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Keynote Speech

Earth Governance:
The State as Environmental Trustee

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1. Introduction

Reflecting on the theme of this conference, I will try to explain the meaning and importance of Earth governance drawing on ideas expressed in my book with the same title[1].

The central question of Earth governance is how the protection of Earth and her ecological systems can be expressed in politics, law and governance. 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 – literally – vital. So far, our 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 the massive loss biological diversity.

True to Albert Einstein's famous definition of insanity ("insanity is doing the same thing over and over again and expecting different results"), states have over and over again relied on negotiating compromises between environmental needs and economic demands. This is insanity as you cannot negotiate the physical conditions that all life on Earth, including life of humans and their economies, depend on.

We "know" that climate change is a fundamental threat, yet states have been dealing with climate change as just one issue amongst many other, and often competing, concerns, most notably the concern for ongoing economic growth.

What is missing here is a sense of urgency. If you live in the poorer parts of the world the urgency is only too obvious. If you are young,

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

the urgency is equally felt, but the same may be true for the rest of us as we all experience draughts, floods and erratic weather patterns on a regular basis and wherever we happen to live.

Urgency is less felt, however, in our institutions of governance. Our political leaders may express their concern about climate change at every possible occasion, but they don't do much about it. There are many reasons why governments – despite or, some might say, because of the Paris Agreement – do not really act. The predominance of economic rationality (of cost efficiency and growth) is certainly a major reason. But there is also a remarkable myopia (shortsightedness) that economic and political institutions the world over suffer from corporations, governments and parliaments are neither willing nor sufficiently equipped to solve global environmental problems.

Why is this so? Again, there may be many reasons, but a main reason is that these institutions have been designed in an age of much narrower space and time horizons. 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 30-year long civil war. Creating a peace order of nation states that can be identified as such and held accountable was seen paramount. At the same time, the world outside Europe had been discovered offering highly attractive opportunities for trade and overseas possessions. The best tool for achieving both objectives was the idea of a sovereign state. 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 exploration and exploitation of the rest of the world (America, Africa, parts of Asia, Australia/New Zealand and Antarctica).

The core of state sovereignty was designed as property over the own territory at the exclusion of any foreigners ('territorial sovereignty'). 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 state has no obligation to protect it or protect any areas outside national boundaries (e.g. oceans and the atmosphere).

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 legal 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 or beyond 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 a deliberate, bold move towards trusteeship for the Earth.

As a first step we can ask ourselves who owns the Earth? Answering this question can lead us to some insights of who actually is in charge at present and what we need to do next.

2. Who owns the Earth?

Who owns the Earth? For lawyers such a question is quite intriguing. We are used to capturing reality in legal terms, especially in legal property terms. If you own something you are somebody, if you don't own anything you are nobody.

In a broad sentimental way we can say all of us living today and who ever will come after us own the earth. And not just humans. All inhabitants of the planet "own" the earth in a sense that they need spaces to live in. But such an idea of ownership refers to a biological condition and does not tell us anything about power and control. Once we talk about power and control, the question arises what it means to legally own Earth.

For a start, only land can be owned in a legal sense, not water (incl the oceans) or air (incl 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 currently 7.3 billion people, so each of us theoretically owns 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, there is a single person who legally owns about 6.6 billion acres, i.e. one-sixth of the earth's land surface. This person is Queen Elizabeth II, the Queen of 32 countries and head of a Commonwealth of 54 countries.[2] She owns, for example, the second-largest country on Earth, Australia, and also 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 Queen Elizabeth, she doesn't control the land herself, of course, but her countries do. Thanks to state sovereignty Australia and Canada can do with their land whatever they like, and they sure have done that extensively and in recent times in the most exploitative way: Australia's coal mines and Canada's oil sands are responsible for a considerable chunk of carbons emitted into the global atmosphere, which incidentally is not owned by anyone. The atmosphere – like the oceans – is *res nullius* (nobody's thing) and does not have any legal status that could be used to protect against interferences such us greenhouse gas emissions or – in the case of oceans – acidification, pollution, overfishing and biodiversity loss.

