

## Chapter 4

# Democracy, Sovereignty and the Challenge of the Global Commons

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This chapter looks at forms of governance that are reflective of the need for protecting the integrity of ecological systems. The existing system of global environmental governance has been stunningly inadequate in stemming the flow of environmental damage. Despite more than 900 environmental treaties in the past 40 years,<sup>2</sup> human induced environmental damage is reaching levels where the International Council for Science (ICSU) warns that we have reached a point where the continued functioning of the earth system as we know it, is at risk:<sup>3</sup>

This science also tells us that the rate of global environmental change is, so far, vastly outpacing our response and thus, our current path is unsustainable. We know enough to state with a high degree of scientific confidence that without action to mitigate drivers of dangerous global change and enhance societal resilience, humanity has reached a point in history at which changes ... will undermine development prospects and cause significant human suffering associated with hunger, disease, migration and poverty. If unchecked or unmitigated, these changes will retard or reverse progress towards broadly shared economic, social, environmental and developmental goals.

Any real change will require a move away from a ‘state-centered’ global governance system where acceptance of and then compliance with treaties is voluntary, to an ‘earth-centered’ system in which states act as trustees of the environment on behalf of all citizens. However, nothing short of a renewed push by civil society based on strong ethical values will achieve this. Citizens everywhere must see themselves as stewards of the earth. This vital paradigm shift in how we view ‘our home’ and think about the environment is the only driver strong enough to create the right institutions, needed at local, regional and global levels to reverse environmental destruction.

What are some of the hurdles we face in creating these institutions? At our GEIG meetings, we have regularly discussed the paradox of seemingly unstoppable economic growth in a

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<sup>1</sup> For assistance with researching and writing this chapter I am indebted to Kristen Jones, New Zealand Centre for Environmental Law; for the wider context of this chapter see *Creating a Safe Operating Space through Law and Governance* (146 pages, Sept. 2016), report prepared by Klaus Bosselmann and Kristen Jones for the Planetary Integrity Project <http://planetaryboundariesinitiative.org/>

<sup>2</sup> Frank Biermann and Steven Bernstein “How Rio+20 Can Herald a Constitutional Moment” (15 March 2012) The Guardian <[www.theguardian.com](http://www.theguardian.com)>. See also International Geosphere-Biosphere Programme (IGBP) “Governance experts warn UN overhaul required to govern earth system” (press release) 23 November 2011 <[www.igbp.net](http://www.igbp.net)>.

<sup>3</sup> International Council for Science (ICSU) “Earth System Science for Global Sustainability: The Grand Challenges” (ICSU, Paris 2010) at 5.

closed planetary system with ecological boundaries. There are further paradoxes embedded in the complexity of the Anthropocene that are also clear barriers to a new governance system.

## 1. The Democracy Paradox

The latter part of the 20<sup>th</sup> century and the early 21<sup>st</sup> century have seen a dramatic expansion of democracy as a governing concept.<sup>4</sup> 120 sovereign states out of 192 contain democratic political systems and encompass 58% of the world's population.<sup>5</sup> Patrick Deneen describes this global move towards democracy, as “the only regime most living humans now deem worthy of serious consideration”.<sup>6</sup> Democracy generally defined is “a system of government by the whole population” typically through elected representatives.<sup>7</sup> In a nutshell, the core idea behind democracy is that ultimate authority and power remains with the people. It is a powerful philosophy focused on the innate freedom of every person ‘to be left alone’ or to function as they please. The primary role of any democratically elected government is to ensure the protection of this freedom not only for its citizens but also for the state itself in relation to other states.<sup>8</sup> Yet the paradox hidden within democracy in the Anthropocene is that, as Eyal Benvenisti describes it:<sup>9</sup>

In our era of global governance the freedom to be left alone no longer holds the promise of providing citizens with control over their lives because no Chinese walls will be capable of insulating communities from the outside. States that seek to ensure freedom to their citizens must act proactively by engaging foreign and international governance bodies, and by ensuring opportunities for their citizens to do the same.

