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The Planetary Future

Saving the Earth for Future Generations: Some Reflections

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Abstract. Most legal systems recognize trusteeship functions of individuals or institutions to act on behalf and in the interest of those who cannot legally act for themselves. They can be advanced for the effective protection of future generations and the Earth. Guidance for Earth Trusteeship exist in the form of two agreements created by global civil society, the 2000 Earth Charter and the 2018 Hague Principles. Current opportunities include the UN Secretary General's call for "repurposing the Trusteeship Council", the UN Summit of the Future and ongoing developments in many countries towards implementing ecological integrity and rights of nature into their legal systems.

Keywords: Earth Charter, Earth system, Earth trusteeship, ecological Integrity, Hague Principles, ownership, State sovereignty, fiduciary duties

1. Introduction

The central question of saving the Earth for future generations is how responsibilities for the earth and its ecological systems can be expressed in policies, laws and institutions[1]. If it is true that long-term survival depends on humanity's ability to maintain and restore the integrity of earth's ecological systems, then how we control and govern ourselves is vital. So far, governments have not really governed. Rather they seem to be caught up in crisis management with little vision and commitment to tackling climate breakdown, the plight of the oceans and massive loss of biodiversity.

Reminiscent of the famous definition of insanity ("insanity is doing the same thing over and over again and expecting different results")[2], states have continuously relied on negotiating some compromise between environmental and economic interests. This is insanity as the ecological conditions, that all life on earth including human life (with its socio-economic systems) depend on, are non-negotiable. They determine the ecological niche of all living beings including humans.

States and their representatives "know" that the integrity of Earth's ecological system is at stake, yet international environmental law has not evolved accordingly. Instead, the three pillars of "sustainable development" - environment, economy, society - have served as a convenient substitute for addressing the core question: how can the integrity of Earth's ecological system be preserved? To be fair, states have expressed their commitment to cooperate to conserve, protect and restore the integrity of earth's ecological system can be preserved has been expressed in more than 25 international environmental agreements such as the 1992 Rio

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1 K. Bosselmann (2015), *Earth Governance: Trusteeship of the Global Commons*, Edward Elgar.

2 Commonly attributed to Albert Einstein.

Declaration[3] or the 2015 Paris Agreement.[4]

What's missing is a sense of urgency. Most political leaders may express their concern for climate change and Earth's well-being at every possible occasion, but they too often lack imagination and leadership for transformative change. There are many reasons for this. The predominance of economic growth rationality is certainly one of them. But there is also a remarkable myopia (short-sightedness) that economic and political institutions the world over suffer from. Corporations, governments and parliaments operate within space and time horizons that may serve short-term human interests, but ignore ecological realities.

This is particularly true for the institution of the modern sovereign state. The Westphalian idea of nation-states was designed at a time when Europe recovered from the trauma of a 30-year long civil war. Creating a peace order of nation states was seen a paramount, but also suitable for a new global legal order. At a time of discoveries and explorations, peace within Europe needed to be complemented by a legal order for conquest outside Europe. The best tool for achieving both objectives was the idea of a sovereign state.[5] Once control of a given territory and its people has been physically established, international law recognizes this as the establishment (or extension, respectively) of a sovereign state. State sovereignty allowed for both, mutual control and accountability of nations within Europe (the peace order) and European colonisation of the rest of the world: South America, Africa, parts of Asia, North America, Oceania and Antarctica.[6]

The core of state sovereignty was designed as property and control over the own territory against any foreign intervention ('territorial sovereignty').[7] This core has largely stayed unchanged until today and has been the legacy under which modern international environmental law was established.

Article 2 of the 1992 Rio Declaration on Environment and Development says: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies (. . .)." Like a private owner of land, the state has the undisturbed right to exploit its territory. Crucially, the sovereign state is under no legal obligation to protect it or protect areas outside its boundaries (e.g. oceans and the atmosphere).[8]

On the other hand, the second half of Article 2 says that states have "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." Furthermore, Principle 7 of the Rio Declaration reads: "States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem." So, is there a fundamental obligation of states to protect the global environment and integrity of the earth's ecosystem after all?

The answer is no. The current system of international law does not require the sovereign state to protect the natural environment within national boundaries. It only expects states to consider - but not necessarily avoid – disastrous environmental consequences of their actions. There is huge discretion involved here, a degree of moral responsibility, but no legal obligations whatsoever. Only negotiated treaties and fundamental principles of international law could change that, but so far all treaties have been too weak and fragile - not to mention lack of enforcement - to urge states into the logic of common responsibility for the Earth. For this to happen, we need

3 UN (1992), *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26, 12 August 1992, Principle 7.

4 UNTS (2016), *Paris Agreement*, Paris, 15 December 2015, *UNTS*, vol. 3156, p. 79, Preamble, Articles 2 and 4.

5 K. Bosselmann (2024), *Earth Trusteeship and the Sovereign State: Transforming International Environmental Law,* Routledge, forthcoming, Part II: Examining State Sovereignty.

