: who was in charge of the global environment? The Struggle for Institutional Responsibility 1968–1972’ (2019) 14(1) *Journal of Global History* 87.

⁵⁶ Paul Sabin, ‘Environmental Law and the End of the New Deal Order’ (2015) 33(4) *LHR* 965.

⁵⁷ *Selcer* (n 12).

⁵⁸ See *Locher and Quenet* (n 51).

environmental history scholarship.⁵⁹ Some of the early pushbacks to an American wilderness-centered environmental history come from scholars protesting a universal view of environmentalism tracing to US ‘wilderness’ concepts, and from those rejecting a mythical construction of ‘oriental’ values as being more respectful of nature.⁶⁰ Tackling acultural approaches to environmentalism, Simon Avenell theorizes environmental activism in Japan within a framework of environmental issues at the intersection of Japanese and global imaginaries of identity and nature.⁶¹

Even as it is contested, a particular vision of environmentalism that traces back to a popular US-based social movement in the 1960s has served as an irritant transnationally, as it has framed environmental protection as a problem of the rich. This has led to a recasting of the ‘environmental’ concerns of the Global South as the substance of other disciplines, such as development law, natural resources law or sustainable development law. As Camena Guneratne argues, concurrent with the Brundtland Commission Report, ‘developing countries were grappling with issues that were generally omitted from the sustainable development discourse, including problems of extreme poverty, vertical and horizontal inequity, conflict over the possession and use of natural resources and a disadvantageous international economic order.’⁶²

A question that transnational legal scholars cannot escape is how is it that issues of drastically inequitable resource use and extreme poverty were not conceived of as core concerns of environmental law. Bruno Latour’s *Down to Earth: Politics in the New Climatic Regime* draws attention to the last century’s social movements’ massive and profound failure to connect the dots between ‘social’ and ‘environmental’ conflicts.⁶³ Transnational legal scholarship has some work to do tracing, and indeed explaining, the legal transformations that did not take place. The

⁵⁹ See Donald Worster, ‘World Without Borders: The Internationalizing of Environmental History’ (1982) 6(2) *Environmental Review* 8.

⁶⁰ See e.g. Ramachandra Guha, ‘Radical American Environmentalism and Wilderness Preservation: A Third World Critique’ (1989) 11 *Environmental Ethics* 71. The latter objection traces to the significant controversy surrounding Lynn White’s 1967 public address, reproduced in *Science*, asserting that Christianity ‘bears a huge burden of guilt for the devastation of nature in which the West has been engaged for centuries’. Lynn White Jr, ‘The Historical Roots of our Ecological Crisis’ (1967) 155 *Science* 1203.

⁶¹ Simon Avenell, *Transnational Japan in the Global Environmental Movement* (University of Hawaii Press 2017).

⁶² Camena Guneratne, ‘Environmental Law Scholarship in a Developing Country – an Alternative Discourse’ in Ole W Pedersen (ed), *Perspectives on Environmental Law Scholarship* (Cambridge University Press 2018) 182.

⁶³ Bruno Latour, *Down to Earth: Politics in the New Climatic Regime* (Catherine Porter transl. Polity 2018) 56-58.

non-occurrence of transformative environmental law may indeed be one of the consequences of leaving unchallenged a particular and dominant vision of environmentalism, one that separates the environment from the social. Studying the past goes some way to reminding us that separations between human inequality and environmental quality may be quite recent.

AN UNEQUAL PRESENT

The massive inequality of our time is now the subject of serious and sustained scholarly inquiry.⁶⁴ New scholarship on human rights, such as Samuel Moyn's second major commentary on the subject, *Human Rights in an Unequal World*, asks why 'we chose to make human rights our highest ideals while simultaneously neglecting the demands of a broader social and economic justice.'⁶⁵ This work keeps its gaze firmly attached to the injustices of the *human* world. In the same way, powerful social histories that seek historical explanation of the 'vast wealth and disturbing inequalities that are with us today' are written as stories of capital and labour.⁶⁶ The relationships of inequality between humans and the natural world do not feature in these works. Yet research attentive to the multi-directional relationship between human suffering and environmental suffering, social justice and environmental justice, might help us connect some dots.