Remember, legal ownership means power and control. And as each of the world's 196 countries are "owners" of their territories, they not

2) See K. Cahill, *Who Owns the World? The hidden facts behind land ownership* (Mainstream Publ. 2006).

only can do within their own territories whatever they like, they can also externalize any waste and pollution originating from their respective territories. This is either been done through commercial deals (e.g. Europe's export of waste to poor countries in Africa or Asia). Or it is done through 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, at present, perfectly legal. Apart from a few global treaties and the legal doctrine of state responsibility – both rather weak instruments –, there is nothing that could legally prevent states from collectively destroying the Earth.

Countries do not intentionally destroy the earth, of course, but they behave as if this is inevitable or, at least, just a distant risk. The reason for this ignorance is that governments continue to produce laws – domestically and internationally – that are essentially geared to secure "their" property at the exclusion of all others. "The other" comes 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" and cooperation between states is hampered by a counterproductive me-over-you attitude called national interest.

In this way, not just national laws, but the world's entire legal system 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: the richest 26 people own half of the world's assets[3] and the three richest people in the USA – Jeff Bezos, Bill Gates and Warren Buffet – own as much wealth as the bottom half of the US population (of 160 million).[4] The net worth of these three people alone is USD 286 billion which is higher than the combined annual GDP of 47 countries.[5]

At global level, the combined GDP of the world's 11 richest countries – in descending order: United States, China, Japan, Germany, India, United Kingdom, France, Brazil, Italy, Canada and Korea[6] – is the same as the combined GDP of the remaining 185 countries. Small wonder that these 11 and only further 15 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. Rich countries shape the international agenda and would never accept anything that could jeopardize their specific economic and strategic interests.

3) "Public Good or Private Wealth?", Oxfam Report, January 2019, p. 28
https://www.oxfam.org.nz/sites/default/files/reports/Public%20Good%20or%20Private%20Wealth%20-%20Oxfam%202019%20-%20Full%20Report.pdf
4) The Guardian, 31 October 2018
https://www.theguardian.com/commentisfree/2018/oct/31/us-wealthiest-families-dynasties-governed-by-rich
5) "International Inequality" Wikipedia http://en.wikipedia.org/wiki/International_inequality.
6) Measured in USD;
https://knoema.com/nwnfkne/world-gdp-ranking-2019-gdp-by-country-data-and-charts

Yet, even such imbalances between the world's few rich and the many poor people 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. I believe that the law has a very important role to play here.

In my own field – environmental law – many of my colleagues seem to be fairly content with the world as it is. Or why is it that most books and articles are still being written with a view that "the law" cannot be fundamentally changed, only gradually improved?[7] A revolution in legal thought is not really happening. Or is it?

3. Reclaiming Earth: trusteeship of the global commons

There is, in fact, an ever-growing ecological movement that has found its legal expression in Earth jurisprudence, Earth law and ecological law[8]. Some recent developments give us a sense just how significant this legal movement has been.

In 2016, some 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"[9] has since been endorsed by hundreds of environmental lawyers and

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

8) See K. Bosselmann and P. Taylor (eds.), *Ecological Approaches to Environmental Law* (Edward Elgar, 2017).

9) Oslo Manifesto. https://www.elga.world/oslo-manifesto/

environmental law organizations from around the world and has led to the establishment of the Ecological Law and Governance Association (ELGA)[10] in 2017. ELGA is a global network of lawyers and environmental activists that coordinates initiatives for transforming law and governance.

One of these initiatives is the Earth Trusteeship Initiatives (ETI)[11], 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."[12]

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"[13] 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.

10) Ecological Law and Governance Association. https://www.elga.world/
11) Earth Trusteeship Initiative. https://www.earthtrusteeship.world/
12) The Hague Principles http://www.earthtrusteeship.world/the-hague-principles-for-a-universal-declaration-on-human-responsibilities-and-earth-trusteeship/
13) People for Earth. http://www.peopleforearth.kr/eng/default.asp

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 ruin its own territory, transboundary ecological systems and Earth as a whole.