6 Chr. Clapham (1999), "Sovereignty and the Third World State", *Political Studies*, 47(3); N. Pourmokhtari (2013), "A Postcolonial Critique of State Sovereignty", *Third World Quarterly*, 34(10): 1767-1793; H. Bauder and R. Mueller (2023), "Westphalian vs. Indigenous Sovereignty: Challenging Colonial Territorial Governance", *Geopolitcs*, 28 : 156-173.

7 Th. Merrill (2017), "Property and Sovereignty, Information and Audience", *Theoretical Inquiry Law*, 18 : 417-445; K. Bosselmann (2016), "Governing the Commons: Can States be Trustees?", in L. Westra, J. Gray and A. D'Aloia (eds.), *The Common Good: The Role of Integrity in the Support of Life and Human Security,* Routledge/Earthscan, pp. 272-73; see generally, J. Smith (ed.) (2013), *Property and Sovereignty: Legal and Cultural Perspectives*, Routledge.

8 Bosselmann, n. 1, pp. 72, 162-165.

a deliberate, bold move towards trusteeship for the Earth.[9] As a first step we could ask who owns the earth?[10] Answering this question can lead us to some insights of who actually is in charge at present and what may be needed to take responsibility for the earth.

2. Who owns the Earth?

Who owns the earth? In law, ownership usually equates with possession and ownership over property. In this sense, the earth cannot be owned. Yet, the earth could be seen as owned by all humans and not just humans living today. In the same vein, all inhabitants own the earth. But such an idea of ownership refers to a biological condition and does not tell us anything about power and control. When human power and control are added, the question arises what it means to legally own earth.

For a start, only land can be owned in a legal sense, not water (including the oceans) or air (including the atmosphere). The earth overall is 123 billion acres in size, of which 37 billion acres are land. These 37 billion acres are shared by a current world population of just over 8 billion people.[11] Theoretically, each of us owns 4.5 acres. This is plenty of space per capita and should theoretically allow humanity to utilize available resources without overshooting the earth's life-supporting capacity. In reality of course, there is a very uneven distribution and intensity of land use – as also manifest in the way the (Western) concept of legal ownership operates.

Take one extreme example. There is a single person who legally owns about 6.6 billion acres or one-sixth of the earth's land surface. This person is King Charles III, the monarch of 15 states and head of the Commonwealth of Nations with 56-member states.[12] As the sovereign, his ownership status includes, for example, the world's second-largest country, Australia, and the third-largest country, Canada.

Legal ownership means control and power, but a lot depends on whether land is owned individually or collectively and whether ownership involves obligations of care and stewardship. In the case of King Charles, he does not control the land himself, of course, but his countries do. Thanks to state sovereignty, Australia and Canada can do with their land whatever they like, and – like other sovereign states - they have done that in an exploitative way: Australia's coal mines and Canada's oil sands are responsible for a portion of carbons emitted into the global atmosphere and the oceans which incidentally are not owned by anyone. The atmosphere and the oceans are *res nullius* (nobody's thing) and do not have any legal status that could be used to protect them against interferences such us carbon emissions, acidification, pollution and biodiversity loss.

Legal ownership reinforces power and control. As each of the world's 195 countries are "owners" of their territories, they not only can largely do within their own territories whatever they like, they can also externalize waste and pollution originating from their respective territories. This is done through either commercial deal (e.g. Europe's export of waste to poor countries in Africa or Asia) or discharge into areas outside national jurisdictions, i.e. the oceans (e.g. plastic) and the atmosphere (e.g. greenhouse gases). Both forms of discharge are *per se* perfectly legal. Apart from a few global treaties and the legal doctrine of state responsibility – both rather weak instruments - there is little that could legally prevent states from incrementally destroying the integrity of Earth's ecological system.

