



Earth  
System  
Governance

**EARTH SYSTEM LAW:  
STANDING ON THE PRECIPICE OF THE ANTHROPOCENE**

**Earth System Law Task Force Meeting**

**8 November 2018, 11.00-18.00**

**Room 0.14, Minnaert building (Campus De Uithof), Leuvenlaan 4, 3584 CE Utrecht**

# **REPORT OF THE EARTH SYSTEM LAW TASK FORCE WORKSHOP**



**Universiteit Utrecht**



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The notes contained in this report have been compiled by Catherine Blanchard, and revised by Louis Kotzé.

Apologies for any erroneous reporting of participants’ views.

## 1. PROGRAMME

### 11.15-11.45 **Opening statements**

Introduction of the ESL Task Force – Rak Kim

Introduction of the ESL Task Force 2017 workshop (Lund, Sweden) – Dona Azizi

Introduction of the book project – Tim Cadman

### 11.45-13.00 **ESL – what does it mean?**

**Facilitator: Louis Kotzé**

Round table with all participants on their interpretation of the concept of Earth System Law

*We ask all participants to reflect upon this topic before the workshop and to share their ideas in a 5 min. presentation (approx.). We are also interested in knowing how your understanding of the concept is influenced by your field of research.*

*This round table aims at generating ideas that will form the basis of the afternoon discussion, as well as the introduction of the publication.*

### 13.00-14.00 **Lunch break**

### 14.00-16.00 **Introduction to the publication and presentation of abstracts**

**Facilitator: Rak Kim**

*Approx. 10 min for each abstract, followed by a discussion with all participants.*

**Rosalind Warner**, “Expanding the Ethical Community to Include the Non-Human World: Implications for International Sustainable Development Theory and Practice”

**Margot Hurlbert** (presented by Tim Cadman), “Law, Society and the Anthropocene”

**Sandy Lamalle**, “Towards the Conceptualisation of Earth System(s) Law”

**Francesca Spagnuolo** (via Skype), “The analytical dimension of earth system law”

**Kevin Grecksch** (via Skype), “Earth System law: a socio-legal perspective”

### 16.00-16.30 **Coffee break**

### 16.30-17.30 **Fleshing out the publication**

**Facilitator: Tim Cadman**

*In this last substantive session, we ask participants to reflect upon all the material generated so far, and help flesh out the structure of the publication project.*

*We also ask participants to reflect upon the role of the publication project in defining the mission of the Task Force and its strategic approach.*

### 17.30-18.00 **Way forward and closing statements**

**Summary: Catherine Blanchard**

## 2. PARTICIPANTS

Harro van Asselt	University of Eastern Finland/Stockholm Environment Institute
Dona Azizi	Utrecht University
Louis Kotzé	University of Lincoln/North-West University
Rozemarijn Roland Holst	Utrecht University
Rosalind Warner	Okanagan College
Hanna Ahlström	University of Oslo
Edgar Fernandez Fernandez	Université de Rennes
Rakhyun E. Kim	Utrecht University
Mitsuru Kawamoto	Keio University
Juan Auz	Potsdam Institute for Climate Impact Research
Daphina Misiedjan	Utrecht University
Sarah Mason-Case	University of Toronto
Catherine Blanchard	Utrecht University
Alex Oude Elferink	Utrecht University
Seline Trevisanut	Utrecht University
Sandy Lamalle	ESGRREW/Loyola Sustainability Research Centre (LSRC) at Concordia University
Jesse Reynolds	UCLA School of Law
Tim Cadman	Griffith University
Ellycia Harrould-Kolied	University of Melbourne
Mike Angstadt	Colorado State University
Cameron Holley (on Skype)	University of New South Wales
Kevin Grecksch (on Skype)	University of Oxford
Francesca Spagnuolo (on Skype)	Scuola Superiore Sant'Anna DIRPOLIS Institute

## 3. DISCUSSIONS

### 3.1 OPENING STATEMENTS

#### **ESL Task Force - Rak Kim**

Short introduction of the origins of the Task Force.

It is not *per se* necessary to be an ESG research fellow to be part of the Task Force, but it would be desirable.

Introduction of the other Task Force core members: Louis Kotzé, Tim Cadman, Dona Azizi, Catherine Blanchard, Margot Hurlbert and Cameron Holley.

#### **ESL Lund 2017 – Dona Azizi**

The 2017 workshop consisted mostly of brainstorming sessions.

Small groups, which focused on three perspectives that we can have on the ESL concept: analytical, normative, and transformative. The groups reflected on how we could think of the Earth System and related legal theories on this issue. Discussions also included aspects related to non-human life and what it means for law. From there, key questions emerged that could shape the research agenda.

