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Troubling environmental governance: citizen legal experiments with transboundary commons

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ABSTRACT

Environmental phenomena shed light on the fiction that inter-state borders constitute on some level, and the limitations of state-based environmental governance. Transboundary watersheds, in particular, flow across borders of different kinds, evincing the interdependence of water bodies, both human and nonhuman. The lack of cross-border comprehensive environmental governance imposes regional forms of inequity and inefficient forms of water protection. In Central America, to address such problems, citizens have created a legal prototype for how transboundary watersheds could be governed as a commons going forward. This endeavour has been led by Salvadorans, concerned as they are by their country's position as a lower co-riparian and their significant interdependence with transboundary water bodies. I argue that, in addition to destabilizing established approaches to environmental governance, the legal prototype opens avenues for forms of earthly politics and multispecies justice by placing the reproduction of life, human and nonhuman, side by side.

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Introduction

Transboundary watersheds or river basins raise fundamental concerns about transnational cooperation that are of direct relevance to the global environmental crisis we currently face. Their governance brings to the fore the challenges that arise in facilitating coordinated and solidary transnational measures and actions attuned to the planetary scale of our environmental problems and their localized manifestations across the globe. Scholars and practitioners alike have acknowledged the inefficacy and limitations of existing soft and hard law initiatives devised for international cooperation on shared watersheds – initiatives that include global conventions and bi- or multi-lateral treaties, agreements, and other mechanisms (e.g. temporary contracts) (World Water Week, 2023). Against a background of lack of recognition, implementation or adequacy of existing instruments, it is of utmost importance to explore a broader spectrum of governance initiatives, innovations and experiments emerging on-the-ground, many of them citizen-led or involving citizens. Central America is a paramount example where citizen concerns over the transboundary Lempa watershed have given rise to experiments with law that seek to incubate, nurture, and promote cross-national cooperation on the governance of the region's shared water bodies.

The proliferation in Central America's borderlands of economic activities that absorb vast amounts of water and produce significant toxic waste has been a concern of local populations, civil society organizations, and NGOs, especially in El Salvador given its location in the region's

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transboundary watersheds. Being downstream, as is the case of El Salvador, translates into a lack of effective sovereignty over the water bodies that flow through the country's territory and are vital to its lifeblood (Montoya, 2021b; cf. Mason & Khawlie, 2016). In other words, El Salvador has been curtailed its political authority to determine the industrial activities that are pursued along the riverbanks of the international streams of its transboundary watersheds or in territories located within them. As a result, Salvadoran citizens denounce, the country is subject to polluted or reduced water flows due to activities performed by Guatemala or Honduras in the watersheds' upper streams. Against this background, Salvadoran civil society organizations and NGOs have lobbied authorities to promote negotiated forms of environmental governance in the region while engaging in experiments with law that could potentially facilitate these forms of governance.

This article explores one such instance of citizen-led experimentation and innovation with law aimed at addressing the limited transboundary cooperation in the region with regard to environmental governance. It asks how environmental protection is envisioned by citizens in a transboundary eco-region with shared watercourses where the boundlessness of the environment manifests materially. The article also asks how their proposals to address their environmental concerns are modelled on existing governance frameworks yet vernacularize them. I examine these questions by exploring the conceptualization and drafting of a transboundary treaty proposal by the Salvadoran organization Centre for Research in Investment and Trade (Centro de Investigación sobre Inversión y Comercio, CEICOM). Civil society organizations and NGOs of the three co-riparian nations (El Salvador, Guatemala, and Honduras) have subsequently embraced the treaty proposal and engaged in lobbying the political authorities of these nations. This citizen-led attempt at producing a prototype of a trinational legal treaty that would promote cross-border cooperation implicitly seeks to destabilize established environmental governance approaches in the region. These approaches remain rooted in national sovereignty and as such are unable to apprehend and embrace the situated experiences, sensibilities and needs of territories, populations, and biota.

Although I take a regional approach to examining concerns over a transboundary watershed, this article draws from ethnographic fieldwork research conducted chiefly in El Salvador between 2014 and 2019. I interviewed key actors involved in conceptualizing and elaborating the prototype of a legal treaty or reflecting on regional environmental transboundary impacts. In 2019, I collaborated with some of them in activities to raise awareness of the challenges posed by the transboundary governance of watersheds and accompanied them through legal procedures they embarked upon to promote the ideas reflected in the treaty draft. My informal exchanges with them throughout these collaborations have also informed this research. In addition, I conducted a short-term ethnography in the borderlands of the Lempa watershed, especially around the binational Güija Lake.

This article is part of a long-term exploration of citizen-led legal actions which have sought to counter the concession of Central American territories to mining companies, aiming to understand how non-indigenous peasant and rural populations of this region introduce alternative moral values into legal realms and the outcomes of doing so (see Montoya, 2024). It is not as much an attempt to discern whether their initiatives are legally successful as an exploration that aims to capture the transformations that such initiatives yield and the political possibilities they open up, regardless of their procedural outcome. Their value thus lies in their potential to shape public conversations and policy agendas by for instance introducing different moral schemas, political grammars, and visualizations of alternative futures.

I begin with an exploration of the particulars of the environmental governance of transboundary eco-regions such as watersheds and the challenges thereof, focusing on how they emerge as what I call 'transboundary commons'. In the section that immediately follows, I introduce the Lempa transboundary watershed shared by El Salvador, Guatemala, and Honduras; the downstream location of El Salvador in this watershed and the inequity thereof; the water stress that characterizes it; and the water concerns that it generates. I then move on to describe, against the background of such concerns, the process that led to the drafting and mobilizing of the treaty proposal from El

Salvador; the political and legal reasoning underlying the elaboration of the treaty; and the lobbying of authorities to promote it.

Deploying the transboundary watershed as a heuristic device and drawing on Salvadoran citizens' conceptualization of the treaty allows me to explore broad challenges to environmental governance and the original ways in which citizens have suggested that these challenges could be overcome, including their proposed shift of perspective on the transboundary watershed. This shift of perspective, I argue, amounts to a re-scaling and redefining of the region's environmental governance approaches which are partly informed by international law but also by Catholic eco-theology and a deep attunement with territory. Drawing from discussions on environmental governance that span political anthropology, human geography and environmental humanities, the article explores situated approaches to transnational environmental protection and how they engage global frameworks as well as the local environmental sensibilities and moral schemas neglected by these frameworks.