In the light of what we know about our age of human planetary dominance (the Anthropocene), we need to revisit the concept of state sovereignty inherited from an age when a global environmental crisis did not exist. Now is the time to advance the concept of sovereignty as a concept of rights and responsibilities. The rights of self-determination and non-intervention must be complemented by responsibilities for human rights and the Earth.

In my address to the UN General Assembly in April 2017, I said the following:

"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 no less than 25 international agreements – from the 1982 World Charter for Nature right through to the 2015 Paris Climate Agreement![14] To act on this duty 'states need to cooperate in the spirit of global partnership' as, for example, Principle 7 of the 1992 Rio Declaration says."[15]

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

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

15) The Next Step: Earth Trusteeship, Address to the United Nations General Assembly, April 2017, p. 2/3 http://files.harmonywithnatureun.org/uploads/upload96.pdf

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. a *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 commons. 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 is lives there and under what conditions.

From the perspective of citizens – and all human beings are – 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.[16] 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[17] and Peter Sand[18] or economists such as Peter Barnes[19] or Robert Costanza[20]. Trusteeship governance is also advocated by the general literature on the commons.[21]

16) P. Costanza, "Claim the Sky!", (2015) 6/1 Solutions, 18-21.
17) M.C. Wood, "Nature's Trust: A Legal, Political and Moral Frame for Global Warming,"(2007) 34 Environmental Affairs 577; M.C. Wood, *Nature's Trust: Environmental Law for a New Ecological Age* (Durham: Carolina University Press, 2013).
18) P. Sand, "Sovereignty Bounded: Public Trusteeship for Common Pool Resources," (2004) 4 *Global Environmental Politics* 47; P.Sand, 'The Rise of Public Trusteeship in International Law' (2013) *Global Trust Working Paper Series* 04/2013, 21; P. Sand, "The Concept of Public Trusteeship in the Transboundary Governance of Biodiversity" in L. Kotzé and Th. Marauhn, *Transboundary Governance of Biodiversity* (Brill, 2014).
19) P. Barnes, *Capitalism 2.0: Who Owns the Sky? Our Common Assets and the Future of Capitalism* (Island Press, 2001); P.Barnes, *Capitalism 3.0: A Guide to Reclaiming the Commons* (Berret-Koehler Publ., 2006).
20) "Claim the Sky" https://secure.avaaz.org/en/petition/Claim_the_Sky/?pv=58.
21) E.g. D. Bollier, *Think Like a Commoner: A Short Introduction to the Life of the Commons* (New Society Publishers, 2014); D. Bollier and B.H. Weston, Green Governance: Ecological Survival, Human Rights and the Law of the Commons (CUP, 2013); S. Helfrich and J. Haas (eds.), *The Commons: A New Narrative for Our Time* (Heinrich Böll Stiftung, 2009); E. Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (CUP, 1990).

My *Earth Governance* book tries to make the case that 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 Council, the World Health Organization (WHO) with respect to public health and – somewhat ironically – the World Trade Organization (WTO) with respect to free trade.[22] A number of other UN or UN-related institutions with weaker trusteeship functions exist also[23]. 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 of states can be transfered to international levels.

The UN Trusteeship Council could quite easily be revived as an Environmental Trusteeship Council following proposals by the Global Governance Commission in 1995 which were supported by a number of states and particularly championed by the former UN Secretary General, the late Kofi Annan. I strongly believe that a combination of environmental activism and new political alliances (e.g. between particularly motivated progressive states) can make a crucial difference. Chances are that such combined effort will be very powerful as our global ecological, financial, political and democratic systems continue to disintegrate.

I do 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 do I advocate states to be in charge of running and controlling global trusteeship institutions such as a World Environment Organization or a

22) Bosselmann (n1), 198-232.
23) Ibid., at 206.

Global Atmospheric Trust. Rather I envisage their governance as 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 activsits 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. 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.'[24)]

24) Barnes, *Capitalism* 3.0 (n 19) 38.