Globalization and technology mean we are more interconnected than ever before. Economic activity and trade flows through porous national borders creating state interdependency. Open trade brings more prosperity for countries but also worsens ecological footprints as we crisscross the oceans using them as highways to move goods from one side of the world to the other. The democratic vacuum at the global level has invited powerful states to hollow out single country agendas in the international space,<sup>10</sup> to negatively effect weaker states and to allow large multinational corporations (with private profit agendas) to hijack economic rules.<sup>11</sup> This development has eroded state autonomy, reducing democracy through privately negotiated trade deals taking place outside the public democratic arena and reducing states’ ability to regulate their own affairs. Of particular concern is the flow on effects which compromise states’ internal social and environmental agendas. States see it as their duty to participate in this economic model in order to secure prosperity for its people - if you don’t have a seat at the table, your family will go hungry.<sup>12</sup>

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<sup>4</sup> See Klaus Bosselmann, *Earth Governance: Trusteeship of the Global Commons* (Edward Elgar, Cheltenham/UK, 2015) at 9.

<sup>5</sup> Ibid. See also, Daniele Archibugi “Demos and Cosmopolis” (2002) 13 *New Left Review* at 27.

<sup>6</sup> Patrick J Deneen *Democratic Faith* (Princeton University Press, Princeton, NJ 2005) at xvi.

<sup>7</sup> Definition of ‘democracy’ Oxford dictionaries, <[www.oxforddictionaries.com](http://www.oxforddictionaries.com)>.

<sup>8</sup> See above n 1 at 26. Democracy was espoused and popularized by John Locke, Jean-Jacques Rousseau and Immanuel Kant.

<sup>9</sup> Eyal Benvenisti “The future of sovereignty: The nation state in the global governance space” (2015) 01/2015, The Global Trust Working Paper Series <[www.globaltrust.tau.ac.il/publications](http://www.globaltrust.tau.ac.il/publications)>.

<sup>10</sup> See above n 4 at 12.

<sup>11</sup> Ibid. at 10, 11,12, 13, 18, 30, 31, 38 and 45.

<sup>12</sup> Ibid. at 12.

Needs of the market and needs of society are not the same and must be carefully separated. The fact that governments have increasingly neglected this separation, points to a crisis of democracy. Quite obviously, it is not in the interest of the 'demos' if governments allow markets to determine the direction, scope and content of public policies. Democratic process "requires that citizens decide all issues that are politically decidable"

Democracy now requires deeper construction at the global level if our freedoms are to remain, along with the realization that with any freedoms also come duties and responsibilities. The Anthropocene traffics in complex global environmental problems, which no single state can address like climate change, ocean acidity and acid rain and which have no respect for national borders. This changes the playing field of democracy from an activity that happens only within state borders to include governance systems, activities and institutions that are global. Immanuel Kant foresaw this development where international society is forced to move slowly and in a non-linear fashion towards global democracy.<sup>13</sup> Benvenisti describes this leavening process taking place (and not particularly desired by states) as "engaged sovereignty"- the growing recognition by democratic states of their embeddedness within a global order to which it is accountable. Kant puts it this way:<sup>14</sup>

The same sociability which drives man to the creation of a commonwealth causes any single commonwealth to stand in unrestricted freedom in relation to others; consequently, each of them must expect from another precisely the evil which oppress the individuals and forced them to enter into a lawful civic state. The friction among men, the inevitable antagonism, which is a mark of even the largest societies and political bodies, is used by nature as a means to establish a condition of quiet and security.

The process of global democracy is far from complete but is at the root of unlocking solutions to the ecological crisis. The role of the citizen is expanding from the national to the international scale with citizens all over the world seriously concerned about the environmental crisis and the ineffectiveness of the existing system to address the problems.

To date, the strongest expression of civil society that announces a new ethic to take responsibility for the earth is found in the Earth Charter.<sup>15</sup> This provides a new framework for global governance and a new 'covenant' between humans and nature.<sup>16</sup> Part IV of the Charter sets out four principles for sustainable earth governance, which are:<sup>17</sup>

1. To strengthen democracy at all levels (including transparency, accountability, participation and access to justice);
2. To integrate the required capabilities for a sustainable way of living in a process of lifelong learning;
3. To treat all living beings with respect and consideration;

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<sup>13</sup> Ibid. at 11.

<sup>14</sup> Immanuel Kant "Idea for a Universal History from a Cosmopolitan Point of View" Seventh Thesis (1784).

<sup>15</sup> The Earth Charter Initiative, *The Earth Charter* (2000) <[www.earthcharterinaction.org](http://www.earthcharterinaction.org)>.

<sup>16</sup> See above n 4 at 39-47.

<sup>17</sup> Ibid. at 2. See also J Ronald Engel "The Earth Charter as a New Covenant for Democracy" in Klaus Bosselmann and J Ronald Engel (eds) *The Earth Charter: A Framework for Global Governance* (KIT Publishing, Leiden 2010) at 29-40.