1. Breaking Down the Social v. Environmental Barricade

The relationship between social and economic inequality and environmental law is of interest far beyond law, but law's multiple and conflicting roles in this relationship speak powerfully to the sort of environmental law that is being created and whom it might serve. How transnational environmental law navigates issues of inequity and social inclusion, and its potential complicity in developing, finetuning and disseminating legal tools that perpetuate inequalities, will be

⁶⁴ Thomas Piketty, *Capital in the Twenty-First Century* (Harvard University Press 2013); Adam Gopnik, *A Thousand Small Sanities: The Moral Adventure of Liberalism* (Basic Books 2019); Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press 2018); *Slobodian* (n 34).

⁶⁵ Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press 2018), quotation from book jacket.

⁶⁶ These themes are not brought to life by Beckert but emerge from reading this work through a transnational legal lens. Sven Beckert, *Empire of Cotton: A Global History* (Vintage 2015).

defining issues for the field.⁶⁷ These issues are being played out in real time in debates and practices, including those surrounding REDD+ and its geographic dislocation of the burden of addressing global warming to the forested countries of the Global South.⁶⁸

REDD+ focuses attention on the significant challenge for transnational environmental law of responding to the reality that environmental law ‘solutions’ involve and impact humans, impact them differentially in different places, and can be at odds with indigenous conceptions of rights and obligations to land and waters.⁶⁹ REDD+ has mobilized alternative frameworks that are sensitive to local culture and traditional knowledge.⁷⁰ It marks one of the few territories of transnational environmental encounters where the barricade between environmental and social issues is being effectively challenged and dismantled.

In other venues, Oxfam’s work in mapping ‘extreme carbon inequality’ raises significant questions for legal scholars in confronting an era of inequality on previously unknown scales.⁷¹ The urgent need for an environmental law-centered research agenda on inequality further emerges out of the realization that, while notable research on national-level inequality is amassing, relatively little work has been done on how inequalities impact the biosphere.⁷²

The relationship between inequality and environmental change is multi-scalar and multi-dimensional, as Maïke Hamman and her co-authors demonstrate, linking gender inequality and the depletion of aquatic resources:

⁶⁷ For thoughtful work on the nature of complicity see Joanne Scott, ‘The Global Reach of EU Law’ in Marise Cremona and Joanne Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford University Press 2019) 49-63.

⁶⁸ Julia Dehm, ‘Authorizing Appropriations: Law in Contested Forest Spaces’ (2017) 28(4) EJIL 1379, 1381.

⁶⁹ Kathleen Birrell, Lee Godden and Maureen Tehan, ‘Climate Change and REDD+: Property as a Prism for Conceiving Indigenous Peoples’ Engagement’ (2012) 3 JHRE 196, 210.

⁷⁰ For example, the Amazon Indigenous REDD+ (RIA) model emphasizes the role of indigenous people and their traditional knowledge in preserving forests and establishes an alternative public funding mechanism that does not depend on the international carbon credit market. Randall S Abate and Elizabeth Ann Kronk, ‘Commonality among Unique Indigenous Communities: An Introduction to Climate Change and Its Impacts on Indigenous Peoples’ (2013) 26 Tulane Env’tl L J 179, 187.

⁷¹ Timothy Gore, ‘Extreme Carbon Inequality’ (*Oxfam International*, 2 December 2015) <https://www-cdn.oxfam.org/s3fs-public/file_attachments/mb-extreme-carbon-inequality-021215-en.pdf>.

⁷² Maïke Hamann and others, ‘Inequality and the Biosphere’ (2018) 43(1) Annual Review of Environment and Resources 61, 63.

In some parts of sub-Saharan Africa, for instance, where women generally have limited access to aquatic resources to begin with, increasing resource scarcity may not only reduce women's income, but may also drive women to engage in 'fish-for-sex' transactions to secure a steady food supply for themselves and their families, which increases the incidence of sexually transmitted diseases such as HIV/AIDS. Furthermore, the burden of care for HIV/AIDS-affected adults, and those with other illnesses, usually lies with women, thus compounding their economic and educational marginalization as a result of changing environmental conditions.⁷³

Thinking about how law fits into, and responds to, exactly this sort of challenge takes us back to the point that Philip Jessup was seeking to make in 1956 when he argued that a new term, and a new concept, was needed to 'analyse the problems of the world community and the law regulating them'.⁷⁴

2. Challenging Assumptions About How Law Moves

Philip Jessup's insistence that judges and lawyers have access to a far-ranging and diverse toolkit for responding to transnational law problems aligns well with the context of contemporary environmental law research and practice.⁷⁵ The demand for such a rich tool kit, or menu, of environmental law models, examples, arguments and forms of judicial reasoning means that the production and diffusion of environmental law ideas are central features of transnational environmental law practice and scholarship. Such transfers not only spread ideas and models across national borders but equally permeate supra-national and sub-national lawmaking processes, private environmental governance, sites of indigenous lawmaking, legal cultures and traditions, judicial discourse and international organizational practice.⁷⁶

⁷³ *ibid* 69.