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'.[25] This means that governments have positioned themselves as holding discretionary powers to permit resource exploitation.[26] 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.[27] To the contrary, domestic commons such as forests, water, energy etc. have been privatised and commerzialised in most countries.

We can clearly see that 'governance' today is about a *quid pro quo* relationship between politicians and corporations.[28] 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.'[29] The assumption that the state promotes 'the common good' is sadly false.[30]

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.[31] Governmental duties can therefore be understood as fiduciary

25) Wood, *Nature's Trust* (2007) (n 17).
26) Ibid 592.
27) Barnes (n 19) 43.
28) Ibid 37.
29) Ibid 45.
30) Ibid.

obligations towards citizens.[32] Such fiduciary obligations are recognized typically in public law[33], exist in common law and civil law (although in varying forms and degrees[34]) and are also known in international law[35]. The fiduciary function of the state can also be described as a trusteeship function.[36]

How then can state sovereignty can be reconciled with trusteeship? *Prime 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.[37] 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"[38] This "glaring misfit" engenders inefficient, undemocratic and unjust outcomes for under – or unrepresented affected stakeholders.[39] Non-citizens, future generations and the natural

31) J. Locke: "(G)overnment is not legitimate unless it is carried on with the consent of the governed" (R. Ashcraft (ed.): *John Locke: Critical Assessments*, Routledge, 1991, 524).
32) E. Fox-Decent, *Sovereignty's Promise: The State as a Fiduciary* (Oxford University Press, Oxford, 2012; T. Frankel, "Fiduciary Law" (1983) 71 *Calif Law Rev* 795.
33) Including constitutional law, administrative law, tax law, criminal law and environmental law.
34) 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.
35) M. Blumm and R. Guthrie, 'Internationalizing the Public Trust Doctrine' (2012) 45 UC *Davis L Rev* 741; H. Perritt, 'Structures and Standards for Political Trusteeships' (2004) 8 *UCLA J Int'l L & Foreign Aff* 391; E. Brown Weiss, 'The Planetary Trust: Conservation and Intergenerational Equity' (1984) 11 *Ecology Law Q* 495
36) P. Finn, 'The Forgotten 'Trust': The People and the State' in Malcolm Cope (ed), *Equity: Issues and Trends* (The Federation Press, 1995) 131-151.
37) S. Stec, 'Humanitarian Limits to Sovereignty: Common Concern and Common Heritage Approaches to Natural Resources and Environment' (2010) 12 *Int C L Rev* 361, 384-385, 378-380.
38) E. Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders'(2013) 107(2) *AJIL* 295, 301.
39) Ibid.

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 legitmize its continued existence through ongoing trust by its people. 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 in the French Revolution.[40] 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."[41] 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

40) W. Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 *AJIL* 886, 867.

41) E. Criddle and E. Fox-Decent, 'A Fiduciary Theory of Jus Cogens' (2009) 34 *Yale* J Int'l Law 331; Pennsylvania Constitution of 1776, art IV.

obligations from the duty-bound relationship between parents and children.[42] 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 général ("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.[43] 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."[44]

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

42) Ibid. 352.
43) Ibid. 378-379.
44) *Universal Declaration of Human Rights* GA Res 217 A(III) (adopted 10 December 1948) (UDHR)

in the marketplace.

Following Eyal 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.[45] 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"[46] or of course protect and preserve them. Secondly, sovereign states are agents of humanity as a whole[47] 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.

6. Environmental trusteeship for the Korean Demilitarized Zone?

I believe that Korea is in a very good position to take leadership and be a trusteeship model to the world.

45) Benvenisti (n 38) 301.
46) *International Covenant on Civil and Political Rights* 999 UNTS 171 (adopted 16 December 1966, entered into force 23 March 1976), art 1 (ICCPR).
47) Benvenisti (n 38) 305.

