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Global Green Governance: Embedding the Green Economy in a Global Green and Equitable Rule of Law Polity

Joyeeta Gupta and Nadia Sanchez

The global community is crossing planetary boundaries while it has not yet met the basic needs of at least one-third of the global population. Although governance systems are developing, they are still unable to adequately deal with current global environmental problems. This article assesses global green governance, inferring that it is reactive, incoherent and fragmented, lacks the tools to implement a systemic approach, is ad hoc rather than principled, is becoming politically charged, and may be unable to support the implementation of a green economy and cope with the societal changes expected by 2050. The article concludes that fragmentation of international environmental law and policy is inevitable, but that some degree of constitutionalization is necessary to provide a rule of law framework in an increasingly globalized, networked, multilevel world.

INTRODUCTION

This article assumes that law is not an isolated field, but that it must continuously and systematically respond to, and anticipate, social changes and new scientific knowledge without compromising on key legal values such as the rule of law. It addresses two closely linked problems. First, global environmental problems are crossing planetary boundaries,¹ and stressing ecosystems.² And yet, the minimum needs of the global population remain unmet and the Millennium Development Goals (MDGs) unachieved.³ Environmental problems affect lives, ecosystems, as well as ecosystem services

(supportive, regulatory, provisioning and aesthetic).⁴ If our ecosystems cannot provide these services, we may be unable to meet global minimum social standards and compromise future development. For example, if current environmental pollution trends are not reversed, the Human Development Index may be 8–15% lower than otherwise in 2050.⁵ Second, although global governance is evolving incrementally, it has not controlled the climate change problem, halted deforestation or protected our ecosystems.⁶

These problems are critical issues at the 2012 United Nations Conference on Sustainable Development in Rio (Rio+20).⁷ The summit aims to secure political commitment to sustainable development, assess progress towards achieving past goals, including those in Agenda 21⁸ and the MDGs, and deal with emerging challenges. It has two themes: a green economy; and the institutional framework for sustainable development.⁹ This article aims to contribute primarily to the second theme. More specifically, it examines existing patterns in international environmental governance, as well as expected trends until 2050, and argues that although the fragmentation of international environmental

¹ J. Rockström *et al.*, 'A Safe Operating Space for Humanity', 461:7263 *Nature* (2009), 472.

² N. Myers *et al.*, 'Biodiversity Hotspots for Conservation Priorities', 403:6772 *Nature* (2000), 853.

³ For example, while the percentage of undernourished people has reduced from 20% (1990) to 15% (2008), the absolute numbers have remain unchanged. Some 2.6 billion people still lack access to improved sanitation. The 2011 Millennium Development Goals Report states that the poverty reduction target has been met only by 45 of the 84 countries for which there is data (out of a total of 144 countries). Progress to Date and Remaining Gaps in the Implementation of the Outcomes of the Major Summits in the Area of Sustainable Development, as well as an Analysis of the Themes of the Conference, Report of the Secretary General, (A/CONF.216/PC/2, 1 April 2010), paragraph 15.

⁴ Provisioning services include food, water, energy; regulating services include carbon sequestration, climate regulation, waste decomposition and detoxification; supporting services include nutrient cycling and seed dispersal; and aesthetic/cultural services include the significance of these ecosystems to the societies that live in them. Millennium Ecosystem Assessment, *Ecosystems and Human Well-being: Synthesis* (Island Press, 2005).

⁵ United Nations Development Programme (UNDP), *Human Development Report, Sustainability and Equity: A Better Future for All* (UNDP, 2011), at 2.

⁶ B. Walker *et al.*, 'Looming Global-scale Failures and Missing Institutions', 325:5972 *Science* (2009), 1345; F. Biermann *et al.*, 'Earth System Governance: A Research Framework' 10:4 *International Environmental Agreements: Politics, Law and Economics* (2010), 277.

⁷ <<http://www.uncsd2012.org/rio20/index.html>>.

⁸ Report of the UN Conference on Environment and Development (Volume I), Agenda 21 (A/CONF.151/26/Rev.1, 14 June 1992), found at <<http://www.un.org/esa/dsd/agenda21/index.shtml>>.

⁹ Implementation of Agenda 21, the Programme for the Further Implementation of Agenda 21 and the Outcomes of the World Summit on Sustainable Development (UN General Assembly Resolution A/RES/64/236, 24 December 2009).

governance may be inevitable, constitutionalization for a multilevel legal system is necessary to provide support for new legal tools capable of dealing with a systems approach and promoting a green economy.

ASSESSING GLOBAL GREEN GOVERNANCE

A BRIEF HISTORY OF GLOBAL GREEN GOVERNANCE

Environmental challenges first appeared on the global political agenda as ad hoc issues (e.g., the impact of DDT on bird's eggs, threats to single species like pandas and whales, and deforestation). They were mainly tackled by issue-specific policy responses (e.g., the Convention on International Trade in Endangered Species¹⁰ and the Whaling Convention¹¹). As different environmental challenges became linked, this led to the identification of a comprehensive environmental problem,¹² evoking policy responses on common environmental (e.g., the 1972 Stockholm Declaration¹³) and water-related issues (e.g., the 1977 Mar Del Plata Action Plan¹⁴). The next two decades experienced the interlocked relationship between environment and development (e.g., the 1992 UN Conference on Environment and Development),¹⁵ leading to global consensus and prioritization of the concept of 'sustainable development' at the 2002 World Summit on Sustainable Development,¹⁶ which was reiterated in the preparatory work for the 2012 summit in Rio. Environmental accidents (in Bhopal in 1984, and Chernobyl in 1985), disasters (like Hurricane Katrina in 2005) and creeping environmental problems (like drought, chemical pollution, depletion of fish stocks and climate change) disrupt development patterns and provide a new impetus to prioritize basic needs and

the environment,¹⁷ although the global economic recession has cast a damper on current efforts.

The links between the environment and other aspects of development (e.g., energy), and security (from local to global) have made environmental problems very complex. This has led to discourses on environment policy integration,¹⁸ integrated water resource management (IWRM),¹⁹ mainstreaming environment into development²⁰ and the green economy.²¹ However, implementing these discourses is not easy because of competitiveness, free-rider and leakage arguments,²² because we lack systemic instruments, and because countries continue to 'treat poverty, infectious disease and environmental degradation as stand-alone threats'.²³ However, the interlocking nature may lead environmental issues to be framed as high-politics issues, which may either result in rapid responses in the context of an interdependent world or to intensive competition as each actor tries to maximize his or her own gains in a neoliberal world.

CHALLENGES IN SPECIFIC ISSUES IN GLOBAL GREEN GOVERNANCE

The aforementioned challenges will now be further explored for the specific issue areas of water, forest and climate governance.

¹⁷ UN Millennium Declaration (UN General Assembly Resolution A/RES/55/2, 8 September 2000).