The environmental governance of transboundary eco-regions

Since modern environmental consciousness began to rise in the 1960s, a growing sense of globalism has surfaced that has, in turn, shaped modalities of environmental governance (Jasanoff & Long Martello, 2004). A globalist perspective towards environmental concerns was partly facilitated by Western scientific and military visualizations of the earth that were made available in the second half of the twentieth century and led to the saliency of the planetary gaze (Jasanoff & Long Martello, 2004, pp. 38–41). 'Environmental governance' – a concept widely employed since the 1990s – points precisely to the subsequent shift in perspective made possible by such a gaze, from state-centric to multiply scaled and multiply-distributed regulatory frames, mechanisms and practices pertaining to the administration of nature (Bridge & Perreault, 2009). The state-centric administration of nature typical of the nineteenth century, which continued to be promoted during a good part of the next, has given way since the last quarter of the twentieth century to multi-actor, multi-scale, and cross-national modalities of decision-making about the non-human world (Bridge & Perreault, 2009; Lemos & Agrawal, 2006; Mol, 2018).

This shift in governance was partly rooted in the roll-back of the state introduced in the 1980s and the emergence of a new political imagination vis-à-vis the environment conjured by an 'earthly politics' that – by making the earth visible – has nurtured greater awareness of global environmental phenomena (Jasanoff & Long Martello, 2004; see also Bresnihan & Millner, 2023, p. 5). The shift also resulted from the lack of efficiency and deficits demonstrated by state-centered and state-led forms of global environmental governance (Lemos & Agrawal, 2006, p. 301). Yet historians have reminded us that the globalism underpinned by a sort of 'planetary thinking' concerned about the looming environmental crisis and its consequences for the earthly community was, by the 1980s, replaced by an emphasis on economic globalization and financial interdependence over other concerns (Sluga, 2021).

Since the 1990s, the realm of governance has included lawmaking by a range of actors (von Benda-Beckmann & Turner, 2020). International and multilateral institutions engaged in norm-making have attempted to make law that is consistent with the boundlessness of the environment and the integrated nature of the earth system. Not only have we witnessed an expansion of environmental and related human rights international law but also an increase of proposals for novel legal approaches to the environment. These include a constitution for the earth and earth system law, which aspire to address the global dimension of climate change and the problems thereof in the so-called Anthropocene era (see, for instance, Ferrajoli, 2023; Kotzé & Kim, 2022). Meanwhile, environmental governance efforts have not just introduced scaled-up modalities for the administration of nature but multi- and inter-scalar ones in which subnational, national, regional, and global actors, institutions and mechanisms have been involved (Lemos & Agrawal, 2006). Indeed, a mere planetary or global gaze risks missing the idiosyncrasies of specific locations,

ecosystems and the peoples who dwell in them (Jasanoff & Long Martello, 2004, p. 45). Nor can a situated gaze be simply scaled-up. Hence, the shift to an understanding of the global through the concrete connections and negotiations that occur among diverse and differently positioned actors (Tsing-Lowenhaupt, 2005). This shift entails, among other things, displacing the centrality of modern environmentalism and considering alternative moral schemas and ontological perspectives regarding the environment, that is, other ways of being with, relating to, and representing nature.

The move away from state-centric modalities of environmental governance notwithstanding, the international terrain remains underpinned by national sovereignty. Environmental agendas have thus continued to be largely driven by national interests and attempts at global coordination have often proved limited or ineffective – a reminder that geopolitical borders continue to have very material consequences. How this manifests, and the role of the state within nationally led environmental governance, of course varies regionally. In nations of Latin America that were part of the Hispanic and Lusophone colonial empires, constitutions still retain the colonial legacy that grants ownership of subsoil resources to the state (Montoya, 2023). This legacy has facilitated that state governance of natural materials and the subsoil in which they are deposited remains largely extraction-oriented throughout the region, and that citizen opposition to extractive ventures is mostly met with authoritarian responses (see Bebbington, 2012, pp. 1155–1156). In Central America, in particular, initial attempts at regional coordinated environmental governance ran parallel to peace negotiations during the 1980s (M. W. King et al., 2016). Yet more recently they have been undermined by political and economic elites, especially those who lead export-oriented commodity-based economies and have disregarded the environmental deterioration wrought by their activities (Bull, 2017).

Among continuing attempts at coordinating environmental governance globally, a proposal that is gaining traction is to consider resources or territories that do not fall under the jurisdiction of any single country, such as the oceans, atmosphere, outer space, or Antarctica, as ‘global commons’ – that is, domains, elements or entities that are to be administered as humanity’s common pool resources, especially as extractive technologies and property regimes are evolving and facilitating the extraction of their value (Buck, 1998). More recently, however, the term ‘global commons’ has expanded to encompass ecologically vital biodiversity-rich domains that are shared by various nation-states (see, for instance, Global Commons Alliance, n.d.). This expansion raises important challenges and concerns, not least the question of sovereignty and the neocolonial underpinnings of environmentalism. Considering certain eco-regions as global commons, however crucial they may be for planetary sustainability, entails that the proposed models of governance derived from such a consideration may contribute to reproducing the geopolitical hegemonies and colonial inequalities that are at the very root of the environmental crisis.

Buck has drawn a useful distinction between ‘global commons’ and ‘international commons’. The former, she explains, is limited to the initial denomination of non-jurisdictionally defined commons while the latter denotes resource domains over which several countries exercise sovereignty and therefore require different considerations (Buck, 1998, pp. 5–6). International commons, which I suggest may also be fruitfully labelled as ‘transboundary commons’ to acknowledge their non-global quality, raise important questions regarding their protection, especially where they overlap with biodiversity-rich eco-regions or biomes. Various instruments have been created to promote the conservation and maintenance of transboundary or regional biomes as well as to address the international conflicts thereof. For instance, ‘peace parks’ have gained traction in the new millennium as a kind of transboundary protected area, thereby drawing a link between peacebuilding and environmental protection and promoting international cooperation (Ali, 2007; Duffy, 2001). Yet this approach to transnational governance is often at odds with the livelihoods of local populations and does not promote their participation in decision-making (B. King, 2010).