#### **Publication project – Tim Cadman**

The discussion focused on how to eventually determine how we go about with determining the framework of the work programme– see the framework developed by Rak and Dona on the ESG website. Such a determination would reflect the dimensions of the envisaged research programme:

Analytical dimensions of ESL:

- How does conventional legal discourse translate into this emerging field?
- The Anthropocene as a theme of ESG

Normative dimensions:

- What we ought to do normatively, politically and in terms of governance.
- The law is static, highly anthropocentric; it is a way of dealing with human activities

- Move towards ESL, that encompasses a whole range of planetary boundaries, all these dimensions of terrestrial existence
- Intergenerational equity and equity among species are also important
- We are all one, we are interconnected, everything has an impact on everything else – how does this influence sustainability and sustainable development.

Transformative dimensions:

- How do we transform epistemologically, normatively and our governance arrangements alongside ideas such as ESL?
- It is important to involve other stakeholders, through transformative actions
- The focus of transformation must be local, regional, national, and global
- How do we make legal systems fit for purpose for going into the future?

These ideas are summarized in the graph that Tim has made to summarize the findings from last year’s workshop:

Analytical	Normative	Transformative
<p><b>Is there an actual existing “Earth System” (Governance) law</b></p> <ul style="list-style-type: none"> <li>• If not, can we create it?</li> </ul>	<p><b>1) Standards of behaviour</b></p> <ul style="list-style-type: none"> <li>• Will rule of law really solve everything?</li> <li>• Could/should “soft”/contested eco-norms get hard [?]</li> <li>• What is the normative view on non-human life?</li> <li>• [E.g.] retirement rights for cows?</li> </ul>	<p><b>Eco-constitutionalism: what has changed?</b></p> <ul style="list-style-type: none"> <li>• Crosscutting principles of universal application vs. current silos</li> </ul>
<p><b>How do we deal with the fundamentally static, and anthropocentric nature of law and lawyers?</b></p>	<p><b>2) Application of jurisprudence to sustainability as a legal norm</b></p> <ul style="list-style-type: none"> <li>• Are existing human rights in conflict with Non-human life</li> <li>• Do we need an interspecies ombudsman?</li> </ul>	<p><b>Eco-centrism</b></p> <ul style="list-style-type: none"> <li>• Still under development</li> </ul> <p><b>State-centrism</b></p> <ul style="list-style-type: none"> <li>• Problems: <ul style="list-style-type: none"> <li>• Where is the will to change?</li> <li>• Why are existing mechanisms not working?</li> </ul> </li> </ul>
<p><b>How do we translate the memes/types of law ?</b></p> <ul style="list-style-type: none"> <li>• Law in society (socio/legal)</li> <li>• Local (common) vs. global law</li> </ul>		<p><b>Non-state internationalism</b></p> <ul style="list-style-type: none"> <li>• Is this feasible or is its novelty too problematic?</li> </ul>
<p><b>Can we “stretch” existing law or do we need a new law?</b></p>		

Table from Tim Cadman

## 3.2 ROUND TABLE – WHAT IS ESL?

### Questions for reflection asked by the facilitator to trigger the discussion

- Do we need a new legal paradigm?
- Why the label ESL?
- Would a new label have normative consequences?
- Maybe label “environmental law” is not insufficient, inefficient, is it conceptually outdated?
- Is environmental law desperate for a new paradigm, or is it the ES community looking for lawyers?
- Could ESL be a new “catch phrase”; or do we create something new (like international environmental law (IEL) was created in the 70s)?
- How are issues related to scale, ontology, ethics, and so forth important for the determination of ESL and its research agenda?
- What does ESL mean for ESG, and how could ESL change ESG and vice versa?

### Interventions from participants

ESL is different from other legal paradigms, e.g. IEL. It is however unclear how, why and to what extent. It does seem that ESL has a better fit with the object of regulation/governance than a pure juridical paradigm has, in terms of institutional fit and to the extent that it is more adaptive and reflexive. It also potentially has a better normative fit e.g. ecological justice.

Better fit with the object we are trying to regulate

- better institutional fit: e.g., less fragmented or better coordinated
  - adaptive and reflexive
- better normative fit: e.g., ecological justice
  - recognising that no normative end - no reference point
- forward-looking
  - traditional law is reactive but ESL could be pro-active/preventative
  - accommodates multiple futures (not a top-down design)
  - using scenario building work

Current legal thought does not accommodate systems thinking and interconnectedness. We draw arbitrary regulatory boundaries, which is challenging from an ecological perspective. New regulatory issues do not necessarily fit comfortably in the existing juridical approach to regulation eg. IEL.