¹⁸ M. Nilsson, M. Pallemaerts and I. von Homeyer, 'International Regimes and Environmental Policy Integration: Introducing the Special Issue' 9:4 *International Environmental Agreements: Politics, Law and Economics* (2009), 337.

¹⁹ IWRM was introduced in Agenda 21. Ministers and heads of states are increasingly committing to it at the meetings of the World Water Forums, and especially at the last World Water Forum in 2009. See Ministerial Statement (5th World Water Forum, Istanbul, 22 March 2009), found at <http://content.worldwaterforum5.org/files/PoliticalProcess/Ministerial_Statement_22_3_09.pdf>.

²⁰ United Nations Environment Programme (UNEP) and UNDP, *Guidance Note on Mainstreaming Environment into National Development Planning* (UNEP-UNDP, 2007); F. Seymour *et al.*, *Environmental Mainstreaming: Applications in the Context of Modernization of the State, Social Development, Competitiveness and Regional Integration* (Inter-American Development Bank, Sustainable Development Department, 2005).

²¹ UNEP, *Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication* (UNEP, 2010), found at <<http://www.unep.org/greeneconomy>>.

²² The competitiveness argument refers to the fact that some countries feel that unilateral measures may make their products more expensive in the international market, meaning that they do not wish to take measures except in consultation with other countries. The free rider argument refers to the fact that some countries may not join a coalition of countries taking action and can thus benefit from the measures taken by others without themselves helping in addressing global problems. The leakage argument refers to a situation in which one country takes measures – for instance, to reduce deforestation – but world demand for products leads to more environmental destruction elsewhere.

²³ 'A More Secure World: Our Shared Responsibility, Report of the High-level Panel on Threats, Challenges and Change' (A/59/565, 2 December 2004), at 27, found at <<http://www.un.org/secureworld/>>.

¹⁰ Convention on International Trade of Endangered Species of Wild Fauna and Flora (Washington, DC, 3 March 1973) (CITES).

¹¹ International Convention for the Regulation of Whaling (Washington, DC, 2 December 1946).

¹² Friends of the Earth, *Only One Earth: An Introduction to the Politics of Survival* (Earth Island, 1972).

¹³ Declaration of the UN Conference on the Human Environment (A/CONF.48/14/Rev.1, 16 June 1972) ('Stockholm Declaration').

¹⁴ Mar Del Plata Action Plan, Report of the UN Water Conference (E/CONF.70/29, 25 March 1977) ('Mar Del Plata Action Plan').

¹⁵ World Commission on Environment and Development, *Our Common Future: Brundtland Report of the World Commission on Environment and Development* (Oxford University Press, 1987); C. Ponting, *A Green History of the World: The Environment and the Collapse of Great Civilizations* (St Martin's Press, 1991).

¹⁶ Johannesburg Declaration on Sustainable Development, found in Report of the World Summit on Sustainable Development, Plan of Implementation of the World Summit on Sustainable Development (A/CONF.199/20, 4 September 2002), found at <http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf>.

Global water governance has passed through transboundary institutionalization experiments (pre-1960), multiple UN water policy initiatives (1960–1992),²⁴ hybridization of policies with the entry of non-state actors and hybrid coalitions in the governance arena (1992–2003),²⁵ and an attempt at system-wide coherence with the establishment of UN Water since 2003. International water law has moved away from fluvial treaties²⁶ to the codification of water law principles in 1966²⁷ and 2004,²⁸ the entry into force of a regional water Convention²⁹ and Protocol,³⁰ the adoption of a global Watercourses Convention,³¹ the introduction of a human right to water and sanitation,³² and precedents in water adjudication.³³ This may suggest a gradual consolidation of global water governance. However, since the Watercourses Convention is not yet in force, and water is dealt with by many bodies with only light coordination by UN Water, the field is diffuse and fragmented.³⁴ Concepts like IWRM remain poorly defined,³⁵ while trade and investment rules have helped make water into a private commodity subject to confidential contracts, international dispute

settlement³⁶ and arbitration rules.³⁷ The hybrid (UN/non-UN) governance processes do not follow clear rules of procedure and are less than legitimate, and the meetings of the World Water Forums do not necessarily produce binding agreements.³⁸ The governance vacuum has led to inconsistent policies and funding for strategies that are not necessarily relevant for recipient countries.³⁹

Unlike water, which is governed primarily in relation to its transboundary character, forests fall mostly within national jurisdiction. Yet forests are difficult to govern: not all States see forests as a global issue or as an environmental public good; forest definitions adopted in different fora are inconsistent; ownership rights to forests are heavily contested; the designation of land with tree cover as forests is politically sensitive with equity implications for the land owner; and the costs of maintaining forests are often higher than the direct financial returns.⁴⁰ Direct global forest governance (focused specifically on forest management) can be traced back to the creation of the International Tropical Timber Organization, while indirect governance arrangements focusing on ancillary issues include the International Labour Organization rules on indigenous peoples⁴¹ and treaties on endangered species,⁴² heritage,⁴³ biodiversity⁴⁴ and climate change⁴⁵ as well as initiatives of both UN and non-UN agencies. In addition, system-wide coherence is pursued through the UN Forum on Forests (established in 2000) and the Collaborative Partnership on Forests (established in 2001), which both bring together various of the forest-related organizations efforts. Although ongoing efforts in the area of reduced emissions from deforestation and forest degradation (REDD) frame forests in relation to some of their ecosystem services, processes have been ad hoc

²⁴ These include the Stockholm Declaration, n. 13 above; the Mar del Plata Action Plan, n. 14 above; and the Rio Declaration on Environment and Development, found in Report of the UN Conference on Environment and Development (A/CONF.151/26/Rev.1 (Vol. I), 14 June 1992), Annex ('Rio Declaration').

²⁵ See, e.g., Dublin Statement on Water and Sustainable Development, adopted at the International Conference on Water and the Environment (Dublin, 31 January 1992); World Commission on Dams, *Dams and Development: A New Framework for Decision-making* (Earthscan, 2000). This development was further exemplified by the establishment of the World Water Council and the World Water Forum.

²⁶ UNEP, *Atlas of International Freshwater Agreements*, Oregon State University (UNEP, 2002), at 2.

²⁷ The Helsinki Rules on the Uses of the Waters of International Rivers, printed in *Report of the Fifty-second Conference of the International Law Association held at Helsinki, 14–20 August 1966* (International Law Association (ILA), 20 August 1966).

²⁸ International Law Association, Berlin Rules on Water Resources, in *Report of the Seventy-first Conference* (London, 2004), found at <<http://www.ila-hq.org/en/Other/document-summary.cfm/docid/B6F2AD1C-11B5-45A3-89534097AD1FEE95>>.

²⁹ Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 17 March 1992).

³⁰ Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (London, 17 June 1999).

³¹ Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997) ('Watercourses Convention').

³² The Human Right to Water and Sanitation (UN General Assembly Resolution A/RES/64/292, 28 July 2010). See, for a discussion, J. Gupta *et al.*, 'The Human Right to Water: Moving toward Consensus in a Fragmented World', 19:3 *RECIEL* (2010), 294.