Where water is concerned, international law initiatives have emerged to address, in an integral manner, transboundary water bodies and the transboundary impacts of economic activity in the territories through which these water bodies flow as well as the international

inequities thereof. These international law initiatives have been limited in their approach to environmental governance, especially as they have addressed national sovereignty in a rather naturalized and depoliticized manner. Among the patchwork of bi- and multi-lateral agreements and treaties subscribed over the course of history and tailored to specific regions, two global instruments have stood out as attempts to codify a set of principles that would promote international cooperation towards the regulation of shared water bodies: the Helsinki Rules on the Uses of the Waters of International Rivers, and the UN Convention on the Law of the Non-navigational Uses of International Watercourses.

The Helsinki Rules, issued in 1966 by the International Law Association, are based on existing bi- and multi-lateral treaties geared towards the negotiated governance of shared waters (Mechlem, 2011, p. 210; Salman, 2007). This non-binding set of rules introduced the principle of equitable and reasonable water use by co-riparian nation-states which has served as the groundwork for further codification (Stoa, 2014, pp. 1326–1327). The 1997 UN Convention was slow to be ratified, and it did not enter into force until 2014. Despite being a binding instrument, it has lacked effective support, seen competitive instruments emerge while lacking ratification, and is inherently ambiguous in its seemingly contradictory foundational principles of equitable use and no significant harm between co-riparians (Stoa, 2014). While watersheds, designated as ‘drainage basins’ in the Helsinki Rules and ‘watercourses’ in the UN Convention, include both interdependent surface and groundwater, the specificity of the latter is barely elaborated in either of these instruments – a significant gap given that 97% of global freshwater is groundwater (Mechlem, 2011). The Convention has still not been ratified by El Salvador, Guatemala, or Honduras. Yet, together with the Helsinki Rules and regional treaties and agreements, it has been taken by Salvadoran citizens as a substratum with which to model their own legal prototype.

Transboundary eco-regions such as international watersheds bring front and centre the limitations of existing approaches to governance, especially when it comes to integrating local populations and their livelihoods, histories, and desires. Meanwhile, transboundary eco-regions can be a paramount vantage point from which to explore environmental governance initiatives that are locally grounded but harbour transnational aspirations. Indeed, water bodies by their very nature are uncontainable within a discrete territory, in constant flow as part of hydrological cycles (cf. Neimanis, 2009, p. 171). I thus employ the notion of the ‘transboundary watershed’ both literally and as a heuristic device to visualize and interrogate the negotiations, innovations and experiments that cut across inter-state and inter-species borders as well as the possibilities that these processes may open up for forms of environmental governance beyond borders.

By definition, transboundary watersheds ‘trouble’ the nation-centric and anthropocentric character of mainstream notions of environmental governance insofar as they are spaces that transcend different kinds of borders and boundaries. Water flows oblivious of geopolitical borders and identity boundaries. Yet water is also a trans-biotic or trans-species substance – it is the amniotic fluid that intertwines different lifeforms, human and nonhuman (Neimanis, 2009, 2017). Neimanis’s (2009) concept of ‘hydrocommons’ as the material and semiotic intertwinement of human and more-than-human water bodies may thus be effectively applied to transboundary watersheds as ecosystems that constitute an assemblage of water bodies of different nature that transcends geopolitical borders.

Against this background, I aim to explore the new visualizations and socio-political horizons that transboundary watersheds unleash as they emerge as hydrocommons, thereby challenging commonplace understandings and practices of environmental governance. I herein ask how, when focused on environmental issues, experimentation with law enables the introduction of alternative political grammars and moral schemas regarding territories, especially where such territories may be conceived as commons whose reach extends beyond the human community. Where peasant or rural non-indigenous populations are involved, such moral schemas differ from the alternative ontologies of indigenous populations. For the non-indigenous populations, the rivers, mountains,

forests, or the animals that inhabit them are far from the agentive beings of some indigenous cosmovisions of the Amazonian and Andean regions.

Nonetheless, due to their embedment in and attunement with the territory of peasant and rural populations who do not acknowledge themselves as indigenous, they often introduce alternative moral values and political projects (see for instance, Escobar, 2015; Fals Borda, 1986; Svampa & Viale, 2014, pp. 363–379; Vidalou, 2020). This is even more so when the territory they inhabit, a transboundary watershed in this particular case, is constituted as a commons through an ‘ontologic of amniotics’ (Neimanis, 2009) – that is, of shared natural-cultural substance – that evinces material as well as semiotic continuities between humans and nonhumans. These continuities are not just physiological but also social, cultural, political, and ethical as water takes on a significance and meaning as something more than a mere liquid (Neimanis, 2009, p. 171).

Considering the forms of being and becoming with water and territory of peasant and rural populations, and the continuities between them, allows thinking of watersheds as a particular sort of commons. This perspective implicitly emerges out of the political–legal proposal put forth by Salvadoran citizens. On one hand, eco-regions like transboundary watersheds emerge as common-pool resources based on an a priori or intrinsic quality of ecological materiality that calls for their governance in common. This essentialist approach underlies the aforementioned notion of ‘global commons’. On the other hand, eco-regions such as transboundary watersheds may also be enacted as commons through a joint practice of meaning-making and care that seeks their maintenance, repair, and reproduction into the future – a notion of ‘commoning’ as a set of processes of co-participation and community-making is thus prioritized among other existing approaches to, and lexicons of, the commons (see Lloredo Alix, 2020 for an overview of the myriad approaches to the commons). This understanding of commoning as a joint practice of care for, and of being and becoming with, water and territory emerges through the experimentation with law led by Salvadoran citizens, and it underpins their proposal for the future of the region’s watersheds and their governance.