Although we employ the Anthropocene as a lens, we should not be uncritical towards it: the Anthropocene universalizes “the human” but not all of humanity has contributed to the drivers of the Anthropocene.

It would be pertinent to focus on the role of law in responding to the socio-ecological crisis of the Anthropocene, as well as the extent to which law has been contributing to creating the Anthropocene and its crisis.

**Thinking about ESL raises a number of juridical issues, including:**

Is ESL really different from what already exists?

Paradigms such as global environmental law and transnational environmental law already exists. How are these different from ESL?

In designing a framework for ESL, the focus must be on the law and that what distinguishes ESL from ESG.

What literature is relevant for critiquing ESL? Would this include regime interaction, fragmentation, adaptive law, reflective law?

Is there a need to create a new body of law and a new legal paradigm?

Must ESL have a normative effect or a transformative effect, and if it does not, is it any good? Eg, ecological law is seen to reverse the dominance of humans over nature, and that is what makes it transformative. Will ESL have similar aims?

Thinking about ESL might require looking at philosophical norms and values already existing at the socio-cultural level.

ESL could furthermore require investigating radical ontologies such as rights of nature and indigenous juridical approaches to environmental protection.

A historical reflection on the past and present performance of law in relation to environmental protection would be important.

Do discussions about ESL also involve a focus on the content and form of law?



To what extent will a focus on ESL require a rethink of the issue of legality? Legality should not only be measured in terms of procedural requirements but also in terms of substantive outcomes.

Must ESL and its research agenda play a role in addressing fragmentation? Or is fragmentation inevitably a part and positive aspect even of an Earth system approach to law? Fragmentation might contribute to accommodate complexity.

In thinking about ESL, international relations theory could make a meaningful contribution.

The relationship between ESL and ESG is multifaceted. For example:

- ESL as a research agenda is superfluous as ESG already implicitly encompasses it.
- ESL is as an end result of the ESG movement
- ESG is a framework to be imported into ESL
- Any conceptualization of ESL must start from the ESG framework
- What is the target audience? ESG, international law, IEL?

Is ESL an alternative corpus of law, or is it a different way we look at the law (i.e. analytical view)? A study of literature on the evolution of law could inform such an exploration.

There is a view that ESL is different from other concepts, it involves a paradigm shift which is embedded in the name ESL, while it rests on systems thinking, a systems approach, which is not prevalent in “conventional” environmental law. After all, the Earth system is a single complex adaptive system and the linear way of approaching nature has become redundant.

### **Methodology**

It is unclear which methodology to follow in unpacking, understanding and describing ESL. Determining the methodology will be part of the ESL research agenda. What is clear at least, is that ESL research will require an trans-disciplinary approach and perspective. The ESG community provides ample opportunities for uniting different disciplines under the banner of ESL.

### 3.3 ABSTRACTS

N.B. These abstracts are the abstracts submitted by the authors.

#### **3.3.1 Rosalind Warner, “Expanding the Ethical Community to Include the Non-Human World: Implications for International Sustainable Development Theory and Practice”**

This paper will examine recent trends toward the expansion of the ethical community to include the non-human world, and the impact of this trend on international development theory and practice. The purpose of the project is to identify and analyze patterns in law, policy, and civil society practice that have moved international actors toward recognition of non-human entities as part of the human ethical community, particularly the role of indigenous knowledge. This paper will first articulate the various ways in which the non-human is and has been viewed in international development thinking, then explore various ‘inroads’ towards changing the view of the non-human world, and finally consider the ways in which international development thinking might usefully move away from an anthropocentric toward a more eco-or bio-centric view that more accurately and fully reflect these evolutions.

The paper will do this in stages: first, a chronology of international development thinking on the non-human world will demonstrate the discursive integration of an ecocentric ecological framework into institutional agendas of sustainable development. The second stage involves a closer look at how Western legal concepts and premises, such as personhood and property, affect the integration of the non-human into international development thinking. Finally, the paper will turn to the specific case of the Whanganui river decision in New Zealand, which broke new ground on a legal front and has implications globally due to the norm-leadership effect on other jurisdictions. The paper will examine the Whanganui river decision, analyze the factors for success, the potential to impact further development of national and international environmental law, and the implications for international development theory and practice.

This paper ultimately concludes that although modernity’s bifurcation of reason and nature<sup>1</sup> persists and continues to privilege humans above Gaia, there is a real sense in which projects to acknowledge the intrinsic worth of the non-human can straddle, and even defy, this divide. To move the law toward personhood for nature is to recognize the analytical distinction between humans and nature while simultaneously upsetting the overly dichotomous categories that currently imprison thinking. If adaptation to a

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<sup>1</sup> Some trace the anthropocentric view of human superiority over nature even further back to Christian and Greco-Roman origin (Magallanes, 2016).

changing world is necessary and foreseeable, and if this is bound to be a planetary project and not only one for specific locales and peoples, then it is difficult to imagine how it might occur *absent* a reconsideration of the ethical basis of the current conventional sustainable development discourse. Although there exists a burgeoning literature on human rights, ethics, and ecology in sustainable development, more studies are needed to directly explore how changing views of the non-human world affect international development thinking and practice.