³³ ICJ 25 September 1997, *Hungary v. Slovakia* ('*Gabcikovo-Nagymaros Case*'), [1994] ICJ Rep. 151.

³⁴ C. Pahl-Wostl *et al.*, 'Governance and the Global Water System: A Theoretical Exploration', 14:4 *Global Governance* (2008), 419.

³⁵ K. Conca, *Governing Water: Contentious Transnational Politics and Global Institution Building* (MIT Press, 2006).

³⁶ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, DC, 18 March 1965).

³⁷ A.-M. Klijn *et al.*, 'Privatising Environmental Resources: The Need for Supervision', 18:2 *RECIEL* (2009), 172.

³⁸ P. Gleick and J. Lane, 'Large International Water Meetings: Time for a Reappraisal', 30:3 *Water International* (2005), 410.

³⁹ J. Gupta, 'Driving Forces around Global Fresh Water Governance', in D. Huitema and S. Meijerink (eds.), *Water Policy Entrepreneurs: A Research Companion to Water Transitions around the Globe* (Edward Elgar, 2009), 37.

⁴⁰ J. Gupta and E. Bergsma, 'A Conceptual Framework for Assessing Multi-level (Forestry) Governance' (manuscript on file with authors).

⁴¹ Indigenous and Tribal Populations Convention (Geneva, 26 June 1957).

⁴² See CITES, n. 10 above.

⁴³ Convention Concerning the Protection of the World Cultural and Natural Heritage (Paris, 16 November 1972).

⁴⁴ Convention on Biological Diversity (Rio de Janeiro, 5 June 1992) ('CBD').

⁴⁵ UN Framework Convention on Climate Change (New York, 9 May 1992) ('UNFCCC'). Another key UN initiative related to reducing deforestation is the UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries ('UN-REDD'), found at <<http://www.un-redd.org>>.

and incoherent⁴⁶ – and there is no guarantee that the REDD process will in fact lead to protection of ecosystem services.

Climate change is an unquestioned global issue. The regime developed in response to global scientific assessments and led to the adoption of the UN Framework Convention on Climate Change (UNFCCC) in 1992⁴⁷ and the Kyoto Protocol in 1997.⁴⁸ However, although the treaty regime moved rapidly (compared to global water and forest governance), the targets and timetables set out in the UNFCCC⁴⁹ and the Kyoto Protocol⁵⁰ have lost momentum, and follow-up targets are conditional and voluntary,⁵¹ leaving little incentive to implement cost-effective mechanisms, such as the Clean Development Mechanism and REDD. The United States' refusal to ratify the Kyoto Protocol,⁵² as well as the more recent decision by Canada to withdraw from the Protocol, have further pointed to a weakening of the regime. The development of many other climate-related agreements⁵³ may divert attention away from the binding targets approach needed to address the climate problem.⁵⁴

CHALLENGES IN THE STRUCTURE OF GLOBAL GREEN GOVERNANCE

In general, environmental issues are addressed by the United Nations Environment Programme (UNEP) since the 1972 Stockholm Conference. However, climate change was explicitly not entrusted to UNEP but to the UN General Assembly, and most environmental issues fall under the purview of many other UN agencies, lightly coordinated by the UN Environment Management Group. The issue of reorganizing international environmental governance has been on the agenda since 1992.

⁴⁶ D. Humphreys, *Logjam: Deforestation and the Crisis of Global Governance* (Earthscan, 2006), at 213. See also J. Rayner, A. Buck and P. Kapila (eds.), *Embracing Complexity: Meeting the Challenges of International Forest Governance. A Global Assessment Report*. Prepared by the Global Forest Expert Panel on the International Forest Regime (IUFRO, 2010).

⁴⁷ UNFCCC, n. 45 above.

⁴⁸ Kyoto Protocol to the UN Framework Convention on Climate Change (Kyoto, 11 December 1997).

⁴⁹ UNFCCC, n. 45 above, Article 4.2 (a) and (b).

⁵⁰ See Kyoto Protocol, n. 48 above, Article 3.

⁵¹ J. Gupta, 'Climate Change: A GAP Analysis Based on Third World Approaches to International Law', 53 *German Yearbook of International Law* (2010), 341.

⁵² J. Gupta, 'A History of International Climate Change Policy', 1:5 *Wiley Interdisciplinary Reviews* (2010), 636.

⁵³ See, e.g., the Global Methane Initiative at <<http://www.globalmethane.org/>>; and the International Partnership for Hydrogen and Fuel Cells in the Economy, at <<http://www.iphe.net/>>.

⁵⁴ M. Allen, 'Planetary Boundaries: Tangible Targets are Critical', 3:10 *Nature Reports Climate Change* (2009), 114.

There are many theoretical options for reorganization,⁵⁵ each with its own pros and cons,⁵⁶ of which at present six options are being considered in the discussions on the institutional framework for sustainable development in preparation for the Rio+20 Summit: strengthening UNEP; strengthening the Commission on Sustainable Development; creating a UN Environment Organization (UNEO); monitoring and enforcing multilateral environmental agreements (MEAs); clustering MEAs to achieve coherence and efficiency; and improving the context of international environmental arbitration.⁵⁷ Some of these approaches are being supported by intellectual efforts at improving global environmental governance.⁵⁸ There are a number of challenges that influence the process of deciding how to structure governance at the global level. These include the fact that there are existing bodies with their own legal mandates and contractual arrangements which cannot be phased out easily; the need to keep expenses down in designing a new body; the fear of countries that a strong centralized body with substantial powers may intervene in the sovereign powers of a country; and the very different perspectives of countries on how to compartmentalize issues and how much priority should be given to them.

THE DOMINANT DISCOURSE: TOWARDS A GREEN ECONOMY

A key substantive challenge at the global level is how to reconcile environmental issues with the growth paradigm. The ideological stress between environmental and capitalist paradigms has given birth to the concept of the 'green economy'.⁵⁹ The UN Secretary General has identified four different interpretations: the internal-

⁵⁵ These include: the hierarchical, integrated sustainable development organization (e.g., a World Sustainable Development Organization), which would cover all environmental and developmental issues; the hierarchical, single issue organization which would focus only on environmental issues (e.g., a World Environment Organization); a high-level advisory group which would focus on specific issues and would include people with a high profile; a non-hierarchical focal point, which could be an existing body that takes on the role of being the focal point for discussions; coordination bodies, which would include UN Water, UN Energy and the UN Environment Management Group; strengthening individual bodies such as UNEP; promoting coordination through common principles, such as the Rio Principles; regime clustering – combining different treaty regimes into one body; and decentralized network organizations, which would allow individual bodies to network and collaborate. See J. Gupta, 'Global Sustainable Development Governance: Institutional Challenges from a Theoretical Perspective', 2:4 *International Environmental Agreements: Politics, Law and Economics* (2002), 361.