Countries do not intentionally destroy the Earth, of course, but unintended consequences and cumulative effects have amounted to a disintegration of planetary systems. There is no inbuilt mechanism in the concept of state sovereignty to prevent states – domestically or internationally – from utilizing "their" territory at the expense of others. "Others" come in many forms: other states, other people (non-citizens, foreigners), other beings (animals and plants), other areas (global commons) and other times (future generations). Fundamentally, state sovereignty is about excluding "the other". While there are perfectly valid reasons for self-determination,

9 K. Bosselmann (2021), "The Framework of Ecological Law", in Bharat H. Desai (ed.), *Earth Matters: Pathways to a Better Environmental Future*, IOS Press, pp. 33-40; Bharat H. Desai (2021), "A New Mandate for the Revived UN Trusteeship Council", in Bharat H. Desai (ed.), *Earth Matters: Pathways to a Better Environmental Future*, IOS Press, pp. 189-201.

10 K. Cahill and Rob McMahon (2010), *Who Owns the World? The Surprising Truth about Every Piece of Land on the Planet,* Grand Central Publication.

11 Current World Population, available at: https://www.worldometers.info/world-population/.

12 See G. Olya (2023), "Top 10 Largest Landowners in the World", 19 June 2023, available at: https://www.gobankingrates.com/money/wealth/largest-landowners-in-the-world/.

cooperation is essential for ensuring peace, justice and ecological sustainability. The crux is the equation of state sovereignty with territorial ownership.[13]

Not only domestic laws, but international law was developed on the basis of protecting the individual ownership of states, corporations and people. In other words, national and international laws are largely about competing property rights. In today's culture of competition and rights, success is determined by ownership. You either own something in which case you are somebody or you own nothing in which case you are nobody.

What at a personal level may hardly be noticeable – most of us own, at least, "something" – at a collective and global level appears as a massive problem. Two thirds of all new wealth generated in 2023 has gone to the richest 1% who own nearly twice as much money as the bottom 99% of the world.[14] The three richest people in the USA have a combined wealth of USD 401 billion, which is higher than the combined annual GDP of 65 countries.[15]

At global level, the combined GDP of the world's 5 richest countries- in descending order: United States, China, Germany, Japan, India[16]- is the same as the combined GDP of the remaining 190 countries. Small wonder that these five and only further fifteen or so other countries are firmly in charge of everything that affects the lives of the world's entire population. What is being done about climate change, nuclear weapons, poverty, food security or the internet including our personal data is largely determined by and within the richest countries. They shape the international agenda and are unlikely to accept anything that could jeopardize their economic and strategic status.

Yet, even such imbalances between the world's few rich and the many poor cannot deny the reality of the situation that we are in. Ultimately, the lives and living standards of all people – rich or poor – depends on our ability to preserve the Earth's ecological systems. We are all in this together and only a common effort to take responsibility for Earth can save us. The law has a very important role to play here.[17]

3. Trusteeship of the Earth

There are many good arguments to suggest an inherent obligation of states to protect the global environment. Ultimately, they all rest on the interconnectedness of all life forms and ecological systems. They are backed up by science and have found their jurisprudential expression mostly in Earth jurisprudence,[18] Earth system law[19] and ecological law.[20] Since 2009, the legal discourse has also found its way into the United Nations.[21] Some recent developments give us a sense just how significant this legal movement has been for framing and institutionalizing earth governance.

13 K. Bosselmann, n. 5, ch. 5.

14 Oxfam (2023), *Survival of the Richest: How we must tax the super-rich now to fight inequality*, p. 7, available at: https://oxfamilibrary.openrepository.com/bitstream/handle/10546/621477/bp-survival-of-the-richest-160123-en.pdf.

15 A. Koop (2022), *Top Heavy: Countries by Share of the Global Economy*, available at: Top Heavy: Countries by Share of the Global Economy (visualcapitalist.com)

16 Forbes India (2024), "The top 10 largest economies in the world in 2024", 30 April 2024, available at: World GDP Rankings 2024 | Top 10 Countries Ranked By GDP - Forbes India

17 See, for example, S. Gaines (2014), "Reimaging Environmental Law for the 21st Century", *Environmental Law Reporter*, 44(3): 10188-10215; K. Bosselmann (2010), "Losing the Forest for the Trees: Environmental reductionism in the law", *Environmental Laws and Sustainability*, *Special Issue on Sustainability,* 2(8): 2424-2448, available at: http://www.mdpi.com/2071-1050/2/8/2424/.

18 J. Koons (2009), "Earth Jurisprudence: Key Principles to Transform the Health of the Planet", *Penn State Environmental Law Review*, 18(1): 46-69; "What is Earth Jurisprudence?",available at: https://gaiafoundation.org/earth-jurisprudence/.