### **3.3.2 Francesca Spagnuolo, “The analytical dimension of earth system law”**

From a legal perspective, research on earth system governance can be seen as part of the effort to identify, design and help build new principles and mechanisms of law to address the consequences of globalized interdependence in fields such as environmental protection, food safety, biodiversity conservation, and forest degradation (Spagnuolo, 2011). Earth system law can be understood as comprising legal principles and mechanisms (rule-making procedures, adjudication, etc.) set up to “steer societies towards preventing, mitigating, and adapting to global and local environmental change” (Biermann et al., 2009:19). (2) Legislation and judgments are forms of legal discourse conventionally recognized as law. However, as a consequence of a “procedural turn” registered in earth system governance (Gupta, 2008) administrative-law type mechanisms, such as the right to access information and to judicial review, and their underlying general principles (e.g. transparency), can be also recognized as part of the body of earth system law. (3) Thus, an analytical framework that provides an appropriate understanding of legal concepts, principles and rules applicable to earth system governance must be developed by taking in due consideration legal mechanisms/procedures/tools currently available in the context of earth system governance (i.e. those that have already emerged/are adopted in many areas of earth system governance, including food safety and climate change adaptation). (4) In so doing both theoretical and practical links between earth system governance/law and the Anthropocene can be explored, by analyzing concrete legal changes (e.g. in terms of procedures and mechanisms to enhance public participation in rule-making and standard-setting procedures at multiple levels, from the local to the global) associated with the pressure to adapt to the Anthropocene or to mitigate the changes producing it. Examples include the update of national laws to respond to climate change (e.g. Climate Change Acts in UK, Denmark, Finland, etc.) and the transformation of legal doctrines in both public and private law (Biber. 2017)

#### ***Questions/Comments raised during the workshop***

But what is different from global environmental law?

Norms transcend from different systems

Caution: don't link it to the conceptual framework of ESG as a whole, because that framework was developed for specific purposes, and it might not be applicable to other things.

### **3.3.3 Kevin Grecksch, “Earth System law: a socio-legal perspective”**

Socio-legal studies or law in society, studies law as historic, evolving and culturally specific mode of social organisation and is characterised by conceptual as well as institutional components. It is furthermore an empirical and multi-disciplinary approach. Established strands of socio-legal research are for instance to research fundamental questions about the effect of environmental law and regulation or the study of legal cultures. The latter refers to parallel legal systems, for example western-style versus indigenous legal systems and practices, an issue that has gained more prominence in recent years. Another important branch is legal consciousness research, which asks how people perceive law and legal systems. In other words, how do people for example perceive environmental law and regulation? Do they for instance apprehend it as just and effective? Or, do all actors have the same access to environmental justice and what are barriers and enablers? Hence, in the light of current and future environmental challenges such as climate change, the question can and should be asked what socio-legal research can contribute to these urgent public debates. This chapter offers a socio-legal perspective and will thereby address the first theme “The analytical dimensions of earth system law” and especially the question what theoretical framework could inform earth system law.

The chapter will define what socio-legal research is, what theoretical and normative underpinnings and approaches it offers and most importantly how it could inform earth system law. It will introduce socio-legal studies in general and subsequently introduce approaches such as legal cultures, legal consciousness and the socio-legal contributions to the study of the effects of environmental law and regulation. In the context and for the purpose of earth system law, I will argue that a socio-legal perspective can bridge the gap between a mere doctrinal view of law and a more social-science perspective on law. ‘Socio’ in this context is less a reference to the discipline of sociology or social sciences in general but the context within which law exists. Thus, a socio-legal approach to earth system law can be useful for its conceptualisation because it goes beyond conventional legal theories. This can help to address wicked problems and challenges such as climate change and other current and future societal and environmental challenges.

### ***Questions/Comments raised during the workshop***

Are you limiting your chapter to explaining the socio-legal perspective, or you want to give your thoughts?

Shall we make many chapters on other perspective? How do we want to structure the book, what approaches we want to take?

### **3.3.4 Sandy Lamalle, “Towards the Conceptualisation of Earth System(s) Law”**

In the perspective of Earth Systems Governance, the notion of Earth System(s) Law and its conceptualisation could open a new path for the institutional transformation needed in the Anthropocenic era. Such a conceptualisation will be all the more relevant and helpful if major lessons in international legal practice, critiques in international law and insights from different legal traditions are taken into consideration.