⁷⁴ Philip Jessup, *Transnational Law* (Yale University Press, 1956) 1.

⁷⁵ 'Some rules are made by ecclesiastical authorities as in specifying times and manners of fasting. Some are made by corporations regulating their sales agencies... Other rules are made by secret societies, by towns, cities, states. Still others are made by international organizations such as the Coal and Steel Community, the International Monetary Fund... Nowadays it is neither novel nor heretical to call all of these rules 'law'.' *Ibid* 9.

⁷⁶ This section draws on Natasha Affolder, 'Contagious Environmental Lawmaking' (2019) 31 *JEL* 1, an article that sets out some of the methodological and terminological challenges to studying how environmental law ideas move.

The methods for measuring and tracking processes of legal transfer of environmental law ideas have neither kept up with the reality of these movements, nor have concepts evolved from the theory of ‘legal transplants’ to reflect the complex and multi-directional patterns of such movements. These movements do not uniformly lead in one direction – towards convergence around a universal model. Even when developments appear very unique and place-based, such as the emergence of constitutional rights in Ecuador drawing on indigenous cosmology, the narratives of transnational influence and transfer are never far behind.⁷⁷

The uptake of models and inspiration from different places reveals another manifestation of ‘The Unequal Present’. Tracing the history of influence of two foundational climate change cases – *Urgenda Foundation v State of the Netherlands*⁷⁸ and *Leghari v Federation of Pakistan*⁷⁹ – provides a quick illustration of this point. While both cases have been labelled ‘ground-breaking’, and the *Leghari* case identified as ‘potentially more transformative than the decision in *Urgenda*,’⁸⁰ the degree to which these cases have attracted ‘uptake’ and attracted calls for emulation from scholars, commentators, and the media, is starkly uneven.⁸¹

A reason why future work on the transfer of environmental law models and ideas may serve as pivotal for transnational legal scholarship more generally is that it signals a flashpoint for the wider tension between the urgent practical work of finding and forcing globally relevant legal solutions to environmental law problems and the profound, if still under-appreciated, links between law and culture.⁸² Understanding how law is linked to people and place is a subject of

⁷⁷ Maria Akchurin, ‘Constructing the Rights of Nature: Constitutional Reform, Mobilization, and Environmental Protection in Ecuador’ (2015) 40(4) L & Soc Inquiry 937.

⁷⁸ *Urgenda Foundation v State of the Netherlands* [2015] HAZA C/09/00456689.

⁷⁹ *Leghari v Federation of Pakistan* (2015) WP No 25501/201.

⁸⁰ Jacqueline Peel and Hari M Osofsky, ‘A Rights Turn in Climate Change Litigation?’ (2017) 7 TEL 37, 52.

⁸¹ A few examples of the claimed influence of *Urgenda* on other climate lawsuits include litigation in Belgium, Switzerland, and Ireland. The case has also had a tangible influence on the environmental advocacy community in Australia despite significant differences between Australian common law and Dutch civil law. Jacqueline Peel, Hari Osofsky and Anita Foerster, ‘Shaping the Next Generation of Climate Change Litigation in Australia’ (2017) 41 Melbourne U L Rev 793, 805. Calls for replication of the case frequently emerge from jurisdictions with little similarity to the Dutch legal system. See e.g. Rogers Cox, ‘A Climate Change Litigation Precedent: *Urgenda Foundation v The State of the Netherlands*’ (2016) 34(2) Journal of Energy & Natural Resources Law 143. In sharp contrast, and despite the groundbreaking aspects of the *Leghari* decision, that case has generated relatively little media attention and significantly fewer claims that it is a model ripe for replication than the ruling in *Urgenda*.