4. To promote a culture of tolerance, nonviolence, and peace.

The Earth Charter is not sanctioned by sovereign states but by global citizens:<sup>18</sup>

A multilayered transnational system of democratic governance based on constitutional principles such as those expressed in the Earth Charter may still involve states, but is not dependent on them.... Any democratic system is accountable only to the demos, neither to states nor corporations nor any other legal constructs.

Despite decades of political discussion, only one treaty has set targets and timetables (the Kyoto Protocol) to take practical action on just one serious threat - climate change, with no practical success so far. This reflects the failure of the current international approach of negotiated consensus as a viable method to contain and reverse global environmental problems. We need to acknowledge the existing system of governance is not working and as citizens, explore and demand a dramatically improved system. This calls for re-imagining and creating institutions at the local, regional and global levels that gain legitimacy through the process of global democracy and have the necessary “teeth” to take the required actions. How do we honor the philosophical heart of the idea of democracy by placing decisions back in the hands of the public? How do we ensure people most affected by ecological damage have a democratic voice? Essentially this involves a shift away from state centered governance to earth focused governance emphasizing the role of the citizen as the source of legitimacy. Re-conceptualizing and re-invigorating state sovereignty is a fundamental part of this process.

## 2. The Sovereignty Paradox

In the current system of law and governance, the earth is conceptually divided into two distinct areas. The first is that of sovereign states and the second is the ‘global commons’ which consists of everything outside (or not controllable) by states such as the atmosphere, the oceans, seabed and fisheries (beyond coastal state limits), Antarctica and outer space (including celestial bodies), the geo-stationary orbit and the electromagnetic spectrum.<sup>19</sup> Westphalian sovereignty and international environment law provide that:

1. Sovereign states effectively ‘own’ the natural resources and the environment within their borders and may preserve, use or exploit that environment as they see fit and without external interference.
2. With respect to that part of the environment *other* nation states ‘own’ the international principle of good neighborliness (not to cause damage to another state) applies.
3. With respect to the global commons, these are not owned by anyone and access to them is free to all. This results in the ‘tragedy of the commons’<sup>20</sup> where a natural resource becomes overused and eventually exhausted because no limits on use are set.

Nature itself has no legal rights or ‘standing’ in the eyes of the law (no legal personality) therefore any overuse, harm or pollution that occurs whether by a state, a corporation or an individual is difficult to rectify through normal legal channels.

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<sup>18</sup> See above n 4 at 3.

<sup>19</sup> Ibid. at 72.

<sup>20</sup> Garret Hardin “The Tragedy of the Commons” (1968) 162 (Issue 3859) Science at 1243-1248.

There is no legal entity to bring an action against, no property right breached and no plaintiff.

There are a multitude of environmental treaties and soft law documents for discrete parts of the global commons, which have been developed over the last 40 years through international negotiation amongst states and with the encouragement of the United Nations and civil society. However sovereign states *choose* whether to be bound by these treaties or not and most of them operate with minimal success in terms of protecting the environment. Each treaty operates independently with legal autonomy, which results in problem shifting,<sup>21</sup> exponential complexity of procedures and rules and a growing administrative burden on states. Where there are ‘gaps’ in environmental law that are not covered by either a treaty regime at the international level or legislation at the national level, the vacuum is filled by default with either sovereign state legal rights or individual property rights that allows exploitation of the commons without accompanying duties or responsibilities to do so in a sustainable manner.<sup>22</sup>

International environmental law is based on respect for state sovereignty, which is the international mirror of private property rights.<sup>23</sup> However the paradox within state sovereignty is that an examination of its history uncovers the potential for understanding state sovereignty as a trustee for the preservation and protection of the ecological integrity of the environment. The United Nations has a history of trusteeship concepts that we can draw upon, which itself is based upon sovereign state trusteeship traditions.<sup>24</sup>

### **3. Reclaiming Earth for Global Citizens**

We have already briefly discussed the notion that political power and the legitimacy of a sovereign state flows from representing its people:<sup>25</sup>

Popular sovereignty denotes that the state’s sovereign powers belong to the people, and so those powers are held in trust by their rulers on condition that they be used for the people’s benefits. Popular sovereignty thus implies that the state and its institutions are fiduciaries of the people; for the justification rests exclusively on the authority they enjoy governing and serving the people.