⁵⁶ J. Gupta, n. 55 above.

⁵⁷ See <<http://www.earthsummit2012.org/institutional-framework-for-sd/issues>>.

⁵⁸ Earth System Governance Project, 'Rio +20 Policy Brief: Transforming Governance and Institutions for a Planet under Pressure' (London, March 2012), found at <http://www.earthsystemgovernance.org/sites/default/files/publications/files/Policy-Brief-3_Institutional-Framework.pdf>.

⁵⁹ See UNEP, n. 21 above.

ization of environmental externalities to reduce market imperfections; a broader systemic perspective to incorporate environmental challenges within the economic order; linking social goals (like job creation) to economic goals; and a new macroeconomic framework that designs a pathway towards sustainable development.⁶⁰ This re-ordering of global society will be one of the two themes discussed at Rio+20.

Policy ideas to implement a green economy include re-inventing economies; getting the prices right (e.g., internalization of environmental externalities, green taxes, linking social goals with economic goals); investing in a sustainable infrastructure; promoting science-based sustainable product chains; the dematerialization and decarbonization of society; multiple land use and sustainable agriculture; better water use and the protection of ecosystem services; sustainable procurement policies for the State; and empowering people through education, research and dialogue to ensure that access to basic services becomes an enforceable right and that protecting the environment is a parallel responsibility.⁶¹ Although these elements are all critical and useful ideas, actually implementing them through instruments that can take their systemic character into account is very difficult. For example, decarbonization as part of the green economy is easier said than executed.

THE DOMINANT CHALLENGE: ADOPTING AN INCLUSIVE AND EQUITABLE PROCESS

While the major substantive challenge was reconciling environmental goals with growth goals, a major political challenge is reconciling conflicting North–South perspectives about the state of global governance. The Third World Approaches to International Law (TWAIL) school⁶² argued in its first post-Second World War phase⁶³ that international law was a hegemonic tool to promote, justify and protect the interests of the power-

ful; in its second phase that economic institutions were institutionalizing an unfair economic order;⁶⁴ in the post 9/11 phase that international law and politics are becoming more intrusive;⁶⁵ and in the wake of the American withdrawal from the Kyoto Protocol that the climate regime is institutionalizing a new pragmatism in international environmental law that compromises equity.⁶⁶ TWAIL scholars argue that treaties take a ‘West-centric’⁶⁷ approach and embody explicit and implicit norms that institutionalize inequities⁶⁸ by prescribing standard solutions to an unequal world. They argue that international lawyers should also account for the interests of the developing countries,⁶⁹ scrutinize universalist arguments,⁷⁰ and unpack discourses that hide colonial and neo-colonial approaches.⁷¹

IMPLICATIONS

On the basis of the above, we can point to a number of implications for international environmental governance. First, international environmental governance is ‘reactive’,⁷² not proactive. Second, it is incoherent across related sectors (e.g., environment and trade),⁷³ as well as fragmented within sectors (e.g., water,⁷⁴ energy,⁷⁵ forests⁷⁶). Third, there is a substantive evolution from sectoral to systemic analysis (e.g., in water towards IWRM,⁷⁷ in biodiversity towards an ecosystem approach,⁷⁸ in climate change from a technocratic to a

⁶⁴ M. Salomon, ‘Poverty, Privilege and International Law: The Millennium Development Goals and the Guise of Humanitarianism’, 52 *German Yearbook of International Law* (2009), 39, at 51.

⁶⁵ See M. Khosla, n. 62 above.

⁶⁶ See J. Gupta, n. 51 above.

⁶⁷ K. Mickelson, ‘Taking Stock of TWAIL Histories’, 10:4 *International Community Law Review* (2008), 355, at 358.

⁶⁸ See, e.g., B. Rajagopal, ‘Counter-hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy’, 27:5 *Third World Quarterly* (2006), 767.

⁶⁹ See O.C. Okafor, ‘Critical Third World Approaches’, n. 62 above at 377–378.

⁷⁰ M. Somarajah, ‘The Asian Perspective to International Law in the Age of Globalization’, 5:2 *Singapore Journal of International and Comparative Law* (2001), 284, at 285.

⁷¹ See B.S. Chimni, n. 62 above, at 4; M. Somarajah, n. 70 above, at 285; and O.C. Okafor, ‘Newness, Imperialism and International Legal Reform’, n. 62 above, at 177.

⁷² P. Sands, *Principles of International Environmental Law* (Cambridge University Press, 2003), at 620.

⁷³ See, e.g., J.H. Jackson, ‘World Trade Rules and Environmental Policies: Congruence or Conflict’, 49:4 *Washington and Lee Law Review* (1992), 1227.

⁷⁴ See, generally, C. Pahl-Wostl *et al.*, n. 34 above; see also J. Delapenna and J. Gupta (eds.) *The Evolution of the Law and Politics of Water* (Springer, 2008).

⁷⁵ J. Gupta and A. Ivanova, ‘Global Energy Efficiency Governance in the Context of Climate Politics’, 2:4 *Energy Efficiency* (2009), 339.

⁷⁶ See D. Humphreys, n. 46 above.

⁷⁷ See UNEP, n. 21 above. Whether States can actually implement this concept remains problematic.

⁷⁸ The ecosystem approach calls for integrating land, water and living resource management to ensure conservation and sustainable use and equity. This concept was made concrete at the Fifth Conference

⁶⁰ See Report of the Secretary General, n. 3 above, at paragraph 44.

⁶¹ Based, *inter alia*, on the Report of the Secretary General, n. 3 above, at paragraph 44; Commission Communication of 8 March 2011, A Roadmap for Moving to a Competitive Low Carbon Economy in 2050, COM(2011)112; National Platform Rio+20, Priorities for a Sustainable Future: Civil Society Outcomes for the Netherlands Rio+20 Preparations (2011), found at <<http://www.nprio2012.nl/wp-content/uploads/2011/06/NPRio+20-priorities-for-a-sustainable-future.pdf>>.

⁶² M. Khosla, ‘The TWAIL Discourse: The Emergence of a New Phase’, 9:3 *International Community Law Review* (2007), 291; B.S. Chimni, ‘Third World Approaches to International Law: A Manifesto’, 8:1 *International Community Law Review* (2006), 3; O.C. Okafor, ‘Newness, Imperialism and International Legal Reform in Our Time: A TWAIL Perspective’, 43(1–2) *Osgoode Hall Law Journal* (2005), 171; O.C. Okafor, ‘Critical Third World Approaches to International Law (TWAIL): Theory, Methodology or Both?’, 10:4 *International Community Law Review* (2008), 371.