19 L. Kotzé, R. Kim, C. Blanchard et al. (2022), "Earth System Law: Towards a New Legal Paradigm for the Anthropocene", *Earth System Governance*, 11; L. Ma and E. Boulot (2021), "The transformative potential of earth System Law: From Theory to Practice", *Earth System Governance,* 7, available at: https://www.sciencedirect.com/science/article/pii/S2589811621000070.

20 K. Bosselmann, n. 9; K. Bosselmann and P. Taylor (eds.) (2017), *Ecological Approaches to Environmental Law*, Edward Elgar; K. Anker, P. Burdon, G. Garver, M. Maloney, C. Sbert (eds.) (2021), *From Environmental to Ecological Law*, Routledge.

21 United Nations Program on Harmony with Nature, available at: http://www.harmonywithnatureun.org/; J. Schmidt (2022), "Of Kin and System: Rights of Nature and the UN search for Earth jurisprudence", *Transactions of the Institute of British Geographers*, 47(3), available at: https://rgs-ibg.onlinelibrary.wiley.com/doi/full/10.1111/tran.12538.

In 2016, nearly 100 professors of environmental law adopted a manifesto called "From Environmental Law to Ecological Law" at the IUCN Academy of Environmental Law Colloquium in Oslo, Norway. The "Oslo Manifesto"[22] has since been endorsed by hundreds of environmental lawyers and environmental law organizations from around the world. It has also led to the establishment of the Ecological Law and Governance Association (ELGA)[23] in 2017. ELGA is a global network of legal scholars, practicing lawyers and environmental activists committed to transforming law and governance at national and international levels.

One of ELGA's projects is the Earth Trusteeship Initiative (ETI)[24], established on 10 December, 2018 in the Peace Palace in The Hague, Netherlands. This day marked the 70th anniversary of the adoption of the Universal Declaration of Human Rights. With the support and endorsement of many human rights, environmental and professional organizations, the ETI launched the "Hague Principles for a Universal Declaration on Responsibilities for Human Rights and Earth Trusteeship."[25]

The three "Hague Principles" set out the framework for Earth trusteeship. All rights that human beings enjoy depend on responsibilities that we have for each other and, crucially, for the Earth. We cannot live in dignity and well-being without accepting fundamental duties for each other and for Earth. These are trusteeship duties. We must understand ourselves as "People for Earth"[26] or trustees of Earth. As citizens of our respective countries, we must demand our governments to accept Earth trusteeship. State sovereignty implies obligations as trustees of human rights and the Earth.

In our current legal system, Earth has no meaning or status. Earth is taken for granted as if it does need to be protected. On the other hand, we all know that critical planetary systems are at risk (the atmosphere, oceans, global biodiversity). We also know that protection efforts based on negotiations between states have not worked very well. A logical step forward is, therefore, to rather than relying on political compromises between states establish trusteeship obligations of states themselves. The sovereign state is not so sovereign as to destroy ecological systems of its own territory, transboundary systems and ultimately Earth.

In the light of what we know about our age of human planetary dominance, i.e. the Anthropocene, we need to revisit the concept of state sovereignty inherited from an age when neither human nor environmental rights existed. Now is the time to advance the concept of sovereignty to include responsibilities towards protecting human rights and the natural environment as expressed in the Hague Principles. The case for trusteeship of the Earth has been summarized, in one of the writings by this author, as follows:

> "The ethics of stewardship or guardianship for the community of life is one of the most foundational concepts in the history of humanity. It is inherent in the teachings of the world's religions and the traditions of indigenous peoples and is an integral part of humanity's cultural heritage. Yet, our political and legal institutions have not taken Earth ethics to heart. The Earth as an integrated whole may be featuring in images, in science and in ethics, but does not feature in law. Earth and the areas outside national jurisdictions (the global commons) are considered as res nullius, a legal nullity without inherent rights. Not that Earth cares about such rights. It is we humans who must choose to care about them. If we keep ignoring them, then basically we are saying that the Earth system doesn't really matter. We take it for granted - like sunshine and rain - and of no relevance to the system of law that governs society and states. Given that the ethics of earth stewardship are widely accepted today we should be ready for taking the next step: Earth trusteeship. Earth trusteeship is the essence of what Earth jurisprudence is advocating, but, more importantly, it has also been advocated in key international environmental documents. Earth trusteeship is the institutionalization of the duty to protect the integrity of ecological systems. This duty is expressed in more than 25 international agreements - from the 1982 World Charter for Nature right through to the 2015 Paris Climate Agreement.[27]

22 University of Oslo (2016), *Oslo Manifesto for Ecological Law and Governance*, Oslo, 21 June 2016, available at: http://files.harmonywithnatureun.org/uploads/upload691.pdf.