⁸² An inspiration for such work is Eloise Scotford’s writing on environmental principles, work that remains attentive to internal legal culture while canvassing the broader work that principles do. Eloise Scotford, *Environmental Principles and the Evolution of Environmental Law* (Hart 2017).

increasing research of critical interest to transnational environmental law. Attentiveness to the importance of legal culture spawns research into subjects ranging from the differential experience of the judicialization of politics,⁸³ to the practical challenges of traditions of importing concepts, frameworks and vocabularies for assimilation and implementation.⁸⁴ Methodology again becomes a critical aspect of this work. In the context of comparative constitutionalism, an area of significant current interest in environmental law scholarship, Peer Zumbansen suggests the need for constant vigilance to resist practices of referral to only the ‘usual suspects’—including Canada, Israel, Germany, New Zealand, South Africa, the United Kingdom and the US.⁸⁵

Approaching law as a product of specific peoples and specific places ultimately leads to the question: what might a culture-attentive version of transnational environmental law look like?⁸⁶ The non-recognition of culture in global environmental law is perceived by some as part of a conscious attempt by internationalists to disregard it for the challenge it poses to the universalist agenda.⁸⁷ Others draw attention to the particularities of legal culture in accounting for the success of strategic litigation that uses international law arguments.⁸⁸ In a case study of litigation in Colombia brought by indigenous and black communities and their advocates to challenge the constitutionality of the General Forest Law, Daniel Maldonado argues that a close analysis of the particular legal culture of Colombia, including its transplant of ‘the block of constitutionality from France,’ reveals why this litigation was able to succeed.⁸⁹ Such a search to

⁸³ Rachel Sieder, Line Schjolden and Alan Angell (eds), *Judicialization of Politics in Latin America* (Springer 2005).

⁸⁴ See César Rodríguez-Garavito, ‘Remapping Law and Society in Latin America: Visions and Topics for a New Legal Cartography’, in César Rodríguez-Garavito (ed), *Law and Society in Latin America: A New Map* (Routledge 2015).

⁸⁵ Peer Zumbansen, ‘The Rule of Law, Legal Pluralism, and Challenges to a Western-Centric View: Some Very Preliminary Observations’ in Christopher May and Adam Winchester (eds), *Handbook of the Rule of Law* (Edward Elgar 2018) 71.

⁸⁶ For an important critique of the acultural foundations of private and public international law see Lan Cao, *Culture in Law and Development* (Oxford University Press 2016).

⁸⁷ Roda Mushkat, *International Environmental Law and Asian Values: Legal Norms and Cultural Influences* (UBC Press 2004) 3.

⁸⁸ Daniel Bonilla Maldonado, ‘International Law, Cultural Diversity, and the Environment: The Case of the General Forest Law in Colombia’ in Shawkat Alam and others (eds), *International Environmental Law and the Global South* (Cambridge University Press 2015) 524.

⁸⁹ *ibid* 524.

extract lessons of ‘what works’ from detailed place-based accounts of rare litigation successes finds powerful parallels in the uncertain future of climate litigation.⁹⁰

AN UNCERTAIN FUTURE

One consequence of the considerable uncertainty about the future, and environmental law’s place in that future, is that current legal initiatives tend to be seen as experiments. Indeed, the current trend of portraying climate law as experimental is so ubiquitous as to avoid notice.⁹¹ An experimental approach to climate lawmaking is not irrelevant to transnational law because it institutionalizes a culture of cut, paste and copy. It facilitates the mentality of uncritical legal transfers that were the subject of discussion in the previous section of this chapter. Viewing legal developments through the clinical lens of ‘lab experiments’ may also foster an instrumental view of law and one that reduces legal practitioners and scholars to the role of technicians. Imagining a different role for legal scholars and practitioners is easy to do and comes to light through integrating theory and practice, policy and prescription.

1. Transnational Environmental Law and Affluence

In 2016 Oxfam reported in detail on why emissions from some countries were so much greater than others.⁹² Simply put, the problem is affluence. Excessive consumption means that the best-off in any country waste more energy, drive more than they need to, take more flights, and require more building materials.⁹³ Thinking about affluence and its environmental effects leads to new frontiers for transnational legal research. It involves thinking about inequality not only in terms of geography, but across geographies, and the climate implications emerging from the fact

⁹⁰ See Jacqueline Peel and Jolene Lin, ‘Transnational Climate Litigation: The Contribution of the Global South’ (2019) 55 AJIL, DOI: 10.1017/ajil.2019.48.