The culture of the Anthropocene has birthed a new and more cosmopolitan citizen who is often more mobile, moving and living in different countries for work, and connected via technology with others around the world. Even those citizens living in less developed

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<sup>21</sup> Problem shifting occurs where one treaty ignores environmental problems outside its own narrow mandate. For example the UNFCCC treats carbon capture by the oceans as a carbon sink rather than acknowledging the environmental impact of excess CO<sub>2</sub> on the oceans. See Rak Hyun Kim “Unraveling the Maze of Multilateral Environmental Agreements: A Macroscopic Analysis of International Environmental Law and Governance in the Anthropocene” (PhD Australian National University 2013) at 89.

<sup>22</sup> Aoalheiour Jóhannsdóttir “The significance of the default, a study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law” (Doctor of Law jur dr, Uppsala University 2009).

<sup>23</sup> See above n 4 at 167.

<sup>24</sup> See above n 4 at 198-232.

<sup>25</sup> Evan J Criddle and Evan Fox-Decent “A Fiduciary Theory of Ius Cogens” (2009) 34 Yale Journal International at 350.

countries share this connectivity and are aware of matters far outside of their immediate environment. The idea of ‘citizenship’ is no longer confined to nations. In fact, if we identify only as a citizen of one country we undermine the very global conditions we need to flourish.<sup>26</sup> If we reframe our thinking of ‘home’ from our immediate country to the earth itself, and envisage that we are a part of the earth system and the ‘community of life’ relying upon a shared healthy biosphere, this brings an awareness of the need for institutions that reflect this reality.<sup>27</sup>

The difference between humans and nature is not absolute or categorical, but gradual. This aesthetic experience offers the moral insight of a special responsibility for the nature we are essentially part of.

Once we approach our relationship with the environment in this paradigm fracturing fashion, an interesting question naturally arises. Who actually owns the earth? Is it us? What happens if the public asserts property rights over the natural environment? What if there is an insistence that environmental public goods are owned by all of us? As legal owners, the public could charge for damage to ‘common property’ and provide rewards to those who protect it. Private property rights and state sovereignty would continue to exist - but only up to the place where common property rights begin.<sup>28</sup> This idea to assert global citizen rights to the environment within the legal system is what Donella Meadows would call a key ‘leverage point’ - meaning, a point of power within a complex system where a small shift can produce big changes.<sup>29</sup> Such a change of mindset or paradigm is only possible through a radical shift in our relationship with the earth, moving away from viewing earth as just a resource to create economic growth towards seeing it as a birthright to be protected by and for ourselves, for future generations and for all other forms of life. The driver to any change towards ‘responsible sovereignty’ rests with real people embracing the idea that democratic citizenship operates at local, national and global levels. If we begin to see ourselves as protectors and stewards of the earth and our sovereign states as trustees of the earth for the common good on our behalf, this is the *crucial step* that takes us towards a sustainable system of governance.<sup>30</sup> Meadows points out that the striking aspect of living and social systems is their ability to change themselves by creating new paradigms, structures and behaviors:<sup>31</sup>

In biological systems that power is called evolution. In human society it’s called technical advance or social revolution. In systems lingo, it’s called self organization... a system that can evolve, can survive almost any change, by changing itself... the same could be said of human cultures of course, which are the store of behavioral repertoires, accumulated over not billions, but hundreds of thousands of years. They are a stock out of which social evolution can arise.

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<sup>26</sup> See above n 4 at 31.

<sup>27</sup> Ibid. at 37.

<sup>28</sup> Klaus Bosselmann “Governing the Commons: Can states be trustees?” in Laura Westra, Janice Gray and Antonio D’Aloia (eds) in *The Common Good and Ecological Integrity: human rights and the support of life* (Routledge, Milton Park, Abingdon, 2016) at 270 and 271.

<sup>29</sup> Donella H Meadows “Leverage Points: Places to Intervene in a System” (1999) Sustainability Institute.

<sup>30</sup> See above n 4 at 289.

<sup>31</sup> See above n 28 at 15 and 16.

Paradigms are the source of our systems. From them flow our social agreements about reality along with system goals, information flows, and feedbacks.<sup>32</sup> Thomas Kuhn wrote the seminal book about paradigm shifts but in Meadows words, the way to create such a shift involves the following:<sup>33</sup>

In a nutshell, you keep pointing at the anomalies and failures in the old paradigms, you keep speaking louder and with assurance from the new one; you insert people with the new paradigms in places of public visibility and power. You don't waste time with reactionaries; rather you work with active change agents and with the vast middle ground of people who are open-minded.

Having thrown down the gauntlet to take charge of human destiny, we need new institutions that reflect and operationalize this.