⁶³ See M. Khosla, n. 62 above.

development approach⁷⁹). Fourth, although we have tools for sectoral management, we do not have the tools (and political willingness) for integrated and systemic management – such tools would have to be cross-cutting tools that apply across sectors and imply a fundamental reordering of society. Furthermore, at the global level there is a shift towards soft governance (e.g., the biodiversity regime is ‘going soft’,⁸⁰ and the climate regime of targets and timetables is changing into a pledge and review⁸¹ regime). Fifth, the TWAIL school sees international law as continuously embodying patterns of exploitation.

Going beyond these initial inferences, we can argue that if environmental challenges enter the domain of ‘high politics’, the political stakes will increase. The politicization of environmental issues leads to the ad hoc use of principles in different Conventions (e.g., the CBD includes the limited sovereignty principle,⁸² whereas the UNFCCC does not;⁸³ the UNFCCC only has a limited set of principles;⁸⁴ and the principles in the Watercourses Convention⁸⁵ are not reflected in, or reflective of, the Rio principles). The ad hoc incremental governance developments do not always meet good governance criteria: the shift to administrative law⁸⁶ at the international level bypasses State consent; public-private mergers often transform public into economic goods subject to private ownership and confidential contracts;⁸⁷ and legal fragmentation generates inconsistent policies which may not meet the standards of legality, legitimacy, transparency and accountability.⁸⁸ This reflects the gradual erosion of the global legal order, the

decreasing importance being given to the concept of the rule of law and the rise of alternative voluntary mechanisms for governance that will be unable to promote the green economy. All this calls for a trend break in governance patterns,⁸⁹ especially in light of the fact that a large number of future studies predict accelerated changes in the structure of society in the coming years.

THE FUTURE WORLD: TRENDS AND IMPLICATIONS

If current governance trends continue, such governance may remain reactive, fragmented, inequitable, unable to deal with systemic problems, ad hoc rather than principled, more spontaneous than predictable, and may protect current and new hegemonic interests at the cost of the rule of law and respect for global values. This could well imply that without a trend break, law will be unable to address the problems of the world in 2050. Future studies by academics,⁹⁰ political bodies⁹¹ and the private sector⁹² show that society is changing in unrecognizable directions. These studies discuss social, economic, financial, technological, environmental and geopolitical trends.

Social trends indicate that in 2050, the global population will be nine billion, consuming at higher rates, living mostly (75%) in urban areas,⁹³ migrating to other parts of the world, leading to the rise of new multiethnic societies with different value systems. These trends may be affected by climate change, natural disasters, wars or pandemics, as well as major social transitions.

Economic trends include the rise in global world output by at least three times in 2050, and show that 19 of the top 30 economies will be from the current group of emerging economies and will be collectively bigger than

of Parties to the CBD. Decision V/6, Ecosystem Approach (UN Doc. UNEP/CBD/COP/5/23, 22 June 2000).

⁷⁹ J. Gupta and N. van der Grijp, ‘Climate Change, Development and Development Cooperation’, in *Mainstreaming Climate Change in Development Cooperation: Theory, Practice and Implications for the European Union* (Cambridge University Press, 2010), 1.

⁸⁰ S. Harrop and D. Pritchard, ‘A Hard Instrument Goes Soft: The Implications of the Convention on Biological Diversity’s Current Trajectory’, 21:2 *Global Environmental Change* (2011), 474.

⁸¹ See J. Gupta, n. 51 above, at 360–363.

⁸² See CBD, n. 44 above, Article 3.

⁸³ The UNFCCC, n. 45 above, includes five sets of principles in Article 3, but relegates the limited sovereignty principle to a paragraph in the preamble.

⁸⁴ For example, the UNFCCC, n. 45 above, does not include the ‘polluter pays’ principle or the ‘liability and compensation’ principle.

⁸⁵ The Watercourses Convention, n. 31 above, includes detailed equity criteria for sharing water resources that cannot be found in the Rio Declaration.

⁸⁶ See, e.g., E. Hey, ‘The Climate Change Regime Sustainable Development and International Administrative Law in the Making’, 1:1 *Int. Environmental Agreements: Politics, Law and Economics* (2000), 75; J. Brunnée, ‘COPing with Consent: Law-making under Multilateral Environmental Agreements’, 15:1 *Leiden Journal of International Law* (2002), 1.

⁸⁷ J. Gupta, ‘Developing Countries: Trapped in the Web of Sustainable Development Governance’, in O. Dilling, M. Herberg and G. Winter (eds.), *Transnational Administrative Rule-making: Performance, Legal Effects and Legitimacy* (Hart, 2011), 305.

⁸⁸ *Ibid.*

⁸⁹ See Report of the Secretary General, n. 3 above, at paragraphs 19–21; B. Walker *et al.*, n. 6 above, at 1345; F. Biermann *et al.*, n. 6 above; cf. E. Blanco and J. Razzaque ‘Ecosystem Services and Human Well-being in a Globalized World: Assessing the Role of Law’, 31:3 *Human Rights Quarterly* (2009), 692.

⁹⁰ L.C. Smith, *The World in 2050: Four Forces Shaping Civilization’s Northern Future* (Dutton, 2010).

⁹¹ European Commission, *European Forward-looking Activities: Building the Future of ‘Innovation Union’ and ERA* (Publication Office of the EU, 2011); UK Ministry of Defence, Development, Concepts and Doctrine Centre, *Future Character of Conflict* (DCDC, 2010), found at <http://www.mod.uk/NR/rdonlyres/3E38C6EC-4A76-402F-9E28-C571EAB9929F/0/fcoc_final_revised_12Feb10.pdf>.

⁹² For example, PriceWaterhouseCoopers has a series of reports on the challenges and opportunities posed by the shift of global economic power, found at <<http://www.pwc.com/gx/en/world-2050>>.

⁹³ United States Joint Forces Command, *The Joint Operating Environment (JOE): Challenges and Implications for the Future Joint Force* (USJFC, 2008), found at <<http://www.fas.org/man/eprint/joe2008.pdf>>.

the current group of developed countries.⁹⁴ Another important trend is the changing face of poverty in that poverty and income inequality will occur also in the developed countries. Other trends include changing trading partners, increasing trade in services via cyberspace, outsourcing of employment to the changing cheapest economies and to home and office robots, and only very skilled and highly qualified people may still be eligible for work.⁹⁵ Financial globalization may take unexpected routes in the aftermath of the current financial crises; new currencies may become more important (e.g., the renminbi); and the use of special drawing rights as a new control mechanism over the existing financial institutions may lead to changes.

Technological changes through eco-, nano-, bio- and info-technologies are expected to dramatically change the way we live. Technological opportunities may create extravagant lifestyles, including, for instance, space travel. The rapid penetration of gadgets (mobile devices) will transform the way we communicate and may even influence the rise and fall of governments, while knowledge may no longer be filtered for its accuracy, secrets may leak, intellectual property rights may be disrespected, and cyber crime and espionage may affect industrial, social and national security. However, existing infrastructure, energy and transport may face institutional, technological and political lock-in.