23 *Ibid*, clause 11. For more details on Ecological Law and Governance Association, see https://www.elgaworld.org.

24 More details on Earth Trusteeship Initiative are available at: https://www.earthtrusteeship.world/.

25 On the occasion of the 70th Anniversary of the Universal Declaration of Human Rights, members of global civil society and representatives of organisations assembled in The Hague and adopted the Hague Principles. The Hague Principles are available at: http://www.earthtrusteeship.world/the-hague-principles-for-a-universal-declaration-on-human-responsibilities-and-earth-trusteeship/.

26 For more details on People for Earth, see http://www.peopleforearth.kr/eng/default.asp.

27 R. Kim and K. Bosselmann (2015), "Operationalizing Sustainable Development: Ecological Integrity as a Grundnorm in International Law", *Review of European, Comparative and International Environmental Law*, 24(2): 194-208.

To act on this duty 'states need to cooperate in the spirit of global partnership' as, for example, expressed in Principle 7 of the 1992 Rio Declaration.[28]" The legal argument for Earth trusteeship can be firmly based on ethics common to all cultures and fundamental obligations of states expressed in many international agreements. The challenge ahead is to convince governments that the step to Earth trusteeship is not only necessary, but actually possible and not too difficult to take.

An important part of meeting this challenge is the public debate around the global commons. As climate change has become the most pressing issue of our time – largely thanks to powerful protests of young people all over the world! - a shift of thinking seems to be occurring. Rather than having to justify calls for action, people put governments on the back foot: lack of action can no longer be justified. More radical measures are needed than negotiating climate deals.

To think that global warming can be negotiated is like thinking rainfall and sunshine could be negotiated. The biogeochemical cycles of the atmosphere follow laws of nature, not laws of humans. It is therefore more realistic and promising to take the atmosphere into focus and recognize it in law! At present, the law treats the atmosphere as an open access resource without any safeguards, i.e. *res nullius*. This legal vacuum has worked to the advantage of property owners who have filled the vacuum by exercising their property rights. Any holder of property rights – you and me or the entire fossil fuel industry - can freely emit carbon dioxide into the atmosphere. Only negotiated deals and compromises would limit these emissions. It would be far more effective if property rights are limited by the atmosphere as a global common. This would constitute a legal duty to protect the integrity of the atmosphere as a whole and reverse the logic of emissions: not the restriction of property rights needs to be justified, but their use with respect to the atmosphere. Emissions would no longer be free, but subject to hefty fees and taxes. As trustees of the atmosphere, states and the international community of states (UN) would have the legal obligation to charge users of the atmosphere (corporations, banks, consumers) and progressively ban any greenhouse gas emissions. Just as the owner of a house controls who lives there and under what conditions.

From the perspective of citizens – and all human beings - this logic is compelling and could, for example, be supported by the well-established public trust doctrine. The public trust doctrine says that natural commons should be held in trust as assets to serve the public good. It is the responsibility of the government, as trustee, to protect these assets from harm and ensure their use for the public and future generations. So nationally, the government would act as an environmental trustee, internationally states would jointly act as trustees for the global commons such as the atmosphere. Considering that only about 90 companies are responsible for two-thirds of carbons emitted into the atmosphere, a global trusteeship institution could quickly fix the problem of climate breakdown.[29] All it takes is the political will to do so! The idea of trusts of the global commons has been promoted by environmental lawyers such as Mary Wood[30] and Peter Sand[31] or economists such as Peter Barnes[32] or Robert Costanza.[33] Trusteeship governance is also advocated by the general literature on the commons.[34]

International law and the United Nations are ready to develop institutions of trusteeship governance. There is, for example, a tradition of UN institutions with a trusteeship mandate including the (now defunct) UN Trusteeship

28 Klaus Bosselmann (2015), "The Next Step: Earth Trusteeship", An address to the United Nations General Assembly, pp. 2-3, 21 April 2017, New York, available at: http://files.harmonywithnatureun.org/uploads/upload96.pdf.

29 P. Costanza (2015), "Claim the Sky!", *Solutions*, 6(1), pp. 18-21.

30 M. C. Wood (2007), "Nature's Trust: A Legal, Political and Moral Frame for Global Warming", *Environmental Affairs*, 34, p. 577; M. C. Wood (2013), *Nature's Trust: Environmental Law for a New Ecological Age,* Durham: Carolina University Press.