#### **4. The State Trusteeship Concept for the Global Commons**

The global commons as we normally think of them are those areas outside of states jurisdiction. However a broader understanding also includes things existing across, i.e. within and outside, state boundaries like water, the atmosphere and biodiversity. This broader understanding of the commons provides framework we need to appreciate 'ownership' of the commons. This kind of ownership is with all humanity, includes communal possession and is fundamentally different from 'property' that might be exclusive and could be sold or commercialized. Ownership is understood here not as ownership in our individual capacity but as the human community reflecting the idea of the common heritage of life.<sup>34</sup> This principle properly understood, creates humanity and all other life as the deserving new 'subjects' of international law and expands sovereign state responsibility beyond territorial borders. Collective state trusteeship can be described as protecting all areas of the global commons, inside and outside of state borders that are recognized as the common heritage of life.<sup>35</sup>

For many years the United Nations has considered the question of the duty of states to act as trustees for the global commons.<sup>36</sup> Currently the state sees its role largely as a facilitator of economic growth<sup>37</sup> and a protector of private property. Governments must function within

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<sup>32</sup> Ibid. at 18.

<sup>33</sup> Ibid.

<sup>34</sup> The common heritage of mankind (CHM) and the common heritage of life (CHL) doctrines, see above n 4 at 75-79, 108-111 and 248. See also Edith Brown Weiss "The Coming Water Crisis: A Common Concern of Humankind (2012) 1 (1) *Transnational Environmental Law* 153, and Prue Taylor "The Common Heritage: Constructive Utopianism in: *The SOS Treaty: A New Approach to Managing Our Use of the Earth System*, ed. by Paulo Magalhães, Will Steffen, Klaus Bosselmann, Alexandra Aragão and Viriato Soromenho-Marques (Cambridge Scholars Publishing, Cambridge, 2016), 104-130.

<sup>35</sup> The ideas discussed here go further than the 'common concern of mankind'(CHM) principle by arguing that the 'common heritage of life' (CHL) prevents appropriation of 'common goods' for individual interests; the CHL concept was developed by Prue Taylor, *An Ecological Approach to International Law* (Routledge, London 1998). See also above n 4 at 248 and Catherine Redgwell "Reforming the United Nations Trusteeship Council" in W Bradnee Chambers and Jessica F Green (eds) *Reforming International Environmental Governance: From Institutional Limits to Innovative Reforms* (United Nations University Press, Tokyo 2005) at 179.

<sup>36</sup> See above n 4 at 233-244.

<sup>37</sup> A recent example of this at the local government level in New Zealand, is a case where the Ashburton District Council was selling a piece of land in its business estate to an overseas bottled water company with a resource consent to extract up to 45 liters of water per second from the towns aquifers. Local residents campaigned

short-term political cycles. As a result the system is structured to encourage short-term solutions. However, environmental trusteeship of states need not be seen as standing in opposition to state sovereignty. An insistence that the global commons belong to all, now and into the future, requires an understanding that governance has the common good as its focus. Maintaining a healthy environment is essential for human prosperity. As representatives of the governed, states can ensure its people ecological, social and democratic well being. Attention shifts from a negotiated consensus settling for the lowest common denominator amongst states (and leaving the commons unprotected) towards a focus on trusteeship governance of the earth as the best approach to foster non-competitive cooperation towards managing the commons.

The public trust doctrine is a simple mechanism that can support the idea that the global commons should be held in trust as assets to serve the public good.<sup>38</sup> The responsibility of sovereign states would be to protect these assets from harm and ensure their use for the public and future generations. Nationally a government would act as environmental trustee and internationally, states would act jointly as trustees of the global commons.<sup>39</sup> The idea of global trusts has been promoted by Peter Sand, Mary Wood, and Peter Barnes among others.<sup>40</sup> We have examples within the United Nations of global institutions that have a trustee mandate. These include the (historical) UN Trustee Council which oversaw the transition of territories from colonialization to independence, the World Health Organisation (WHO) holding governance powers with respect to public health and the World Trade Organisation (WTO) in relation to trade matters.<sup>41</sup>