⁹¹ For example, the scientific language of experimentation has been applied to the US Clean Air Act, the Western Climate Initiative, the development of emissions trading in India, and the Paris Agreement. Not surprisingly, then, climate governance experimentation is a lens through which climate governance is being studied. See Matthew J Hoffmann, *Climate Governance at the Crossroads: Experimenting with a Global Response after Kyoto* (Oxford University Press 2011) 17.

⁹² Deborah Hardoon, Sophia Ayele and Ricardo Fuentes-Nieva, ‘An Economy for the 1%’ (*Oxfam International*, 18 January 2016) <https://www-cdn.oxfam.org/s3fs-public/file_attachments/bp210-economy-one-percent-tax-havens-180116-en_0.pdf>.

⁹³ See generally Danny Dorling, *The Equality Effect: Improving Life for Everyone* (New Internationalist Publications Ltd 2016).

that ‘there is a ‘North’ in the ‘South’ and a ‘South’ in the ‘North’.’⁹⁴ Pragmatically, it leads to proposals for linking responsibility for global warming and affluence through, for example, introducing taxes on business class seats to raise funds for climate adaptation, removing the considerable tax breaks given to private jets,⁹⁵ and targeting ‘carbon majors’ for their role in profiting from global warming.⁹⁶ It provides impetus to scholarly efforts to focus on the individual as a relevant unit for environmental law.⁹⁷

Empirical research on global warming and research agendas on affluence force us to confront a question recently posed by Tim Stephens: given the twin facts that the goals of ‘traditional’ international environmental law (such as habitat protection in a ‘pristine’ state) may now be out of reach and the tools for reaching them (such as protected areas) ineffective or inadequate, is it time for new goals and new thinking?⁹⁸ Are the ambitions of environmental law greater than environmental harm reduction? If so, what are they?

2. Earthly Life Confronts Transnational Legal Theory

The climate crisis is forcing lawyers to ask, even if they cannot answer, these sorts of uncharacteristically large and existential questions. Such questions come to the fore as the climate crisis signals, in Dipesh Chakrabarty’s words, ‘the first glimpse we may have of a possible limit to our very human-centered thinking about justice, and thus to our political thought as well.’⁹⁹ While transnational legal theory has done much to disrupt a view of law where all relevant actors, norms and processes trace to the nation state,¹⁰⁰ it has yet to confront what Daniel Matthews labels globalization’s ‘dark side’: ‘the reality of a dramatically changing planet’.¹⁰¹

⁹⁴ Karin Mickelson, ‘Beyond a Politics of the Possible? South-North Relations and Climate Change’ (2009) 10 *Melbourne J Intl L* 411, 419.

⁹⁵ See ‘Plane Stupid: Private Jets Receive Ludicrous Tax Breaks that Hurt the Environment’ (*The Economist*, 7 March 2019) <<https://www.economist.com/leaders/2019/03/07/private-jets-receive-ludicrous-tax-breaks-that-hurt-the-environment>> accessed 6 June 2019.

⁹⁶ Kim Bouwer, ‘The Unsexy Future of Climate Change Litigation’ (2018) 30 *JEL* 483, 490.

⁹⁷ Michael P Vandenberg and Anne C Steinemann, ‘The Carbon Neutral Individual’ (2007) 82 *NYU L Rev* 1673.

⁹⁸ *Stephens* (n 11) 124.

⁹⁹ *Chakrabarty* (n 1) 109.

¹⁰⁰ For an explanation of the Actor-Network-Process triad as an element of transnational legal method see *Zumbansen* (n 4).

¹⁰¹ Daniel Matthews, ‘From Global to Anthropocentric Assemblages: Re-Thinking Territory, Authority and Rights in the New Climatic Regime’ (2019) 82(4) *MLR* 665, 666.