To that end, this chapter will mobilise knowledge and reflections in law, social sciences and humanities, with a view to formulating key principles for a new vision and process, addressing the challenges defined by the Millenium environmental assessment at the local and global levels, by the movements for legal pluralism and the rights of nature, and by the sustainable evolution of the international legal system and institutions.

### **3.3.5 Louis Kotzé, “The Case for Earth System Law: Jettison the Past?”**

The future configuration of the Earth system is now a key matter of geopolitics, and of how the world is known, reorganized and rebuilt in the struggles for economic and political mastery and human survival in rapidly changing socio-ecological conditions. Because law will continue to play a crucial part in this endeavour, it requires little arguing in support of rethinking the trite juridical constructs that we have designed and relied on for decades to mediate the human-environment interface.

Of all these, environmental law is the most prominent, but there is now sufficient evidence that it has failed at all regulatory levels, from the local to the global, to help effectively maintaining Earth system integrity. The failures and deficiencies of environmental law are explicated by the Anthropocene’s human-induced signatures which loosely characterize them as being: anthropocentric and supportive of neoliberal economic development; incompatible with Earth system complexities; unresponsive to Earth system changes; inflexible and not sufficiently reflexive; and state-centered which preserves sovereignty and shuts out alternative modes of inclusive ecological care. These factors are all apparent in environmental law and they legitimise and reinforce the type of

human behaviour that is causing the Anthropocene, while allowing environmental destruction, growing inter and intra-species hierarchies, human rights abuses, and socio-ecological injustices.

Considering the foregoing, there is evidently a critical need to revisit, and ultimately to reimagine, the traditional foundations, design, scope, ontology and objectives of environmental law in a way that would render it more suitable to respond to Earth system demands and complexities and to the socio-ecological crisis of the Anthropocene. This chapter proposes a new body of law to replace environmental law. It sets out in broad terms to make a case for the development of Earth system law, while it also endeavours to illuminate the broad conceptual and normative contours of this new body of law. It does so by: 1) briefly motivating why environmental law has become obsolete; 2) identifying and elaborating the core demands, and thus considerations for reform, that the Earth system perspective presents in the context of the Anthropocene for law; 3) and proposing short, medium and long-term strategies that should collectively lead to the eventual creation of a coherent body of Earth system law.

### **3.3.6 Margot Hurlbert (University of Regina), “Law, Society and the Anthropocene”**

Theorizing about law, society and the Anthropocene opens a new frontier. The new frontier begins with a trivalent conceptualization of each component: law, society and the Anthropocene but must evolve to a solid theoretical framework of the components and the interrelationships between law, society and the Anthropocene. This chapter briefly builds a theoretical foundation for each component of law, society and the Anthropocene, and then a unifying trivalent framework linking the three constituent components.

Law is often studied in a jurisprudential positivist manner. Assumptions of people as actors making rational choices with full information frame an ‘official version of the law’ (Naffine 1990: 22). Luhmann (1993) envisioned the law as a closed system free from external influences. Those practicing the law, dispense justice through a completely self referential process of reviewing statutes, legal decisions and reasoning. There are no outside influences. New science (such as that surrounding climate change) does not exist within the law until a judge determines that it exists and it applies in a particular case.

Others do believe law connects to society as it has long been conceived as the most important observable manifestation of the collective consciousness and its transformation (Durkheim (1893). Others view the law to be a ‘living law’ that is determined and applied by people in their every day decisions of how to abide by,

invoke, and interpret the law (Comack 2006). But how does our view of society and how it operates inform our understanding of how the law operates? Is it a social structure operating, shaping and being shaped by the society in which it operates (Cotterrell 1996)? Or is it a mere instruments of capitalists who have direct access to and influence on our governments and those passing statute laws (Hunt 1991)? And what are the implications of this for our understanding of how law and society interconnect with the Anthropocene?

Since the Enlightenment people and nature have been studied as separate entities. It is unwise to afford to people the same behaviours and relations as that that exist between different species, ecosystems, and biomes. However, now in the time of the Anthropocene, human action has impacted and changed these in an irreversible manner. Which understandings of law and society relate to the new interconnections between people and their world that is relevant for the 21<sup>st</sup> C? Can we build upon Ostrom's institutional analysis and development framework that interrelates people with common pool resources such as the earth or her conception of the socio-ecological system (Ostrom 2005)? Can theorizing about law and society add value to assessing the dynamic nature of socio-ecological systems that are impacted by the institutional infrastructure created by people and built to cope with external disturbances and internal problems that besiege climate change (Anderies et al. (2004)?