31 P. Sand (2004), "Sovereignty Bounded: Public Trusteeship for Common Pool Resources", *Global Environmental Politics*, 4, p. 47; P. Sand (2013), "The Rise of Public Trusteeship in International Law", *Global Trust Working Paper Series*, 4, p. 21; P. Sand (2014), "The Concept of Public Trusteeship in the Transboundary Governance of Biodiversity", in L. Kotzé and Th. Marauhn (eds.), *Transboundary Governance of Biodiversity,* Brill.

32 P. Barnes (2001),*Capitalism 2.0: Who Owns the Sky? Our Common Assets and the Future of Capitalism,* Island Press; P. Barnes (2006), *Capitalism 3.0: A Guide to Reclaiming the Commons*, Berret-Koehler Publication.

33 "Claim the Sky", available at: https://secure.avaaz.org/en/petition/Claim_the_Sky/?pv=58.

34 E.g. D. Bollier (2014), *Think Like a Commoner: A Short Introduction to the Life of the Commons*, New Society Publishers; D. Bollier and B. H. Weston (2013), *Green Governance: Ecological Survival, Human Rights and the Law of the Commons*, Cambridge University Press; S. Helfrich and J. Haas (eds.) (2009), *The Commons: A New Narrative for Our Time*, Heinrich Böll Stiftung; E. Ostrom (1990), *Governing the Commons: The Evolution of Institutions for Collective Action*, Cambridge University Press; Bharat H. Desai (2018), "On the Revival of the United Nations Trusteeship Council with a New Mandate for the Environment and the Global Commons", *Environmental Policy and Law*, 48(6).

Council, the World Health Organization (WHO) with respect to public health and– somewhat ironically - the World Trade Organization (WTO) with respect to free trade.[35] A number of other UN or UN-related institutions with weaker trusteeship functions exist also.[36] Quite obviously, states have been capable of, expressively or implicitly, creating international trusteeship institutions. These developments – and in particular the existence of supranational organizations such as the European Union – demonstrate that sovereignty rights and duties of states can be transferred to international levels.

The UN Trusteeship Council could quite easily be revived as an Environmental Trusteeship Council[37] following proposals by the Global Governance Commission in 1995 which were supported by a number of states and particularly championed by former UN Secretary General Kofi Annan and proposed by the present UN Secretary General Antonio Guterres.[38] Arguably, joint efforts of civil society and new political alliances between particularly motivated progressive states can make a crucial difference.[39] Chances are that such combined effort will be very powerful as our global ecological, financial, political and democratic systems continue to disintegrate.

We should not expect trusteeship governance being initiated by the "top", i.e. the UN and its member states themselves, but rather by forces outside the system, in particular global civil society. To this end, we can build on many years of activism and proposals for institutional change. Nor should we envisage states to solely be in charge of running and controlling global trusteeship institutions such as a World Environment Organization or a Global Atmospheric Trust. Rather, earth governance must be jointly formed by representatives from global civil society, UN and states with an equal say in decision-making.

So far, governments have been very slow learners and, most alarmingly, they have been too close to corporate powers. The challenge for civil society is, therefore, to bring them back into a position that allows them to actually govern and help solving the crisis rather than just managing or even exacerbating it.

4. Sovereignty and Trusteeship

It has been observed by many political analysts and activists that our democratic institutions have been hijacked by neoliberal economics. The unholy alliance between politics ('sovereignty') and private interests ('property') raises serious questions about the ability for the public to influence policy.[40] Furthermore, as Barnes points out, '[n]ot even seated at democracy's table—not organized, not propertied, and not enfranchised—are future generations, ecosystems, and nonhuman species.'[41]

Neoliberalism has undoubtedly affected how environmental policy and law is conceived *within* states also. Primarily, they are characterised by what Mary Wood calls a 'discretionary frame'.[42] This means that governments have positioned themselves as holding discretionary powers to permit resource exploitation.[43] Domestic environmental commons may be 'government-owned' but this isn't to say that they are managed on behalf of future generations, nonhuman species, or ordinary citizens.[44] To the contrary, domestic commons such as forests, water, energy etc. have been privatised and commercialised in most countries.

35 K. Bosselmann, n. 1, pp.198-232.

36 *Ibid*., p. 206.

37 For an early writing on revival and repurpose of the UNTC, see Bharat H. Desai (2000), "Revitalizing International Environmental Institutions: The UN Task Force Report and Beyond", *Indian Journal of International Law*, vol.40, no.3, 2000, pp.456-504 at 498-503; Bharat H. Desai (2021), *Our Earth Matters: Pathways to a Better Common Environmental Future*. IOS Press, Amsterdam, Chapter 19, pp.189-202; Bharat H. Desai (2021), "A New Mandate for the Revived UN Trusteeship Council", *Environmental Policy and Law*, vol. 51, no.1-2, pp.97-109; Bharat H. Desai (2022), "The Repurposed UN Trusteeship Council for the Future", *Environmental Policy and Law* 52 (3-4) 223–235.