The Korean Demilitarized Zone (DMZ) has become one of the most well-preserved temperate habitats in the world due to the isolation and lack of interference that it has experienced over the last 66 years. As a result, it is now an area which is inhabited by more than 5,000 species, including several endangered plant and animal species.[48] Recently on the 11th of July 2019, the Gangwon and Gyeonggi Province Governors, along with the Cultural Heritage Administrator of South Korea signed a memorandum of understanding concerning the joint registration of the DMZ as a world heritage site.[49] Under this agreement, the Cultural Heritage Agency will seek to lead negotiations with North Korea over the joint inscription plan in cooperation with the two regional governments.

Although the DMZ is not currently designated as an UNESCO Biosphere Reserve – the application having failed in 2012[50] – recently, the South Korean municipalities bordering the DMZ have been designated as UNESCO Biosphere Reserves in recognition of their biodiversity.[51] In light of these recent efforts to promote peace on the Korean peninsula, if such an application is to be made again for the DMZ, a joint bid between North and South Korea would indeed be very advantageous.

The DMZ having been the outcome of the Korean War, makes the topic of sovereignty delicate in this area. However, the importance of protecting the DMZ extends beyond keeping peaceful relations between North and South Korea. With North and South Korea as joint trustees of the

48) Claire Harbage "In Korean DMZ, Wildlife Thrives. Some Conservationists Worry Peace Could Disrupt it." (20 April 2019) National Public Radio <www.npr.org>

49) "Move to Jointly Register DMZ as World Heritage Site with N.Korea" (12 July 2019) Hankyoreh <hani.co.kr>

50) Ko Dong-hwan "South Korean Border now UNESCO Biosphere Reserves" (20 June 2019) The Korea Times <koeratimes.co.kr>

51) Mok Jeong-min "UNESCO Denies Designation of DMZ as Biosphere Reserve" (13 July 2012) The Kynghyang Shinmun <khan.co.kr>

DMZ, it would be demonstrated that self-interests of states can be limited for the greater good. More specifically, citizens in both countries would be more protected from animosities caused by power games.

The idea of the DMZ serving as a "peace park" between the North and the South has been emphasised through recent South Korean initiatives which expanded tours of the DMZ by developing new hiking trails, as well as consideration of a railway connection between North and South Korea. It is estimated that over 1 million people tour the DMZ every year.[52] Given the popularity of the DMZ as a tourist attraction, it is evident that not only is it an ecological asset to both North and South Korea, but it also provides resources such as research and education opportunities to global citizens. However, a balance needs to be struck between granting citizens access to these areas and protecting the environment with its rich biodiversity created by many years of isolation. Joint trusteeship governance would be most favourable in order to preserve and actively protect these resources, as it would recognise the value of the DMZ beyond being an asset to the adjacent states. As a dedicated Peace Park under joint trusteeship governance, the DMZ would not only symbolize commitment to world peace, but also commitment to Earth trusteeship. North and South Korea would create something entirely new not only for the Korean people, but for all humanity in our need for a peaceful, sustainable future.

7. Conclusion

Earth governance breaks with the traditional rule that care for the environment ends at national boundaries. Protection of the integrity of

52) Cristina Varriale "Balancing Peace and Conservation in the DMZ" (5 July 2019) The Diplomat <www.thediplomat.com>

Earth's ecological systems must be a domestic concern as much as an international concern. In fact, not states, but the well-being of Earth must determine degree and quality of environmental protection. Such an Earth-centered viewpoint forces states into the logic of Earth trusteeship.

Earlier this year at the Global Economic Forum, the Prime Minister of New Zealand, Jacinda Ardern, said that to be on the right side of history world leaders must embrace guardianship of the Earth.[53] Only then will it be possible to turn things around and avoid global ecological collapse. This kind of leadership is now required, however, it will not come about unless we as citizens, as environmental lawyers or as 'People for Earth' provide the necessary leadership.

As Warren Buffett puts it: "A leader is someone who can get things done through other people". Let us work together and be true leaders so we can get things done through the people in governments, corporations and society. It is up to us to make the shift towards trusteeship of Earth happen!

53) *The Guardian*, 23 January 2019