The above will affect the environment. The rising population, growing life expectancy, technological opportunities and increased income may result in a significant increase in energy use and multiplying mineral extraction (especially copper, aluminium, rare metals, platinum). Furthermore, this may lead to increasing water withdrawals from 20 to 85%, increasing local pollution, and global temperatures may rise by 1.5–2 degrees Celsius above pre-industrial levels by 2050. The growth of global Gross Domestic Product by 3–6 times may lead to another 10–20% of land being converted to agriculture, transforming habitats, increasing nutrient loading by two-thirds, reducing edible fish populations by 90% in comparison to pre-industrial levels, and reducing plant species by 10–15%.⁹⁶

In terms of geopolitics, almost all future studies indicate that economic power may shift to the BRIC countries (Brazil, Russia, India and China), and military power to China. These new countries may shape the principles of

governance at the global level, and may question the vision of democracy – either by pushing for the current ad hoc approach or by uploading their own domestic visions to the global level. A change in value systems may occur as these newer countries take on a more dominant role in global politics. If international law continues to be reactive and not proactive, and if society changes exponentially in terms of resource consumption and waste and in terms of economic and political power, ethnicity and culture, it may not be able to deal with the problems of 2050. If the current way of dealing in an ad hoc manner is continued, these developments may not be in line with good governance, challenging the very *raison d'être* of law. If the current shifts in law from a hard to a soft character continue, this may undermine the future of international law. International treaties are different from political declarations in that they are legally binding; however, if their content becomes soft, there will be no need to use the treaty format. Furthermore, the new values of the new emerging economies may prefer ad hoc governance, which suits their own interests, over a more structured system of law. If these trends continue into the future, global problems may become even more exacerbated by the positive feedback effects between negative environmental and development trends.⁹⁷ The lack of rule of law at the international level will be further intensified, and global action may be determined by the political and economic will of the changing hegemon.

WHAT KIND OF GOVERNANCE AND LAW WILL BE NEEDED IN THE FUTURE?

To achieve a sustainable development trend break calls for simultaneous demographic, developmental and decoupling (environment from the economy) transitions,⁹⁸ which could possibly be supported by notions such as the green economy. Such transitions need to be supported by international governance processes. If law is to be able to keep up with the twenty-first century, it is important that the law not only develops rapidly and proactively, but also that it is predictable, principled, legitimate, accountable, transparent and equitable, especially in a world of changing geopolitics. Law needs to develop in order to counterbalance politics. This section argues that although fragmentation is inevitable, some degree of constitutionalization and rule of law is essential for coping with future problems.

THE INEVITABILITY OF FRAGMENTATION

The existing fragmentation in international environmental governance and law exists since it is not easy to

⁹⁴ HSBC, *The World in 2050: Quantifying the Shift in the Global Economy* (HSBC Global Research, January 2011).

⁹⁵ By 2020, it is estimated that 35% of all jobs will require high-level qualifications, combined with a capacity to adapt and innovate, compared to the 29% of today. This means 15 million more jobs requiring high-level qualification. See Commission Communication of 15 September 2010, 'Youth on the Move: An Initiative to Unleash the Potential of Young People to Achieve Smart, Sustainable and Inclusive Growth in the European Union', COM(2010)477.

⁹⁶ See, e.g., Millennium Ecosystem Assessment, n. 4 above, at 14–15.

⁹⁷ See UNDP, n. 5 above, at 2.

⁹⁸ See Report of the Secretary General, n. 3 above, at paragraph 36.

differentiate and draw boundaries between problems because of their interlocking character. Hence, it is not entirely clear where the issue area of 'forests' ends and where 'climate change' begins, or where 'climate change' ends and 'development' begins. As such it will be necessary to compartmentalize issues pragmatically.

If we accept this conclusion, then the discussion about the fragmented nature of environmental governance and law (e.g., in the fields of forests, water and, to a lesser extent, climate change) becomes more an observation of what is happening than a driver for change. There will be fragmentation as: environmental problems do not lend themselves to easy compartmentalization, and are linked to trade and investment, if not development,⁹⁹ development cooperation¹⁰⁰ and human rights;¹⁰¹ States are unwilling to select one forum for a comprehensive approach with which to deal with all problems; and one comprehensive forum for global sustainable development governance uniting trade, investment, development and environment may not be feasible. However, this does not mean that policy entrepreneurs should not continue to strive to achieve coherence between treaties,¹⁰² adopt more stringent targets,¹⁰³ fill regulatory gaps,¹⁰⁴ develop tools to deal with systemic issues and strengthen national governance¹⁰⁵ in order to enable States to contribute to and implement international agreements.

THE NEED FOR THE RULE OF LAW IN A MULTILEVEL LEGAL SYSTEM

The question then is: how can we make this fragmentation more palatable? This section argues in favour of promoting the rule of law through some degree of constitutionalization that takes into account the changing power of the State *vis-à-vis* the international and domestic context, and accounts for the observed multi-level governance systems.

At the global level, although there has been an intensive growth of rules since 1945, these are often applied arbi-

trarily within the anarchic global system.¹⁰⁶ This is often described as the unfinished rule of law project at the international level.¹⁰⁷ The 'rule of law' concept implies that rules must be applied to all without discrimination, be made public, should not be applied retroactively, should be clear and consistent and thus not arbitrary, should be equitable, and should be stable and provide a degree of predictability about the direction in which future rules will develop. The rule of law is an element of the concept of 'good governance',¹⁰⁸ which also includes the right of social actors to participate in governance processes, the need for these processes to be transparent, the need to ensure that decision makers are held accountable, that policies are efficient, equitable, effective and responsive.

Those supporting the rule of law tend to be from Europe and the developing countries,¹⁰⁹ while those opposing it tend to come from the United States. For instance, Madeleine Albright reportedly submitted that former President George W. Bush talked about promoting the rule of law in countries, but is 'allergic to treaties designed to strengthen the rule of law in such areas as money-laundering, biological weapons, crimes against humanity and the environment'.¹¹⁰ Opponents of the concept argue that its substantive and procedural content is contested,¹¹¹ that it is not politically feasible because of power politics since power implies rule *by* law and politics will become equal *to* the law,¹¹² and that at the international level we are only talking of rules of international law.¹¹³ Furthermore, they argue that '[t]he

⁹⁹ This includes development issues in general, agencies that deal with development, such as the UN Development Group, and the 1986 Declaration on the Right to Development (UN General Assembly Resolution A/RES/41/128, 4 December 1986).

¹⁰⁰ This includes bilateral and multilateral assistance by individual States, the development of aid policy within the OECD Development Assistance Committee, and the twenty year-old discussions on 'new and additional aid' to deal with environmental problems. See J. Gupta, 'Global Governance: Development Cooperation', in J. Gupta and N. van de Grijp (eds.), *Mainstreaming Climate Change in Development Cooperation: Theory, Practice and Implications for the European Union* (Cambridge University Press, 2010), at 99.

¹⁰¹ This includes, e.g., the 2010 human right to water and sanitation adopted by the UN General Assembly, n. 32 above.