38 UN (2021), *Our Common Agenda*, United Nations Secretary-General's Report, available at: https://www.un.org/en/content/common-agenda-report/.

39 Bosselmann, n. 5, ch. 9.

40 See Bosselmann, n. 5, ch. 5.

41 Barnes, *Capitalism 3.O*, n. 32, p. 38.

42 Wood, *Nature's Trust,* n. 30.

43 *Ibid,* p. 592.

44 Barnes, *Capitalism 3.O*, n. 32, p. 43.

We can clearly see that 'governance' today is about a *quid pro quo* relationship between politicians and corporations.[45] The rewards include unshaken guarantee of property rights, friendly regulators, subsidies, tax breaks, and free use of the commons. What this ultimately means when issues such as environmental degradation arise, is that governments don't govern, rather create as little interruption to market forces as possible. In the words of Peter Barnes, 'we face a disheartening quandary here. Profit-maximizing corporations dominate our economy. Their programming makes them enclose and diminish common wealth. The only obvious counterweight is government, yet government is dominated by these same corporations.'[46] The assumption that the state promotes 'the common good' is sadly false.[47]

On the other hand, the legitimacy of the state rests on its function to act for, and on behalf of, its citizens. This requires consent with the governed.[48] Governmental duties can therefore be understood as fiduciary obligations towards citizens.[49] Such fiduciary obligations are recognized typically in public law[50], exist in common law and civil law (although in varying forms and degrees[51]) and are also known in international law[52]. The fiduciary function of the state can also be described as a trusteeship function.[53] How then can state sovereignty be reconciled with trusteeship? *Prima facie* both seem to have different purposes, yet they are part of the same basic function of the state, i.e. to serve the citizens it depends on and is accountable to.

Furthermore, global commons governance brings sovereignty and trusteeship close together.[54] As has been noted, the traditional concept of sovereignty is less compelling today than it was in the past because of a "glaring misfit between the scope of the sovereign's authority and the sphere of the affected stakeholders"[55] This "glaring misfit" engenders inefficient, undemocratic and unjust outcomes for under - or unrepresented affected stakeholders.[56] Non-citizens, future generations and the natural environment all fall into such a category of "affected stakeholders". To overcome this misfit, states need to increasingly perform trusteeship functions.

5. Fiduciary Duties of the State

The state gains its legitimacy exclusively from the people who created it. While the legality of a state depends on recognition by other states, once in existence a State can only ever legitimize its continued existence through ongoing trust by its people.[57] The core idea of the modern democratic state is that it acts through its people, by its people and for its people. This implies a fiduciary relationship between people and state and is arguably the only legitimate basis for political authority in the English civil war, American Revolution, and then again confirmed

45 *Ibid*, p. 37.

46 *Ibid*, p. 45.

47 *Ibid.*

48 J. Locke (1991), "Government is not Legitimate unless it is Carried on with the Consent of the Governed", in R. Ashcraft (ed.), *John Locke: Critical Assessments*, Routledge, p. 524.

49 E. Fox-Decent (2012), *Sovereignty's Promise: The State as a Fiduciary*, Oxford: Oxford University Press; T. Frankel (1983), "Fiduciary Law", *California Law Review,* 71, p. 795.

50 Including constitutional law, administrative law, tax law, criminal law and environmental law.

51 For example, the United States, Canada, Australia and New Zealand recognize them with respect to indigenous peoples, ratepayers and (with the exception of New Zealand) in the form of public trusts, whereas continental European countries more fundamentally rely on public law to assume fiduciary relationships between individuals and governments.

52 M. Blumm and R. Guthrie (2012), "Internationalizing the Public Trust Doctrine", *UC Davis Law Review*, 45, p. 741; H. Perritt (2004), "Structures and Standards for Political Trusteeships", UCLA*Journal of International Law & Foreign Affairs*, 8, p. 91; E. Brown Weiss (1984), "The Planetary Trust: Conservation and Intergenerational Equity", *Ecology Law Q*uarterly, 11, p. 495.

53 P. Finn (1995), "The Forgotten 'Trust': The People and the State", in M. Cope (ed.), *Equity: Issues and Trends*, The Federation Press, pp. 131-151.

54 S. Stec (2010), "Humanitarian Limits to Sovereignty: Common Concern and Common Heritage Approaches to Natural Resources and Environment", *International Community Law Review,* 12, pp. 361, 384-385,378-380.