The Lempa: a transboundary watershed

El Salvador’s main water bodies, for domestic and industrial purposes and vis-à-vis its biodiversity, comprise three watersheds that are binationally or trinationally shared: Paz (shared with Guatemala), Goascorán (shared with Honduras) and Lempa (shared with both Guatemala and Honduras). El Salvador is downstream in all three, meaning that the quality of the water and the volumetric flows it receives are dependent upon activity in the watersheds’ upper streams located in Guatemala and Honduras – a manifestation of the ‘global landscape of “unequal ecologies”’ (Cunningham, 2012, p. 371). The Lempa watershed is the vastest of the three and a critical one for El Salvador. Indeed, Salvadorans metaphorically refer to the Lempa River as ‘the country’s aortic artery’ given that 85% of it flows through Salvadoran territory and its watershed is estimated to be home to 48% of the country’s population (Khoshnazar et al., 2021, p. 3; Patterson & López, 2013, p. 197). The watershed is not simply constituted by the Lempa River but also by the territory through which it and its tributaries and aquifers flow and which becomes a biome *with* the Lempa River system and the hydrological cycles in which it partakes (see [Figure 1](#) for how this notion of the watershed is reflected in a physical map of El Salvador’s Ministry of Environment and Natural Resources).

The Lempa River is born in northeastern Guatemala and soon after flows through the southwestern corner of Honduras before crossing into El Salvador. From then onwards, it runs only through this country, first through its northern strip and then down through its central lowlands towards the Pacific, aside from a portion of its upper stream that overlaps with the Honduran border (see [Figure 2](#)). The Lempa watershed encompasses the biodiversity hot spot of Trifinio, which is an area of rare biota as well as water catchment where the borders of Guatemala, Honduras, and El Salvador meet. It is governed by a trinational agreement reached in 1987. In the midst of

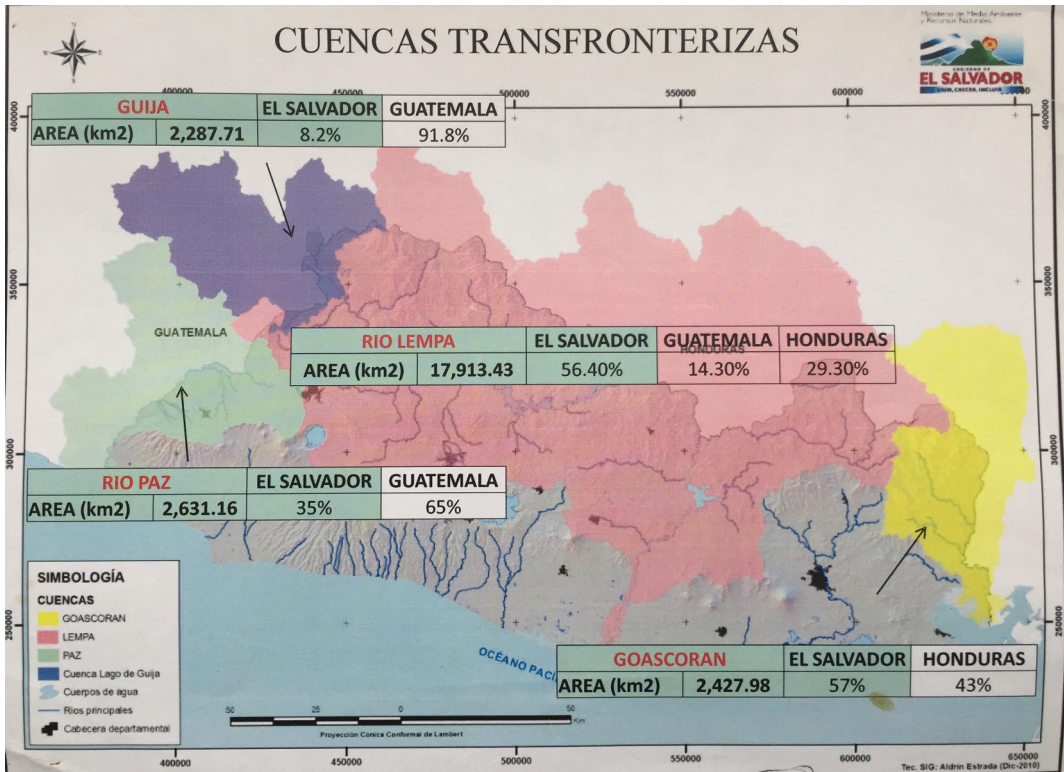


Figure 1. El Salvador's transboundary watersheds.

peace negotiations in the region, authorities of these three nations issued the 'Declaration of the International Biosphere Reserve of Fraternity (Trifinio)'.¹ Ten years later, they signed the 'Treaty for the Execution of the Trifinio Plan', the instrument by which the three neighbouring nations agreed to cooperate on environmental governance and promote sustainable development and which declared the transnational biosphere reserve as an 'indivisible ecological unit'. The Trifinio Plan has focused mainly on soil and forest conservation but failed to develop effective transnational mechanisms to regulate and manage shared transboundary watercourses (Artiga, 2003).

In addition to the Trifinio hotspot, the Lempa watershed includes other biodiversity rich territories. It is home to two inland wetlands: Complejo Güija, which consists of a cross-border lake and surrounding flooded lands and protected natural areas; and Embalse Cerrón Grande, an artificial water reservoir and El Salvador's main source of freshwater (see Figure 2). Both are home to fisheries and the latter is a source of hydro-electric energy. They have been acknowledged as so-called Ramsar Sites and are thus considered wetlands of international importance under the protection of the UNESCO-certified Convention on Wetlands – an intergovernmental treaty providing a framework for the conservation of wetlands adopted in Ramsar, Iran, in 1971, which came into force in 1975 and to which nearly 90% of UN member states are party. Despite being cross-border, Complejo Güija is not cooperatively governed.