¹⁰² See Earth System Governance Project, n. 58 above, at 3.

¹⁰³ See M. Allen, n. 54 above.

¹⁰⁴ See Earth System Governance Project, n. 58 above, at 4.

¹⁰⁵ *Ibid.*, at 5.

¹⁰⁶ K. Abbott, 'Modern International Relations Theory: A Prospectus for International Lawyers', 14:2 *Yale Journal of International Law* (1989), 335; F. Boyle, 'The Irrelevance of International Law: The Schism between International Law and International Politics', 10:2 *California Western International Law Journal* (1980), 193.

¹⁰⁷ 'We the Peoples: The Role of the United Nations in the Twenty-first Century', Report of the Secretary General (UN Doc. A/54/2000, 27 March 2000), at paragraph 326.

¹⁰⁸ See, *inter alia*, M. Doornbos, 'Good Governance: The Rise and Decline of a Policy Metaphor?', 37:6 *Journal of Development Studies* (2001), 93; A. Seif El-Dawla, 'Good Governance after September 11th 2001: A New Dimension for International Development Cooperation', 3:1 *Griffin's View on International and Comparative Law* (2002), 15; N. Woods, 'Good Governance in International Organizations', 5:1 *Global Governance* (1999), 39.

¹⁰⁹ E. Kwakwa, 'The Rule of Law and Global Governance in the Twenty-first Century', in *Proceedings of the 6th Annual Conference of the African Society of International And Comparative Law* (Kampala, 1994); A. Watts, 'The International Rule of Law', 36 *German Yearbook of International Law* (1993), 15.

¹¹⁰ G. Whittell, 'Albright Attacks US Foreign Policy as Schizophrenic', *The Times* (21 May 2002), at 8.

¹¹¹ P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework', in R. Bellamy (ed.), *The Rule of Law and the Separation of Powers* (Dartmouth, 2005), 95; B. Hager, *The Rule of Law: A Lexicon for Policy Makers* (Mamsfield Center for Pacific Affairs, 2000), 4; S.L. Esquith, 'Toward a Democratic Rule of Law: East and West', 27:3 *Political Theory* (1999), 334.

¹¹² R. Baum, 'Modernization and Legal Reform in Post-Mao China: The Re-birth of Socialist Legality', 14:2 *Studies in Comparative Communism* (1986), 69.

¹¹³ See A. Watts, n. 109 above.

fight for an international Rule of Law is a fight against politics',¹¹⁴ and is thus not possible. The rule of law at the inter-State level is inherently contradictory because it is both based on State practice *and* aims at being objective and normative;¹¹⁵ and that while the procedural elements promote stability and maintaining the status quo, the substantive elements question the status quo.¹¹⁶ Since the international arena is not a community of States with common values, powerful countries will determine agendas, principles and instruments.¹¹⁷

However, there are good reasons to support the rule of law and constitutionalization projects. First, adopting a systems approach shows us that we share one planet and we have one set of planetary boundaries. This calls for a common approach. Second, climate change, and many of the common global, current and yet long-term problems, can only be systematically addressed through a consistent and predictable body of rules. Third, various voluntary, hybrid governance activities often do not meet the criteria of legitimacy, equity and predictability.¹¹⁸ Fourth, the idea of a common, systemic, comprehensive, legitimate, equitable and predictable system often has to compete with the reality of ad hoc changes in law which themselves are compromising on accountability, legitimacy, equity and predictability and are going soft, thereby questioning the very *raison d'être* of law. Fifth, political processes in the developed countries see the rule of law as essential within their own contexts, and have been actively promoting it in the developing world¹¹⁹ as both an 'objective of and condition for development assistance'.¹²⁰ If it is so important domestically, then how can it be less important internationally?¹²¹ Finally, it is now foolhardy to continue a hypocritical approach as the new hegemony may have an increasing influence on globalization in the future. The values of current and future hegemony if included in the rule of law project may seek to benefit all countries. Politics needs law to sustain its legitimacy,¹²² and 'those who seek to bestow legitimacy

must themselves embody it; and those who invoke international law must themselves submit to it'.¹²³

INSTITUTIONALIZING RULE OF LAW THROUGH CONSTITUTIONALIZATION

If we accept that the rule of law needs to be pushed further, then the next question is how do we institutionalize this? This can be done through the process of constitutionalization. Such a process can draw inspiration from *jus cogens* norms – that is, norms 'accepted and recognized by the international community of States as a whole . . . from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character',¹²⁴ and obligations *erga omnes* – that is, obligations owed towards the international community as a whole,¹²⁵ the fulfilment of which is in the interest of the international community.¹²⁶ These obligations include the duties of States concerning the basic rights of humans¹²⁷ (i.e., the protection of human life and the conditions indispensable to safeguarding human dignity, human worth and the development of the human personality).¹²⁸ The respect for human rights is, in turn, related to environmental protection because environmental degradation is, in itself, a serious threat to human life and health.¹²⁹ Thus States would have an obligation *erga omnes* to protect the environment and promote sustainable development. The International Court of Justice does not distinguish clearly between *jus cogens* and obligations *erga omnes*.¹³⁰ However, this does not impede the acknowledgement and observation of these norms. The protection of human rights – a common principle of humankind, or a global value (another contested term¹³¹) – can be achieved through the protection of the environment and the promotion of

¹¹⁴ M. Koskeniemi, 'The Politics of International Law', 11:1 *European Journal of International Law* (1990), 4, at 5.

¹¹⁵ *Ibid.*, at 5.

¹¹⁶ T.M. Franck, *Fairness in International Law and Institutions* (Oxford University Press, 1995).

¹¹⁷ G. Simpson, 'The Situation on the International Legal Theory Front: The Power of Rules and the Rule of Power', 11:2 *European Journal of International Law* (2000), 439.

¹¹⁸ See Earth System Governance Project, n. 58 above, at 6–7.

¹¹⁹ T. Carothers, 'The Rule of Law Revival', *Foreign Affairs* (March/April 1998). The World Bank has begun 600 governance related programmes at national level. See C. Santiso, 'Good Governance and Aid Effectiveness: The World Bank and Conditionality', 7:1 *Georgetown Public Policy Review* (2001), 1.

¹²⁰ See C. Santiso, n. 118 above, at 1.

¹²¹ W. Sandelius, 'National Sovereignty versus the Rule of Law', 25:1 *American Political Science Review* (1933), 1; P. Fitzpatrick, ' "Gods Would Be Needed . . .": American Empire and the Rule of (International) Law', 16:3 *Leiden Journal of International Law* (2003), 429.

¹²² P. Fitzpatrick, n. 120 above.

¹²³ Secretary-General's Address to the General Assembly (New York, 21 September 2004), found at <<http://www.un.org/apps/sg/sgstats.asp?nid=1088>>.