55 E. Benvenisti (2013), "Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders", *American Journal of International Law*, 107(2), pp. 295, 301.

56 *Ibid.*

57 See Bosselmann, n. 5, ch. 8.

in the French Revolution.[58] It is echoed in constitutional documents such as the 1776 Pennsylvania Declaration of Rights: "[A]ll power being... derived from the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them."[59] John Locke had famously asserted that legislative power is 'only a fiduciary power to act for certain ends' and that 'there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them.'

Likewise, Immanuel Kant drew the moral basis of fiduciary obligations from the duty-bound relationship between parents and children.[60] Kant claimed that children have an innate and legal right to their parents' care. In a similar sense, he believed that state legitimacy was the result of a contract that is necessarily created between people to form a Rousseauian volonté general ("general will"). Through this process, Kant claimed, we jointly authorize the state who in turn acts in the form of trusteeship governance.

That state sovereignty is fundamentally a trust relationship cannot be dismissed as a mere ideal. Trusts and the implicit fiduciary relationships can be traced back to Middle Eastern origins, Roman and Germanic law. They are also inherent in the teachings of the world's religions and are prevalent in non-Western cultures.[61] In fundamental terms, trust relationship is also anchored in the Universal Declaration of Human Rights. Article 21(3) states that "the will of the people shall be the basis of the authority of government."[62]

At its most simplistic, the state's legitimacy to govern is based on its ability to serve the will of the people usually described as the common interest. Aristotle saw the purpose of the State as for the 'common good'. John Locke also hinted at such a purpose. But of course, who defines common good and what does it include? According to Locke's definition the 'common good' was what arose from there being surplus produce that could be sold in the marketplace.

Following Benvenisti, we can conceive of three normative arguments for state trusteeship. Firstly, sovereignty should be viewed as a vehicle for the exercise of personal and collective self-determination.[63] Collective self-determination embodies the freedom of a group to pursue its interests, further its political status, and "freely dispose of [its] natural wealth and resources"[64] or of course protect and preserve them. Secondly, sovereign states are agents of humanity as a whole[65] as all human beings are holders of rights not because states granted them, but because they are entitlements of free born, equal human beings. The legitimacy of a state ultimately depends on its ability to honour and respect human rights, hence the trusteeship function of the state with respect to humanity. Thirdly, the right to own natural resources ('territorial sovereignty') is intrinsically linked with the responsibility to protect them. Any disjuncture would jeopardize the sustained use by citizens, hence the need for state trusteeship of natural resources. In essence, the legitimacy of the state of the 21st century utterly rests on its ability to function as a trustee of human rights and the natural environment.[66]

6. Conclusion

Earth governance breaks with the traditional rule that care for the environment ends at national boundaries. Protection of the integrity of Earth's ecological systems must be a domestic obligation as much as an international obligation. In fact, not states, but the well-being of Earth must determine degree and quality of environmental protection. Such an Earth-centred viewpoint forces states into the logic of Earth trusteeship. A few years ago, at the Global Economic Forum, the then Prime Minister of New Zealand Jacinda Ardern stated that the world leaders

58 W. Reisman (1990), "Sovereignty and Human Rights in Contemporary International Law", *American Journal of International Law*, 84, pp. 886, 867.

59 E. Criddle and E. Fox-Decent (2009), "A Fiduciary Theory of Jus Cogens", *Yale Journal of International Law*, 34, p. 331; Pennsylvania Constitution (1776), article IV.

60 *Ibid*, p. 352.

61 *Ibid*, pp. 378-379.

62 UN (1948), *Universal Declaration of Human Rights*, GA Res 217 A(III), 10 December 1948.

63 Benvenisti, n. 55, p. 301.

64 UNTS (1996), *International Covenant on Civil and Political Rights*, 16 December 1966, *UNTS*, vol. 999, p. 171, article 1.

65 Benvenisti, n. 55, p. 305.

66 See Bosselmann, n. 5, ch. 9.

need to be "on the right side of history," when "world was crying out for a solution".[67] Ardern has advocated for embracing guardianship (*kaitiakitanga*) of the Earth. Only then will it be possible to turn things around and avoid global ecological collapse. This kind of leadership is now required more than ever. However, it will not come about unless we as citizens, as environmental lawyers and activists provide the necessary leadership.

67 World Economic Forum (2019), "Jacinda Ardern advice for world leaders: don't be on wrong side of history", *The Guardian*, 23 January 2019, available at: Jacinda Ardern's advice for world leaders: don't be on the wrong side of history | World Economic Forum (weforum.org)