This chapter builds a framework of law and society using a social field vision of society and combining it with a multitude of theories of society and its operation and interconnection with law on the micro human to human, and human to nature level, and then on the macro social level. This framework allows for a new way of envisioning the Anthropocene and opens a new research agenda of how to address the complex problems of the Anthropocene.

### **References:**

- Anderies, J., Janssen, M. and Ostrom, E. (2004) 'A Framework to Analyze the Robustness of Social- Ecological Systems from an Institutional Perspective', *Ecology and Society* 9(1):18. <http://www.ecologyandsociety.org/vol9/iss1/art18>.
- Comack, E. (2006) *Locating law, race class, gender sexuality connections* (2<sup>nd</sup> E) Halifax, NS: Fernwood Publishing.
- Cotterrell, R. (1996) *Law's community: Legal theory in sociological perspective*. Oxford: Clarendon Press.
- Durkheim, E. (1893) *The division of labour in society*. New York: Free Press.
- Hunt, A. J. (1981) *Marxism and the analysis of law*. In A. Podgorecki and C.J. Welan (eds.) *Sociological approaches to law* (pp91-109) New York: St. Martin's Press.
- Luhmann, N. (1993) *Law as a social system*. Oxford: Oxford University Press.

Naffine, N. (1990) *Law and the sexes: Explorations in feminist jurisprudence*. Sydney, Australia: Allen & Unwin.

Ostrom, Elinor (2005) *Understanding Institutional Diversity*. Princeton, NJ Princeton University Press.

### **3.3.7 Margot Hurlbert, “Hypothesizing Earth System Law to Achieve Justice and Sustainability”**

Law is not commensurate with justice. The practice and study of law, in many countries adopts a jurisprudential method analyzing case precedent and legislative interpretation. Similarly the study of justice occurs often within a post structuralist or post modern framework situate within a particular practitioner or investigator’s construction of what is or is not fairness. Perhaps for these reasons, environmental law and environmental justice have not yet protected people and the environment from degradation and a changing climate. Both the study and practice of law and justice historically have largely focused on humans and their relationships with one to another. Even in relation to nature’s contributions, law has mostly concerned the rights to and the exclusion of others from nature’s resources. However, now in the dawn of the Anthropocene the pre-eminence of humans and their relationships to one another is bereft, without full consideration of the earth, the juridical status of its fauna and flora in their own right, Earth’s contribution to humans, and the increasing dependence of human’s on the Earth.

The combination of law with justice in the context of the earth develops a new hypothesis for earth system law and justice. This hypothesis is formed by a trilemma of justice – the formal justice achieved by treating equals equally, the substantive justice achieved by treating unequals unequally, and ethical principles of leximin, or looking after the needs and priorities of the less powerful. Adding earth and all it entails to this equation develops a new hypothesis of earth and justice. Adding the world’s coral and all of the species dependent on it to this equation, arguably some of the least powerful now facing extinction, forges a new pathway of Earth law and justice. This 1) changes traditional rules of legal standing or the ability to be recognized to bring actions before courts; and 2) advances the rights of not only Mother Earth, but all of its inhabitants. Treating unequals unequally with considerations of the Anthropocene, reframes distributive justice and legal tools that effect including tort law, and principles of law such as the precautionary principle. Most importantly, considerations of the Anthropocene ultimately advance sustainability, the sustainability of the Earth and all of its inhabitants now and in the future.



### **3.3.8 Margot Hurlbert, “Adaptive Earth System law”**

Considerable literature has studied policies and practices for adaptation and mitigation including adaptive management, adaptive governance, and experimental governance. However, similar frameworks have not yet been fully explored in relation to adaptive law. Law, however, especially in relation to climate mitigation targets is especially important. Law is an important formal institution that influences, if not determines pathways for limiting global warming well below 2 degrees Celsius and adapting to climate change in the Anthropocene. Arguably law can be a hard limit, either because of omission (lack of regulation or failure to create a carbon price) or laws that prevent important response options necessary for achieving pathways to limit global warming to 1.5 degrees Celsius (which might include land tenure laws preventing retention of forests or grasslands that act as carbon sinks).

As weather becomes increasing variable, and in some areas of the world there are increasing droughts and floods of greater duration and intensity, as well as climate migration, land conflict, and food insecurity increasing, immediate action to reduce GHG emissions becomes essential. Attention to law, as a barrier to change and transforming it into a facilitator achieving the pathway to limiting global warming to 1.5 is increasingly important. This chapter reviews principles of adaptive governance, adaptive management and experimental governance and develops a framework of adaptive earth system law. In this framework, law is iteratively assessed, measured for performance, written to advance social and ecological learning, and ensure the necessary accountability and transparency to engender trust in laws necessary to make social ecological change to address GHG emission reduction necessary to achieve Paris commitments.