¹²⁴ Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), Article 53. These rules include the prohibitions of genocide, the right of peoples to self-determination and the respect for basic human rights. B. Fassbender, 'The United Nations Charter as Constitution of the International Community', 36:3 *Columbia Journal of Transnational Law* (1998), at 529–590.

¹²⁵ B. Simma, 'From Bilateralism to Community Interest in International Law', 250 *Recueil des Cours* (1994), 217, at 298.

¹²⁶ See B. Simma, n.125 above, at 300.

¹²⁷ See B. Fassbender, n. 124 above, at 591.

¹²⁸ R.S. Pathak, 'The Human Rights System as a Conceptual Framework for Environmental Law', in E. Brown Weiss (ed.), *Environmental Change and International Law* (UNU Press, 1992), 209.

¹²⁹ S. Giorgetta, 'The Right to a Healthy Environment', in N. Schrijver, and F. Weiss (eds.), *International Law and Sustainable Development: Principles and Practice* (Brill, 2004), 381.

¹³⁰ See B. Simma, n.125 above, at 299.

¹³¹ O. Spijkers, 'What's Running the World: Global Values, International Law and the United Nations', 4:1 *Interdisciplinary Journal of International Law* (2009–2010), 67.

sustainable development. The latter, as a means to achieve the former, can also be considered a global value.

In substantive terms, the constitutionalization project could draw inspiration from the UN Charter,¹³² whose constitutional character of providing fundamental principles and global values for society is presently debated.¹³³ However, some values are globally shared – namely, respect for human dignity, social progress and sustainable development, peace and security, and justice.¹³⁴ Other sources of inspiration include the Rio Declaration on Environment and Development,¹³⁵ the human rights arena,¹³⁶ the discussions on the right to development,¹³⁷ and the emerging norms on the equitable sharing of transboundary resources in the water arena.¹³⁸

The rule of law and the constitutionalization projects also need to take cognizance of the changing realities in State structure and domestic law. The State is a sovereign legal entity in international relations but its role is under pressure because of globalization and the shift from government to governance, which are accompanied by the rise of the non-State actor. This is not an either/or situation, but a paradox with which we will have to live. Furthermore, given that the State is still the legal negotiating unit in public international law, it is the key authority within the domestic system empowered by national constitutions and legal systems. To the extent that the power of the State is contested and it shrinks, it may be unable to promote the rule of law (especially in the context of some developing countries). It may not have the authority to regulate the domestic context, thereby allowing other transnational actors to take over the process of governance.

Furthermore, although the State is the legal authority, its power is eroding and other actors and levels of governance are assuming greater responsibilities. Hence, the constitutionalization project needs to broaden its intergovernmental character to include different actors at multiple levels of governance. This is also justified by the fact that whether environmental issues are defined as global (global heritage, global concern, global public goods, systems perspective) or local is often determined

by the politics of scale,¹³⁹ and it is becoming clear that most environmental problems are simultaneously both local and global, and have both local through to global drivers/causes and impacts. Law, too, may need to examine the potential of developing a conceptual framework for analyzing the new multilevel governance frameworks. Some efforts in this direction are already visible with national courts being empowered by international treaties to deal with transboundary issues.¹⁴⁰

BACKCASTING TO THE FUTURE

A transition to a rule of law world can be achieved through four different steps¹⁴¹: ideas; the agency of actors; institutions; and policy windows/tipping points that allow for change. The idea is the need for constitutionalization within which multilevel governance systems can function. This idea needs to be promoted by the appropriate actors, including legal scholars, global leaders (e.g., Kofi Annan), countries (e.g., the countries of the European Union) and social movements. For example, Global Transition 2012 – a civil society network is aiming to create social support for a global green and fair economy that meets minimum needs, stays within planetary boundaries and is adaptive – could become a carrier of the notion of the rule of law.¹⁴² The third step is the need for institutions that support this idea – for example, national courts, human rights courts, international arbitrators and other adjudicators. And then there is a need for the right moment to push these ideas. We argue that what moment could be better than the present? We are facing global environmental, financial, economic and demographic crises, and existing powers are threatened by the rise of new ones who may use the absence of the rule of law at global level to bring alternative and less acceptable rules. New powers have always asked for a new economic and political order and have questioned the inequity of the global system. In addition, civil society has been activated world-wide, twitter is available as a tool for mass communication of ideas in a simple way, and the stage is being set for Rio+20!

CONCLUSION

This article has argued that current international environmental governance is reactive, incoherent, frag-

¹³² Charter of the United Nations (San Francisco, 26 June 1945).

¹³³ See, e.g., B. Fassbender, n. 124 above, at 529; B. Simma, n. 125, at 256–85; T.M. Franck, 'Is the UN Charter a Constitution?', in S. Chesterman *et al.* (eds.), *Law and Practice of the United Nations: Documents and Commentary* (Oxford University Press, 2008), 4.

¹³⁴ See O. Spijkers, n. 131 above, at 71.

¹³⁵ The Rio Declaration includes 27 principles that can help divide responsibilities between nations in environmental and developmental problems. See Rio Declaration, n. 24 above.

¹³⁶ Here, social and economic rights including the right to access water and sanitation services could form an element of such a constitutionalization process.

¹³⁷ Declaration on the Right to Development, n. 99 above.

¹³⁸ See Watercourses Convention, n. 31 above, Article 6.

¹³⁹ J. Gupta, 'Global Change: Analysing Scale and Scaling in Environmental Governance', in O.R. Young *et al.* (eds.), *Institutions and Environmental Change: Principal Findings, Applications and Research Frontiers* (MIT Press, 2008), at 225.

¹⁴⁰ For example, the Southern African Development Communities' water law makes arrangements for this.

¹⁴¹ L. Lebel, 'Transitions in Water Governance in Developing Asia', Presentation at 'Water Governance Meeting the Challenges of Global Change', European Science Foundation, Obergurgl, 7 June 2011.

¹⁴² See <<http://globaltransition2012.org/2011/12/welcome-to-global-transition-2012>>.

mented, inequitable, unable to account for systems approaches, and ad hoc rather than principled. The lack of political will, path-dependency, technological and institutional lock-in and strong vested interests are blocking the adoption of policy options that may be commensurate with the rate of current problems. When we project into the future, old problems are exacerbated and new problems will likely emerge in 2050. If international law and policy are unable to deal with current problems, will the incremental process of law development be able to deal with the anticipated problems of the future?

This article concludes that because of the interconnectedness of problems, governance is likely to remain fragmented. However, if we are to make sense of the fragmented policy process, if there is to be the rule of law over the rule of power, then some degree of constitutionalization, providing a framework for multilevel governance systems and the green economy, becomes inevitable and necessary in order to protect basic human rights, the rights of developing countries to

develop, the equitable sharing of resources between States, and the sharing of responsibilities for problems caused to others in accordance with key principles. Although the Rio+20 Summit is occurring within a growing movement to promote the 'green economy', such an economy will only be sustainable within the context of a 'green and equitable rule of law polity'.

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