## 5. What Would a Trust for the Global Commons Look Like?

1. A legal entity or trustee such as a World Environmental Organization (WEO) would be required that is responsible for the protection of the beneficiaries, being present and future generations and the community of life. The trustee would exercise discretion and the administration of the trust corpus (the biosphere) in the beneficiaries' interest. Because the corpus is common to all, the commons are insulated from individual claims by companies, governments or specific individuals.<sup>42</sup>
2. Current generations would be the donors or settlers (as well as the beneficiaries) of the trust.
3. Beneficiaries would consist of humans and other life, which currently have no existing legal personality. In other words the beneficiaries are *the community of life*. This gives nature standing which is an important new aspect of any proposed trusteeship regime and which reduces the likelihood of environmental governance simply being about preventing the worst harm and slowing exploitation as has

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against the sale but District Mayor, Angus McKay “said the Council had the public’s best interests at heart, as the sale of the site would go towards rates remissions”. See Sally Murphy “Council to Sell Rights to Bottled Water Company” (4 April 2016) Radio New Zealand <[www.radionz.co.nz](http://www.radionz.co.nz)>.

<sup>38</sup> Peter H Sand “The Rise of Public Trusteeship in International Environmental Law” Third International Haub Prize Symposium, Murnau, 2013. See also, Joseph L Sax “The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention (1969) 68 Mich L Rev at 471; Catherine Redgwell *Intergenerational Trusts and Environmental Protection* (Juris,1999); Ken Coghill, Tim Smith and Charles Samford (eds) *Fiduciary Duty and the Atmospheric Trust* (Ashgate, Farnham, Surrey England 2014).

<sup>39</sup> See above n 28 at 271.

<sup>40</sup> At 267 – 280.

<sup>41</sup> See above n 4 at 199-232

<sup>42</sup> *Ibid.* at 152.

happened so far. Such a trust concept approaches the trusteeship obligations from the perspective of first restoring and then maintaining ecological integrity of the biosphere. This is its focus. Unless a WEO (or similar institution) has equivalent powers to the existing WHO and WTO failure is a distinct possibility. Likewise the necessary funding uncontaminated by political pressures is integral to success.<sup>43</sup>

4. The exercise of the trustee's discretion would be framed by a number of fundamental obligations or guiding principles which are:
  - Sustainability.
  - The common heritage of life doctrine, giving nature standing alongside humans.
  - Decisions to be guided by the precautionary principle.
  - Intergenerational equity, ensuring that the planet is passed on to future generations in a condition capable of sustaining life.
  - Intragenerational equity, providing a legal voice to the less powerful in the global community both human and nonhuman. This provides the trustees with a significant role in managing the equitable use of the global commons amongst developed and developing nations.<sup>44</sup> Serious thought about voting rights and structure that would allay developing countries concerns around power ratios would require careful consideration.<sup>45</sup>
  - The ecological integrity of the biosphere perhaps through recognition of a legal grundnorm.

## 6. Advantages of a World Environmental Organization

A WEO would have a number of advantages. Political friction between states (caused by domestic interests and competitive economic pressure) would be reduced in the face of a clear trusteeship regime applying equally to all. As long as states compete for natural resources, the negative feedback loop race towards the bottom to use up resources continues.<sup>46</sup> Collective action must be *at least* at the same scale as collective harm.<sup>47</sup>

The world community would benefit from the presence of an authoritative environmental voice in the international arena and a recognized forum for national officials and other stakeholders to work cooperatively to address global issues.

Currently earth system governance is not accountable to any one international institution solely devoted to supporting the biosphere.<sup>48</sup> The existing institutional structure is highly fragmented and spread across many institutions (too many cooks in the kitchen) with little coordination resulting in duplication of effort, funding, personnel and lack of strategic

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<sup>43</sup> Ibid. at 264. The experience of the UNEP has highlighted the problems faced by underfunding.

<sup>44</sup> Ibid. at 153.

<sup>45</sup> Frank Biermann *Reforming global environmental governance: the case for a United Nation's Environmental Organization (UNEO)*" Stakeholder Forum, Earth System Governance Project, and VU University Amsterdam, the Netherlands, (February 2011) at 10.

<sup>46</sup> Daniel C Esty and Maria H Ivanoa "Making International Environmental Efforts Work: The case for a global environmental organization" (Presentation at the open meeting of the Global Environmental Change Research Community, Rio de Janeiro, October 6-8 2001) at 4.

<sup>47</sup> Ibid. at 5.