#### ***Questions/Comments raised during the workshop***

What is the difference between adaptive law and adaptive ESL? Maybe it would be good to build on the body of literature that exists.

### **3.3.9 Ryan Burgess (University of Chicago), “What do we mean by Earth Systems Law? What methodological discourses inform Earth Systems Law?”**

By Earth Systems Law, we mean a legal regime which ventures beyond strictly human concerns. It requires the recognition of the concept that the biosphere, as an entity considered outright, ought to be thought of as a realm of separate and independent legal consideration insofar that it encompasses the conditions of possibility for the existence of complex life. The very existence of the biosphere is circumscribed by various

environmental and physical conditions; human activity can alter these conditions, and the continued existence of the biosphere is dependent upon human activity respecting these limits. A legal regime must be developed in order to respect our planetary boundaries, perhaps on a rights basis such that rights are assigned to a variety of non-human entities and by extension, the earth system as a whole. This project would investigate whether or not these rights would be assigned with reference to human rights, or whether or not they would be designated on a separate normative basis. Additional consideration would be extended to the proposal that a so-called “biosphere law” could be fashioned from a synthesis of the realms of (including, but not limited to) environmental law, animal rights law, property law, and natural resources law. This field of “biosphere law” would be analogous to the realm of international law, which was fashioned on the basis of legal regimes which transcend national borders. A key aspect of international law is that it is applicable to state entities as opposed to private citizens. “Biosphere law” would necessarily be applicable to both; the actions of state actors and private citizens both pertain to the areas of concern which would encompass this legal regime. In summation, this project investigates the creation of a novel form of law in order to address the demands of earth system governance. It considers the conditions which are both necessary and sufficient in order to implement such a legal regime, and it furthermore investigates the normative bases upon which such a regime would find its foundations.

### **3.3.10 Genevieve Quirk (Australian National Centre for Ocean Resources and Security (ANCORS), University of Wollongong), “Enhancing the coherence of oceans governance through the integration of regional institutions”**

The proliferation and specialization of international law and institutions has given rise to the phenomenon the International Law Commission defines as fragmentation. The cumulative diversity of international institutions threatens the coherence of the governance system for the ocean. This diversity of institutions, each without exclusive authority on a particular issue area, presents a challenge for consistency and regulatory coherence in the implementation of the United Nations Convention on the Law of the Sea (LOSC), especially when the mandates of various institutions overlap.

The primacy of the LOSC as a constitution for the oceans and its near universal membership, however, provides an unusual starting point for the challenges of coordination between fragmented and differentiated institutions. Accepting that coherence in the law of the sea is crucial, how can coherence in the institutions of the law of the sea be further enhanced? This research proposes that coherence of global oceans governance can be enhanced through the integration of regional-scale oceans governance institutions.

While the literature has looked at the consequences of increasing fragmentation at the international level, less attention has been paid to consequences of fragmentation at the regional scale where the proliferation of instruments has been greatest. This research responds to this challenge by focusing on the important role of regional institutional interactions in promoting coherence in oceans governance. In our era of ocean change, UNESCO, UNEP, UNDP and the IMO together propose an ideal for global oceans governance – Regional Oceans Management Organisations (ROMOs) – organisations that transcend national and sectoral interests, by improving cooperation across issue areas, for an integrated approach to oceans governance. Though theoretical in concept, existing assessments of regional oceans governance arrangements, demonstrate the integration across issue areas proposed under ROMOs is rare. Oceania is ranked among the rare integrated regional institutional oceans governance arrangements and this chapter proposes an analysis of the development of integration may provide valuable insights about institutional integration.

Commencing as distinct entities, the regional institutions of Oceania evolved, through coordinated efforts to improve institutional interaction, to form an integrated regional oceans governance architecture. This chapter applies a theoretical model from Morin and Orsini (2013) on the development of institutional complexes to elaborate the stages of transformation and integration in the governance of Oceania. In accordance with Morin and Orsini's model, areas of overlap in the mandate of Oceania's regional institutions, compelled their co-evolution through stages of competition and specialization. The final stage of integration between these institutions is characterised by an overarching and coherent architecture for cooperation and collective diplomacy at the regional scale.

An emergent property of the integration of Oceania's regional oceans governance architecture is the development of institutional mechanisms for collective diplomacy. This novel finding suggests the potential for horizontal diplomatic ROMO interaction and vertical diplomatic interaction with international-scale governance architecture. ROMO governance, with its qualities of transcending national and sectoral interests is manifestly of interest in an era of ocean change. Oceania's influential collective diplomacy on international oceans governance (eg. drift net moratorium, nuclear free zone and the ocean sustainable development goal) also suggests a potential role for ROMOs in facilitating a cyclical relationship between regional and international law.