The Lempa watershed is a region threatened with water stress, meaning that it barely meets the freshwater demand of its populations and industries, particularly in El Salvador. Some areas of El Salvador are close to suffering from water stress due to the low levels of freshwater availability per capita and their concomitant overexploitation, the fluctuation of rainfalls due to climate change, and the contamination of much of the country's surface water (Patterson & López, 2013). A good part of the watershed overlaps with the so-called Central American Dry Corridor (*Corredor Seco*

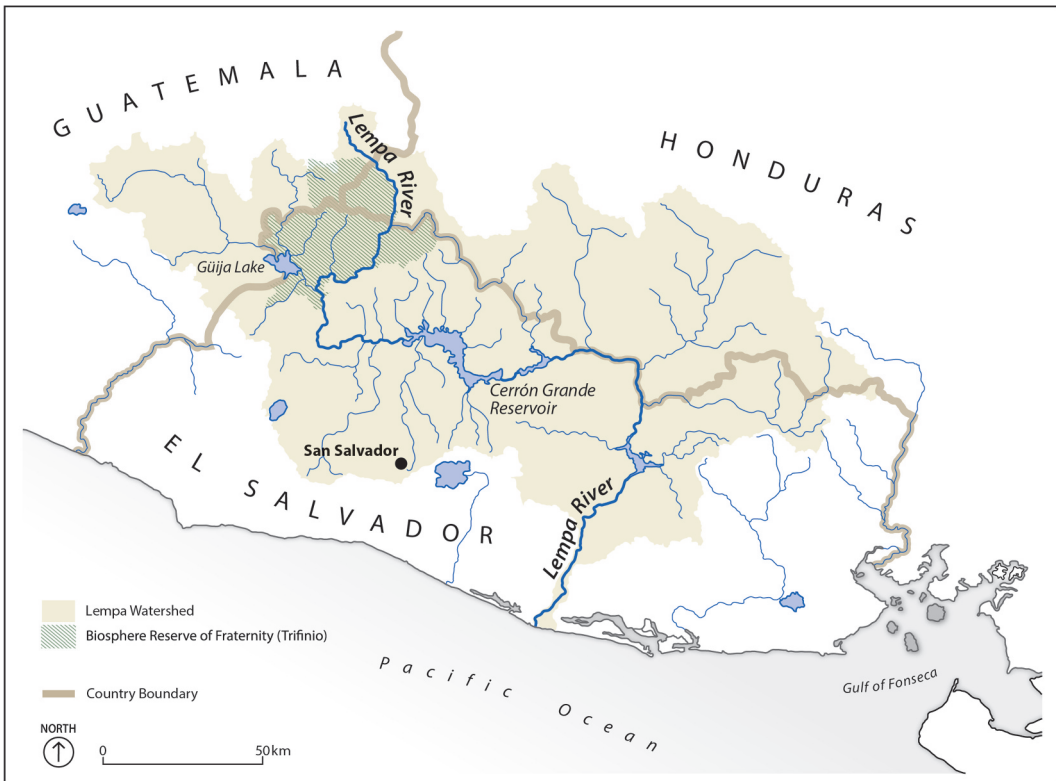


Figure 2. The Lempa transboundary watershed.

Centroamericano), a strip of the region starting in the south of Mexico and running along the Pacific up to Costa Rica, which suffers from an extended dry season and potential recurrent droughts during the wet season (Díaz Bolaños, 2019, p. 300; see Figure 3). Meanwhile, forecasts indicate that by 2030 water stress could affect 13.2% of El Salvador's population and by 2050 as much as 30% (Patterson & López, 2013, p. 196).

Testimony of the nation's impending water crisis is that on April 14, 2016 the government declared a national state of emergency and state of alert in San Salvador to enable urgent measures to address the capital city's escalating freshwater shortages (ReliefWeb, 2016). Following his visit to El Salvador in May 2016, the UN Special Rapporteur on the human right to water and sanitation noted in his report that, in a country of less than 6.5 million inhabitants, 'more than 600,000 people [...] are without any drinking water or sanitation service. In addition, more than 1 million people have access to only an inadequate water supply, with no guarantee as to quantity or drinking quality' (United Nations Human Rights Council [UNHRC], 2016, para. 40). Against this background, concerns over water are high on El Salvador's agenda. Potential and actual impacts on the Lempa watershed, whether national or international in origin, are carefully monitored by citizens participating in grassroots, civil society organizations and NGOs, some of whom have been trained to conduct basic water quality tests. Much of citizen freshwater monitoring goes on in borderlands within the Lempa watershed that are threatened by hazardous agrochemicals and mining waste.

Businesses benefit from the legal laxness and gaps that characterize the territories of El Salvador, Guatemala and Honduras. Highly polluting activities that are considered strategic priorities for development throughout the region are being developed within the territory of the watershed; regulations are rarely applied or are applied arbitrarily. For instance, an industrial mine like Cerro Blanco is sanctioned within a territory cut across by bodies of water that feed those flowing through



Figure 3. The central American dry corridor.

the Trifinio Biosphere. Meanwhile, the large-scale melon crops that cover vast extensions of these borderlands are irrigated with toxic pesticides that flow down with the Lempa's waters and sediments. The lack of effective sovereignty resulting from transboundary socioenvironmental impacts derived from such industries is thus at the heart of the citizen-led treaty proposal. This legal prototype constitutes both a proposal for a trinational negotiated political–legal solution and a means of facilitating transboundary negotiation and cooperation.

A form of citizen experimentation with law and care for the earth

In regions where large-scale extraction and infrastructure megaprojects have competed with local livelihoods, citizens participating in grassroots movements, alongside NGOs, civil society organizations, and human rights lawyers, have pursued myriad political–legal initiatives to contest such developments and the expansion of the extractive frontier. Some of these initiatives constitute forms of 'juridification', that is, mobilization processes in which law proliferates and is vernacularized in social and political domains that were once outside law's purview, often invoked by actors other than legal professionals (for further elaboration of the concept of juridification, see Eckert et al., 2012; Montoya, 2021b, 2023, 2024; Montoya et al. 2022; Sieder, 2020; Sieder et al., 2022). When juridification processes pertain to environmental concerns or promote post-extractive futures, place-based populations introduce alternative onto-epistemological perspectives, moralities or ethics that yield vernacularized forms of law (Montoya, 2021b, 2023, 2024; Sieder et al., 2022, pp. 11–12). These vernacularized forms are attuned to the experiences of territory and the environment of the local populations that inhabit them (Montoya, 2024). Moreover, juridification may entail legal actions before the courts and

other judicial and quasi-judicial institutions, as well as legal-like actions such as non-binding popular tribunals, or initiatives that yield legal innovations or experiments with law (Montoya, 2021b, p. 299; Sieder et al., 2022, p. 7).