<sup>48</sup> Above n 45 at 5.

planning.<sup>49</sup> At the time the UN Charter was implemented in 1945, international security not the environment was the prime concern. The term ‘environment’ does not even appear in the UN Charter.<sup>50</sup> It wasn’t until the early 1970s that the UNEP was set up,<sup>51</sup> “as a mere program, without legal personality, without budgets, and—according to its founding instruments, only with a ‘small secretariat’”. Frank Biermann points out that the UNEP is no match to other specialized international organisations and has had to compete for “time and attention and resources with more than a dozen other UN bodies”.<sup>52</sup>

The existing international environmental institutions, especially UNEP, are hampered by narrow or vague mandates, small budgets, and limited political support. No one organization has the political authority, vitality, expertise, and profile to serve as the center of gravity for the international environmental regime and to exert sustained political influence and other global fora

A WEO would provide high-level expertise and accountability along with a long-term orientation more suited to a global institution than to state governments. Core functions would be, decision-making, implementation, monitoring and dispute resolution. Esty and Ivanoa point out that sound environmental decision making hinges on some necessary factors. First, scientific assessment of high quality information to enable long-term forecasting of environmental trends. Second, the ability to approach problems from multiple perspectives and to draw on a wide range of information sources. Third, the establishment of guidelines and international norms, which over time could develop into more formal rules.<sup>53</sup>

States authorisation of a WEO would lend legitimacy to any enforcement measures. A judicial arm similar to the dispute settlement body of the World Trade Organisation would encourage the fleshing out and development of the guiding principles suggested above. Environmental interests do not currently fit well into the law. Further administrative and judicial remedies are needed.<sup>54</sup> The growing area of international environmental administrative law regarding procedural rights is a possible area of evolution. Trustees of a WEO would include the sovereign states and importantly, also other parts of civil society.<sup>55</sup> Earth governance then becomes a much broader affair.

A WEO could be created by treaty, or by General Assembly Resolution that would endow it with independent institutional status and the power to resolve disputes. Christopher Stone has proposed the creation of a global commons trust fund<sup>56</sup> able to impose levies on use of the commons ensuring a dependable flow of money each year.<sup>57</sup> This mechanism would secure funding directly from those most responsible for using the commons.<sup>58</sup>

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<sup>49</sup> For example UNEP, UNDP WMO and the OECD all have climate change programs with little strategic coordination. See above n 46 at 7.

<sup>50</sup> Above n 45 at 6.

<sup>51</sup> The UNEP was setup in 1973 following the 1972 Stockholm Conference on the Human Environment and is not an intergovernmental institution but a subsidiary body of the General Assembly.

<sup>52</sup> Above n 46 at 7 and 8.

<sup>53</sup> Ibid. 10 and 11.

<sup>54</sup> See above n 4 at 265-267.

<sup>55</sup> For example, the IUCN, the World Wildlife Fund, Greenpeace and the World Meteorological Organisation.

<sup>56</sup> See above n 4 at 265. See also, Christopher D Stone “Defending the Global Commons” in Philippe Sands (ed) *Greening International Law* (Earthscan, London 1993) at 34.

<sup>57</sup> Governments are well aware that institutions can only function with adequate funding. See above n 1 at 264.

<sup>58</sup> See above n 4 at 195.

Trusteeship says that the duty to protect the environment should not have to be negotiated. Sustainability is the goal - this will never change. Like justice and human rights, sustainability should be a foundational norm of humanity that guides the functions of states rather than be guided by them. Territorial sovereignty over natural resources... can only be perceived, therefore, as inherently linked to an obligation to protect the environment. The use of resources is covered by territorial sovereignty only within the parameters of ecological sustainability. This would read as: 'the sovereign right of states to exploit their resources pursuant to the principle of sustainability.'

## 7. Trusteeship Within States

So far, we have been talking about trusteeship at the global level but the idea of trusteeship and acting as guardians of the environment is one that needs to permeate through all levels of society to be effective. In New Zealand, a first experiment of 'rights for nature' can be found in a recent deed of settlement signed between the Whanganui River's Iwi (the local indigenous people) and the New Zealand government. The deed of settlement recognizes the river itself<sup>59</sup> as a 'legal person' with standing before the courts. Two human trustees will be appointed, one by the Crown, the other by Iwi to be known as 'the face of the river'.<sup>60</sup> The Te Awa Tupua (Whanganui River Claims) Settlement Bill was introduced into parliament on 2 May 2016, and is expected to be passed later in 2016. A list of the rivers intrinsic values is also recorded in the bill including that (a) the river is a source of 'spiritual and physical sustenance', (b) the river is 'an indivisible entity', and (c) the local Iwi have 'an inalienable connection to the river'.<sup>61</sup>

Christopher Stone has observed that human societies seem to evolve through certain stages of development and the law itself participates in this process.<sup>62</sup>