### 3.4 FLESHING OUT THE PUBLICATION PROJECT

The goal of this session is to reflect on the material and on the structure of a possible publication; the form and content of which remains to be determined. Such a publication could, for example, reflect on:

- Different understandings of law
- Natural law: link with science v link with traditional approaches
- Descriptive v normative functions of law
- Law v justice
- Law v politics v ethics v science v governance
- Law as reactive v law as proactive/forward looking
- Stability and change and how this is or is not promoted by law

The publication could be structured in terms of three dimensions: analytical, normative and transformative. Some participants however struggled with understanding the difference between normative and transformative dimensions suggesting as they did that the transformative dimension could be a cross-cutting theme.

There was a suggestion that as a first step, the Task Force could publish a concept paper.

#### **Summary table of ideas for the publication**

ROLE OF THE PUBLICATION	
Task Force Mission and Strategy	Practical
More than a publication; also a work programme for 2019 <ul style="list-style-type: none"> <li>• Divide in working groups?</li> </ul>	Timing <ul style="list-style-type: none"> <li>• Book – 18 months</li> <li>• Special issue – depends on journal</li> </ul>
Establish a research agenda <ul style="list-style-type: none"> <li>• Sensible, inclusive</li> </ul>	Publisher <ul style="list-style-type: none"> <li>• Most participants want a double-blind review process</li> <li>• 6 participants in favour of a book, 9 participants in favour of a special issue in a journal</li> </ul>
Acknowledgement of the Anthropocene for ESL <ul style="list-style-type: none"> <li>• Condition + critique</li> </ul>	Possibility of having the book project and the special issue project in parallel
	Next step: new call for abstracts When?

MATERIAL	STRUCTURE
Different understandings and theories	Analytical/normative/transformative <ul style="list-style-type: none"> <li>• Is this crosscutting?</li> <li>• Is there a difference</li> <li>• May guide the structure of the publication, but not necessarily.</li> <li>• It also need to be descriptive.</li> </ul>
Natural law <ul style="list-style-type: none"> <li>• Science</li> <li>• Traditional approach</li> </ul>	Are the different theories and understandings relevant to outsiders?
Descriptive/normative	Chapters need to speak to one another. Themes across chapters?
Reactive/proactive <ul style="list-style-type: none"> <li>• Law as an agent of change</li> <li>• Law as supporting the status quo</li> </ul>	Practical problems: <ul style="list-style-type: none"> <li>• How to reconcile the different fields and backgrounds?</li> <li>• How to include the existing scholarship?</li> <li>• Scale of analysis?</li> </ul>
Tensions: <ul style="list-style-type: none"> <li>• Law/justice</li> <li>• Law/science</li> <li>• Law/ethics</li> <li>• Law/politics</li> <li>• Law/governance</li> </ul>	
Relationship of concepts, not conflict	

## 4. DATA BASE

Rosalind Warner (Okanagan College) has kindly agreed to share a reading list relevant to the work of the Task Force.

It is accessible via a Google Document, meaning that the document can be accessed by all, and new references can be added.

Please feel free to add any reference you would like to share with the group.

For any difficulties with accessing the document, please contact Rosalind directly at ROWarner@okanagan.bc.ca

<https://docs.google.com/document/d/1IhfkSpp2jKpq7Bbb77VmbKIV3-jBw4ozWQSowOrH3eY/edit?usp=sharing>

## 5. SUMMARY

### **ROUND TABLE – WHAT IS ESL?**

Difference between ESL and other concepts

Anthropocene

Having systems talk to one another

Are we creating a new body of law?

Law and non-humans

Law and future generations

How has the law contributed to what we have now?

Content of the law v form of the law

Linking law with politics

ESL as the legal part of ESG → ESL is broader than public international law or international environmental law

Who is the target audience?

### **ABSTRACTS**

**Rosalind Warner:** humans and non humans

**Margot Hurlbert:** 1) law and justice in earth systems; 2) adaptive ESL

**Francesca Spagnuolo:** conceptual framework for ESL

**Kevin Grecksch:** socio-legal perspective for ESL --. Triggered the discussion of whether we should also see ESL from other perspectives

**Sandy Lamalle:** take into consideration different dialogues and different institutions, see legal pluralism in practice

### **PUBLICATION PROJECT**

Material

Structure: concept paper and/or book?

Practical issues

### **NEXT STEPS**

Set the agenda of the Task Force

Ensure the visibility of the Task Force for the next ESG conference → create a sub-committee for next year's conference?