The efforts by citizens to produce the prototype of a legal treaty constitute one such instance of innovation and experimentation with law. Citizens have taken into their own hands the task of lawmaking through the drafting of popular legislative initiatives and other legal artefacts (Montoya, 2024). While such initiatives are not contemplated as legally sanctioned forms of direct democracy in El Salvador's Constitution, as is the case in other nations, I suggest that legal innovation and experimentation have emerged as means by which citizens can introduce their own moral schemas regarding the governance of territory and environmental concerns. Epistemic communities that mobilize and vernacularize law, including the elaboration of prototypes of legal artefacts, have emerged in different contexts in Latin America, though the scholarship has mostly focused on the mobilization of law through the courts.

In the late 2000s CEICOM, a Salvadoran research-focused civil society organization and member of the coalition National Roundtable Against Mining, began raising the alarm nationally about the rising tendency of Guatemala and Honduras to license territories to mining companies in territories exceedingly close to El Salvador's border. While El Salvador had enjoyed a de facto moratorium on mining since 2006, CEICOM alerted El Salvador's government that the country would still incur environmental consequences from the mining taking place across its borders. Some of the licensed territories were located in the trinationally shared Lempa watershed which, as mentioned above, is El Salvador's chief water source for both domestic and industrial consumption as well as for more-than-human life. Since then, CEICOM members dedicated to raising awareness of what they called 'transboundary mining' and the impacts that this would bring to El Salvador given this nation's downstream position in the watershed. Thereafter, CEICOM expanded its concern to other extractive and industrial activities being pursued across El Salvador's borders, specifically large-scale intensive agriculture. In a 2017 interview with me, CEICOM leader Marcos spelled out the reasoning behind the organization's decision to expand the scope of the treaty: 'Our transboundary perspective arose from metallic mining, [but] we accept and recognize that, [...] right now in borderlands there is a set of economic and non-economic activities that are *killing transboundary waters* on a daily basis' (emphasis added).

In 2014, CEICOM began work on a legal treaty proposal that would regulate activity in the Lempa watershed by all co-riparian nations (Montoya, 2021b, 2021a). This endeavour ran parallel to the efforts that the country's National Roundtable Against Mining had started in the mid-2000s to produce various iterations of legislative initiatives, and it gained momentum from the 2017 mining ban that resulted from these initiatives (Montoya, 2021b). In 2015, CEICOM members completed the draft of a treaty proposal which they have since circulated and about which they have lobbied authorities in all three relevant countries. They called it 'Proposed Treaty for the Integrated Sustainable Management of Crossborder Waters, Focused on Shared Watersheds between the Countries of Guatemala, Honduras, and El Salvador'.² The proposal grapples with the need to 'foster cooperative efforts, coordination, exchange of ideas at all levels – regional, national and local' in order to protect both national and transboundary water bodies (Coordinadora Centroamericana por un Acuerdo de Aguas Transfronterizas, 2015, p. 5).

Marcos explained in one of our conversations how the treaty came about: 'We came up with the idea that we had to prepare a document that would [...] try to respond to the problems experienced in cross-border areas'.³ He continued: 'The treaty document was our political stance on metallic mining, on the different activities'. In his words, the treaty 'incorporates a vision of sustainability, a vision of shared watersheds and integrated management'. On an earlier occasion, he had conveyed to me CEICOM's understanding of a watershed as a more-than-human assemblage interconnected by both biological and meaning-making practices around water: 'When we speak of a watershed, we refer to territory, biodiversity, human beings, water, everything that is there. [...] An area where water is shared, but also territory, culture, policies, etc'.⁴

I suggest that the Lempa watershed is thereby invoked as a ‘transboundary commons’. Implicit in CEICOM’s proposal is that bringing the transboundary watershed into life, visualizing it, and maintaining it entails conceiving the watershed as a commons, not only because it materially encompasses a shared body of water and a biodiversity rich hot spot for the region but because its future is premised on a joint practice of care (see Montoya, 2021a; cf. the notion of ‘commoning’ of Helfrich & Bollier, 2020). The eco-theological notion of the earth as a ‘common home’, a commons of sorts conjured up by Pope Francis’s *Laudato Si*’ encyclical, has come to compound a vision of ‘care for the earth’ that transcends national and other borders (see Montoya, 2021b). This vision is embraced by segments of Central American societies that developed a historical connection with the Catholic Church throughout the 1970s, when ecclesial-based communities in rural areas emerged inspired by liberation theology, and during the country’s civil war (1980–92). These are populations for whom memories and reverberations of such experiences are still prevalent.

In my interview with Antonio, a friar member of the Franciscan organization Justice, Peace, and Integrity of Creation (JPIC) in El Salvador, he explained why the treaty proposal found more support in this country:

We are water-dependent; we depend on the waters of Guatemala. The environmental health of Guatemala affects us positively and the unhealthiness of Guatemala affects us negatively because the most important rivers that reach us are born there: the Lempa River basin, the Angue River.⁵

Antonio thus foregrounded El Salvador’s unequal position in the watershed due to its geographic location. Ecological materiality imposes here a form of inequality that, as Antonio indicated, is reinforced by Guatemala’s activities in the Lempa watershed. This form of inequality has parallels in the ‘climate injustice’ rooted in the uneven distribution of both greenhouse gas emissions and the impacts of climate change that are a byproduct of such emissions (cf. Cipler et al., 2022).