Throughout legal history, each successive extension of rights to some new entity has been, theretofore, a bit unthinkable. We are inclined to suppose the rightlessness of right less 'things' to be a decree of Nature, not a legal convention acting in support of some status quo...The fact is, that each time there is a

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<sup>59</sup> The Whanganui River is New Zealand's longest navigable river and of special spiritual significance to New Zealand's indigenous people. This claim brought by local Iwi has been one of the longest and most fiercely contested in New Zealand history dating back to the late 19<sup>th</sup> century. The Waitangi Tribunal found in a report in 1999 that the Crown had taken control and possession of the river in breach of the Waitangi treaty and the crown's obligations.

<sup>60</sup> Kristin Claire Jones "Legal Personality for the Whanganui River" (LLM Research Paper, University of Auckland, 2015).

<sup>61</sup> This promising example of stewardship of a particular part of nature at the local and national level was hard fought for and the result of unwavering pressure on the New Zealand government by the local Iwi combined with early unlawful colonial activity recognized by the New Zealand courts along with a blending of Maori and western cultural ideas and concepts during the negotiation process. See Tom Barraclough "How far can the Te Awa Tupua (Whanganui River) Proposal be said to reflect the Rights of Nature in New Zealand?" (LLB (hons) University of Otago, 2013), Rachel Caroline Harris "The Changing Face of Co-governance in New Zealand" (LLM, University of Canterbury, 2015), James Douglas Kahotea Morris "Affording New Zealand Rivers Legal Personality: a new vehicle for achieving Maori aspirations in co-management?" (LLM, University of Otago, 2009), Laura Hardcastle "Turbulent times: speculations about how the Whanganui River's position as a legal entity will be implemented and how it may erode the New Zealand landscape" (2014) Sir Edward Taihakurei Durie essay competition, Maori Law Review at 6.

<sup>62</sup> Christopher D Stone *Should trees have standing? And other essays on law, morals and the environment* (25<sup>th</sup> ed Oceana, New York, 1996) at 3, 4 and 5.

movement to confer rights onto some new ‘entity’, the proposal is bound to sound odd or frightening or laughable. This is partly because until the right less thing receives its rights, we cannot see it as anything but a *thing* for the use of ‘us’ - those who are holding rights at the time.

Perhaps the way forward is *more* sovereignty through environmental trusteeship and at the same time, *less* sovereignty in the sense of states becoming prepared to be bound by their trusteeship obligations through a World Environment Organisation. Its functions carefully constituted, could level the playing field between the politically strong and weak states and between the world market place and the environment, opening up a space for the creation of an emerging sustainable world system. Esty and Ivanova note that, “an extraordinary mix of political idealism and pragmatism is required to strengthen the international environmental regime”.<sup>63</sup> The ideas expressed in this chapter of trusteeship and cooperation will be viewed by some as utopian, yet given the reality and seriousness of the issues, which threaten security and existence, we must demand that the political paradigm of environmental governance be transformed.<sup>64</sup>

Reimagining state sovereignty to accept limits to jurisdiction and to act as trustees for humanity under international standards of strong environmental institutions is the start of reclaiming and sustaining the commons we are so rapidly losing.<sup>65</sup>

## 8. Conclusion

Protecting and restoring the integrity of ecological and human systems must guide the way we design our legal and institutional framework. This foremost requires an understanding why existing arrangements are ineffective and insufficient, in particular an appreciation that the mismatch between global systems and the different interests of diverse states is systemic and not just politically motivated.

At its core lies a change to the Westphalian concept of state sovereignty. In a globalized world, the state can protect its citizens only by incorporating global issues into national policies. With respect to economic, corporate and financial forces, this requires ‘more sovereignty’ in order to control them. With respect to the global commons, this requires ‘less sovereignty’ in order to adopt trusteeship functions. Such seemingly paradox approach, in reality, reveals ‘smart sovereignty’<sup>66</sup> as it redefines territorial sovereignty simultaneously as a right to use and as a responsibility to protect. In this way, the democratic state may have a chance to regain some the legitimacy that has been lost in recent times.

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<sup>63</sup> Above n 46 at 18.

<sup>64</sup> See above n 4 at 263.

<sup>65</sup> Ibid. at 270.

<sup>66</sup> Inge Kaul, “Meeting Global Challenges: Assessing Governance Readiness”, in: Hertie School of Governance (ed.), *Governance Report 2013* (Oxford University Press, Oxford, 2013), 34-58.