The extent of this challenge is still only hinted at by emerging literatures of the Anthropocene and by scholars taking first steps to understand the significance for law of moving away from a view of the ‘the world’ as something that humans simply inhabit and control.¹⁰² Peter Sloterdijk uses the label ‘background ontology’ to describe the deeply entrenched view of the place of humans in the cosmos underlying modern political thought:

In this ontology, the human being plays the dramatic animal on stage before the backdrop of a mountain of nature, which can never be anything other than the inoperative scenery behind human operations. The thinking anchored in this backdrop ontology remains virulent long after the Industrial Revolution, even though it is now seen as an integrated depot of resources and a universal dump.¹⁰³

David Wallace-Wells captures the same idea in a different way, reminding us climate change transforms even the stories we tell about ourselves and nature:

Parables are a teaching tool and work like glass dioramas in natural history museums: you pass by, you look, you believe that what is contained in the taxidermy scene has something to teach you – but only by the logic of the metaphor, because you are not a stuffed animal and do not live in the scene but beyond it, outside it, observing it rather than participating. The logic is twisted by global warming, because it collapses the perceived distance between humans and nature – between you and the diorama... you do not live outside the scene but within it.¹⁰⁴

As territories sink under water and cease to exist, the very coordinates that tether our view of the world are being dislocated. Scholars are scrambling to understand these dislocations and

¹⁰² See e.g. Fritjof Capra and Ugo Mattei, *The Ecology of Law* (Berrett-Koehler 2015); Peter D Burdon, *Earth Jurisprudence: Private Property and the Environment* (Routledge 2015).

¹⁰³ Peter Sloterdijk, ‘The Anthropocene: A Process-State at the Edge of Geohistory’ (A-S Spring (trans)) in Heather Davies and Etienne Turpin, *Art in the Anthropocene: Encounters Among Aesthetics, Politics, Environments and Epistemologies* (Open Humanities Press 2015) 327, 334. I credit Daniel Matthews with drawing this link between the legal presuppositions of modernity and Sloterdijk’s work. Ibid 667.

¹⁰⁴ David Wallace-Wells, *The Uninhabitable Earth: Life After Warming* (Tim Duggan Books 2019) 150.

transformations and to find the right words and concepts to enable ‘the earth’s biogeochemical relations’ to become part of our political imaginary.¹⁰⁵ Transnational environmental law scholars possess the conceptual toolkits to make unique contributions at a time when law might need to be understood through complex regulatory constellations, when theory confronts the Terrestrial as ‘a new political actor’,¹⁰⁶ and when the pragmatic task of environmental law shifts from ‘saving nature and solving environmental problems to living with problems that are our new and permanent conditions.’¹⁰⁷

CONCLUSIONS: THE DIVERSITY OF PRACTICE OF TRANSNATIONAL ENVIRONMENTAL LAW

Approaching transnational law as a visual field is a way of acknowledging that how and from where and through whom law is perceived, matters. For international lawyers, Daniel Bethlehem suggests that the ‘world looks different from Geneva than it does from New York’.¹⁰⁸ He contrasts the Big Power Politics dominated view of the New York-based United Nations institutions with that of the Geneva-based specialized agencies working ‘at the sharp end of the world of the future – focused on cyber, on food security, on pandemic health scares, on the interconnectedness of the global trade and financial system’.¹⁰⁹ The larger point, and one which Bethlehem acknowledges, is that there is a vastly different, more diffuse and decentralized world, which comes into view when one moves beyond a state-fixated vision. This is a perspective of particular interest to transnational law. Yet this view itself imports a research challenge – that of complementing and correcting the view from Geneva and New York with perspectives from Amman and Addis Ababa and Akbarpur.

As this chapter argues, new research agendas emerge organically from such shifts of gaze. And the very exercise of identifying future research agendas brings to light the rich diversity of

¹⁰⁵ *Matthews* (n 101).

¹⁰⁶ *Latour* (n 63) 40.

¹⁰⁷ *Purdy* (n 29)231.

¹⁰⁸ Daniel Bethlehem, ‘The End of Geography: The Changing Nature of the International System and the Challenge to International Law’ (2014) 25(1) EJIL 9, 11.

¹⁰⁹ *ibid* 11-12.

current practices of transnational environmental law. This diversity emerges through creative lenses such as scholarship on transnational localism, challenging the view that global problems necessitate global or uniform regulatory solutions.¹¹⁰ An ongoing challenge for transnational law scholarship, then, is to nurture research that leads to the multiplying of viewpoints, that challenges both temporal and spatial short-sightedness, and that accounts for and is accountable to, more and different beings.

¹¹⁰ Jerneja Penca, 'Transnational Localism: Empowerment through Standard-Setting in Small Scale Fisheries' (2019) 8(1) TEL 143.