Upon realizing El Salvador’s regional inequity with regard to shared water bodies and the country’s limited national sovereignty over its own water flows, CEICOM set out to elaborate the treaty draft. It did so in consultation with borderland populations and NGOs in all three countries, and with the support of an international law expert with the knowledge and skill to build upon existing global frameworks. The proposal was eventually endorsed by other organizations within and beyond El Salvador’s borders. CEICOM was joined in the efforts to promote the treaty proposal by Salvadoran, Guatemalan and Honduran organizations in the Central American Network for the Defense of Transboundary Waters (Red Centroamericana por la Defensa de las Aguas Transfronterizas, RedCat). Organizations from all three countries with an environmental agenda, such as Colectivo MadreSelva in Guatemala and Cáritas Choluteca in Honduras, were approached and invited to join the network. Together, but also independently, they have lobbied authorities from the three countries as well as deputies of shared institutions such as the Central American Parliament (PARLACEN). Indigenous organizations in El Salvador made part of the RedCat; yet the crafting of the prototype was led by its NGO membership.

When the former guerrilla organization, now leftwing party Farabundo Martí National Liberation Front (FMLN) was in office (2009–19), Salvadoran authorities were open to discussing the treaty proposal – partly due to ideological affinities with organizations like CEICOM, some of whose members had joined the FMLN ranks during the war. The Foreign Ministry, as well as other concerned authorities, such as the ministries of Environment and Natural Resources, of Economy, and of Agriculture and Farming, took on the task of discussing the proposal internally and coming up with their own amendments. The document then effectively became a prototype or open-ended model of a legal artefact⁶, circulated through the ministries’ offices and inscribed with the views of Salvadoran authorities. Over the years, the Salvadoran officials held several meetings with members of CEICOM and other civil society organizations and NGOs to discuss various amended drafts, but governmental iterations of the legal treaty never reached completion nor left the ministries’ offices. With the Nayib Bukele administration (2019–24) that followed, previous channels for citizen lobbying of state officials broke down and work on the treaty draft has no longer been pursued

by their original designers. Yet although the political life of this prototype has been interrupted, it is still worth thinking with.

In our conversations, Marcos addressed how the treaty proposal conceives of the delicate issue of sovereignty, the cornerstone of multi-lateral treaties of this kind:

In general, any treaty or any other agreement affects the issue of sovereignty; the point is, in what sense does it affect it? [...] It is another idea of sovereignty [we are proposing] here, it is sovereignty in which you have the capacity to make decisions to guarantee your reproduction: your reproduction as a human being, your reproduction as a plant, your reproduction as a tree, your reproduction as an animal, etc. In other words, it is the reproduction of life in general. That is our proposal when we talk about the treaty; we are talking about the reproduction of life in the area.⁷

In view of the current prevalence of nation-states, CEICOM's suggestion has not been that we dispense entirely with borders and national sovereignty. Rather, the organization's members have promoted cross-border cooperation, solidarity and co-responsibility, along with an additional layer of remapped sovereignty that overlaps with the transboundary eco-regions carved up by international watersheds (Montoya, 2021b). Of course, as contingent as the map of the nation-state, is the one drawn out for the transboundary watershed. Yet the latter is one that visualizes integral ecosystems from the viewpoint of their biome's composition and functioning – a 'hydrocommons' that facilitates the dissolution of certain boundaries (e.g. geopolitical or those between humans and nonhumans) even as it erects others (e.g. those that delineate the territory and integral ecosystem of the watershed).

Crucially, the text of the treaty makes clear its goal: to protect transboundary water goods, and to do so guaranteeing 'the welfare of transboundary waters and transboundary populations', which cannot be extricated, as well as 'reasonable and equitable management'. In this sense, it places water bodies and their wellbeing front and centre alongside humans. The protection of the health of the latter – as beings completely dependent on water that can even be conceived as water bodies themselves, as Neimanis observes – is placed side by side with the protection of transboundary waters. The treaty proposal thus foregrounds 'the reproduction of life in general', in Marcos's words, being inclusive of all species (human and nonhuman water bodies alike) and attentive to their entanglements.

Furthermore, although not explicitly acknowledged, the treaty proposal incorporates the notion of care for the earth, regardless of borders, with the need to perform this care equitably through regional and inter-state cooperation, solidarity, and co-responsibility. These values, inherent to commoning logics and practices, have been promoted in El Salvador not just by eco-theology but also through the emancipatory political practices of wartime and more recently through the promotion of a solidary economy centered on the reproduction of life. Citizen participation is critical, then, for CEICOM and the RedCat; it enables on-the-ground, experienced-based perspectives on the watershed. While not legally implemented and hence unsuccessful from that standpoint, the citizen-led treaty and its mobilization are an opportunity to examine territorially embedded proposals that promote re-elaborations of existing environmental governance approaches, and the political life of these proposals.

Being and becoming with the watershed

French environmental activist Jean-Baptiste Vidalou (2020) has made an ontological critique of the historical management of natural areas, specifically focusing on forests. His critique goes as follows: 'Because that's the only thing this era does: to manage. It manages ecosystems, it manages populations, it manages bodies, just as it manages an electrical grid, a control room, a cockpit' (Vidalou, 2020, p. 11). He goes on to assert that '[n]atural environments, such as the boundaries or the fences of our fields, become infrastructures comparable to so many others' (Vidalou, 2020, p. 12). Environments managed as infrastructures are thus devoid of life; they are reduced to an

object available for human sustenance and consumption, and solutions to deleterious impacts on them are solely sought out through ‘technofixes’ (Haraway, 2016, p. 3). He counters this utilitarian approach to nature with that derived from dwelling when he notes:

If we go to that forest, if we collect or cut firewood in it, if we gather in it, if we hunt in it, if we play in it, if we walk in it, if we defend it, if we struggle for it, we will understand it in terms other than numbers, resources, and data. And that way we will be able to build another relationship with the world as one made of irreducible spaces. (Vidalou, 2020, p. 15)

‘Dwelling’ as opposed to ‘managing’ thus amounts to a completely different experience of, and relationship to, the watershed; one that has consequences for how the watershed is envisaged to begin with. This experience of dwelling is typical of populations with a relationship of embeddedness and embodiment in territory. While CEICOM does not reject the notion and practice of environmental management and governance, I suggest that implicit in its members’ conceptualization of these is an analogous call to place life in the watershed center stage rather than reducing the watershed to a nature-based museum or a resource to be managed and exploited (cf. Vidalou, 2020, pp. 20–21, 23). According to the CEICOM-drafted treaty, this in turn amounts to caring for ‘the welfare of transboundary waters and transboundary populations’, based on the understanding that ‘the interests of all bodies of water are co-implicated’ (Neimanis, 2009, p. 173).

Vidalou’s suggestion is equivalent to the idea of ‘governance *through* nature’, in contrast to the ‘governance *of* nature’ (Bridge & Perreault, 2009, p. 492). It entails that the reproduction of life, human and non-human, is placed center stage and invoked as the principle that defines and limits national sovereignty, and by extension Guatemala’s and Honduras’s uses of the water flows shared with El Salvador and their activities in the territories that make up the watershed. Moreover, it is by inhabiting the borderlands of the watershed that local populations experience the fiction of borders with regards to environmental phenomena and enact a hydrocommons. In other words, the material continuities and interdependencies between water bodies so vital to the livelihood of local populations and their own bodies become evident in everyday life. For instance, the fishing populations that dwell along the banks of the Güija Lake, which is cut across by geopolitical borders, navigate it irrespective of these borders. Besides, their life is fully conditioned and shaped through the tides of the lake which vary drastically from the rainy to the dry season, the quality of its waters, and its food supply – as is the case for many so-called ‘amphibian populations’ in various regions of Latin America (see, for instance, Fals Borda, 1986). The lake’s waters are a source of sustenance for many reproductive daily tasks, including the fish and snails caught by men and women, respectively, to nourish their families and sell at the market.

Against existing international conventions, the treaty proposal, I suggest, is an attempt to put forward a re-design of environmental decision-making premised on a multi-scalar institutionality – one that includes local, regional, inter- and trans-national authorities yet also local dwellers – that allows approaching the watershed as a transboundary commons. CEICOM and the RedCat are not suggesting that national sovereignty be overturned, aware as they are that to obtain endorsement of their proposal from the authorities of the three countries, this needs to go unchallenged. Their proposal, however, is that national authority over the corresponding portions of the transboundary watersheds co-exists with a tri-partite supranational authority that is led by the gravitating principles of inter-state cooperation, solidarity, and citizen participation. They further suggest that this tri-partite authority embraces the local by incorporating representatives of the populations that dwell in the watersheds and civil society organizations recurrently operating in them. All of these actors necessarily have a different relationship to the watersheds given their day-to-day inhabiting and co-existence with the territory and the more-than-human entities that make up the watersheds’ biomes.

In suggesting meaningful citizen participation, especially of local populations, RedCat is not only proposing a downward re-scaling of environmental governance but also a different form of articulation and realignment of the human and non-human, based on humans’ needs as bodies

that require water to survive and therefore share a vital ‘onto-logics’ with other water bodies. As emphasized by Vidalou for forests, dwelling in watersheds allows a different form of relationship and perspective to emerge, one based on a different kind of sensibility towards the non-human that is morally distant from that which reduces non-human entities and materials to exploitable resources – the latter an elaboration with roots in the colonial history of the region. Populations whose lifeworlds are embedded in territory, such as those inhabiting the region’s watersheds, develop relationships of attunement with the biomes they inhabit, partly rooted in the continuity of water beyond human bodies and the recognition of the need to understand all water bodies in tandem. These relationships are not equivalent to the ontological diversity propounded by the ontological turn when referring to indigenous populations but rather to the interbeing proper of bodies whose lives are deeply shaped by other water bodies (cf. Fals Borda, 1986; Neimanis, 2009).

Conclusions

In this article, I have explored how situated responses to global environmental concerns that are attentive to the local sensibilities, experiences, and memories of place-based populations have engaged existing global frameworks while going beyond them. In Central America, they have done so through the production of a model of a transnational legal treaty that is concerned with water bodies, human and nonhuman. The treaty serves as a prototype that works as both an object of experimentation and a legal artefact through which to expand the horizon of political aspirations. The citizen response has gone beyond the methodological nationalism that informs much of the practice of environmental governance in Central America. By placing ‘the welfare of transboundary waters and transboundary populations’ centre stage, the treaty has also opened up avenues to overcome the anthropocentrism upon which environmental governance in the region is anchored. In other words, the welfare of the watershed’s inhabitants is thus tied to the welfare of transboundary waters. The treaty has not completely decentred the human but, as shown, introduces elements that have the potential to inform initiatives that do. The experimentation through the production of a prototype of a trinational legal treaty has pushed for an approach to environmental governance that emanates from the watershed and involves transnational, cross-sectoral, place-based collaborations rather than one led by technocrats with a proclivity to manage the watershed as a natural infrastructure or an ecological inventory and resource-rich territory ready to be conserved and exploited side by side.

Led by NGOs that work with local populations that dwell in the Lempa watershed, the treaty and the lobby around it have strived to embrace local experiences of environmental deterioration and water stress, water-based livelihoods and forms of worlding or making sense of the world, histories of political and social organizing permeated by Catholic theology, and particular forms of attunement with the watershed. The treaty is a political–legal proposal emerging from on-the-ground experiences but with transnational aspirations to promote the welfare of water bodies and humans simultaneously. There is implicit, I suggest, an understanding of the watershed as a hydrocommons that not only cuts across geopolitical borders but also brings together different kinds of bodies through which water circulates. The proposal drafted by Salvadoran citizens is after all a paramount example of an initiative with a significant potential to help overcome the parochial forms of governance that hinder solutions to environmental urgencies and to visualize a future earthly politics premised on the integrality of ecological cycles and multispecies forms of justice.

Notes

1. For further details of the Declaration and the transnational biosphere reserve it established, see Montoya et al. (2020a).
2. To read the first iteration of the treaty proposal, see Montoya et al. (2020b).
3. Interview with Marcos, CEICOM and National Roundtable Against Mining, San Salvador, 10 February 2017.

4. Interview with Marcos, CEICOM and National Roundtable Against Mining, San Salvador, 4 June 2015.
5. Interview with Antonio, JPIC, San Salvador, 4 April 2017.
6. A prototype works as a model or archetype of something, in this case a legal artefact proposing a form of transboundary collaboration which, in being circulated and amended, becomes open-ended.
7. Interview with Marcos, CEICOM and National Roundtable Against Mining, San Salvador, 10 February 2017.

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