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The Next Step: Earth trusteeship

Excellencies, Distinguished Delegates, Ladies and Gentlemen

I am grateful and honored to speak today to this highest body of the United Nations. The General Assembly had a pivotal role in the search for sustainable development from its beginnings 25 years ago right through to the adoption of the Agenda 2030 with its Sustainable Development Goals.

I am speaking as a representative of legal academia and of global networks specializing in environmental ethics and law. Among the networks I am involved with are the IUCN World Commission on Environmental Law Ethics Specialist Group¹, the Earth Charter Initiative², the Global Ecological Integrity Group³, the Common Home of Humanity project⁴, the Planetary Integrity Project⁵ and the Ecological Law and Governance Association - a new umbrella organisation⁶ to combine efforts towards an effective system of environmental law and governance. What I say here today, however, while it expresses a large consensus among the membership of these organizations, does not represent any official policy position. I speak for myself and on behalf of what I believe is the most realistic and ethically defensible approach we need to take to environmental governance at this critical moment in world history.

I have a simple proposal to make. The proposal is to accompany the current SDG process with high-level ethical dialogue and promote the idea of nation-

¹ IUCN World Commission on Environmental Law Ethics Specialist Group <https://www.iucn.org/commissions/world-commission-environmental-law/our-work/specialist-groups/ethics>

² Earth Charter Initiative <http://earthcharter.org>

³ Global Ecological Integrity Group (GEIG) <http://www.globalecointegrity.net/>

⁴ Common Home of Humanity (CHH) <http://www.commonhomeofhumanity.org/>

⁵ Planetary Integrity Project (PIP) <http://planetaryboundariesinitiative.org/>

⁶ Ecological Law and Governance Association (ELGA) <https://www.elga.world/>

states as trustees for the Earth. The UN should provide a forum for achieving that.

The ethics of Earth stewardship are an integral part of the world's religions and indeed humanity's cultural heritage, but these ethics have never been more topical than today. We should be ready, therefore, for taking the step towards Earth trusteeship.⁷

Earth trusteeship is the essence of what Earth jurisprudence is advocating, but, more importantly, it has also been called for in key international environmental agreements. Earth trusteeship is the institutionalization of the fundamental duty to protect the integrity of Earth's 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!⁸ To act on this duty, Principle 7 of the 1992 Rio Declaration requires states "to cooperate in the spirit of global partnership".

You may be thinking that there's a disturbing gap between the ideal of Earth trusteeship and the harsh realities of economics, finance and nation-states. But bear with me. Sometimes an ideal is closer to reality than we may think.

First, let me remind you that the legitimacy of the state as a legal institution rests on its ability to care for its citizens. To this end, the state has fiduciary obligations and fundamentally acts, in fact, as a trustee for its citizens and their cultural and natural commons. This is clearly evident from legal research into the theory and legitimacy of the modern nation-state.⁹ To strengthen its legitimacy, the sovereign state of the 21st century must act as a trustee for the natural environment.

⁷ Recent legal analysis on the concept of Earth trusteeship include K. Bosselmann, *Earth Governance: Trusteeship of the Global Commons*, Edward Elgar, Cheltenham, 2015; P. Burdon, *Earth Jurisprudence: Private Property and the Environment*, Routledge, Abingdon & New York, 2015; P. Higgins, *Eradicating Ecocide: Laws and Governance to Prevent the Destruction of our Earth*, Shephard-Walwyn, London 2nd ed. 2015; B. Weston and D. Bollier, *Green Governance: Ecological Survival, Human Rights and the Law of the Commons*, Cambridge University Press, Cambridge, 2014; M. C. Wood, *Nature's Trust: Environmental Law for a New Ecological Age*, Carolina University Press, Durham, 2013.

⁸ 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.

⁹ Bosselmann, *Earth Governance*, (above 7), 155-197; for human rights dimensions of state trusteeship see E. Benvenisti, "Sovereigns as trustees of humanity", *American Journal of International Law* 107/2 (2013), 295-333.

Second, the state as an environmental trustee¹⁰ is not mere political philosophy, but rather an emerging legal concept. Ecological integrity and associated trusteeship responsibilities are in the corpus of existing international environmental law as mentioned. We just need to make this more transparent and practically relevant.

Third, many countries around the world have made important constitutional amendments to include environmental rights and duties. They point to a fundamental change in the way the functions of the state are defined.¹¹

For illustration, let me briefly talk about two countries that I am particularly familiar with, Germany and New Zealand. I have been involved with some constitutional changes in both of them.

In the mid 1980's, West Germany (as it was then) conducted a major review to see whether its constitutional arrangements were fit to meet the challenges of the 21st century. At the core of this review was the question how ecological responsibilities could be connected with human rights and the functions of government.¹² In the end, a new state obligation was added to the constitution (Art 20a) that requires the state to protect the natural foundations of all life (not just human life). This is an expression of trusteeship functions for the state and has clearly contributed to Germany's ambitious environmental policies, for example, with respect to climate change, renewable energy and technological innovation.¹³

Also in the mid 1980's, New Zealand began an environmental law reform that culminated with the enactment of Resource Management Act in 1991.¹⁴ The Act was the world's first legislation based on the principle of sustainability and requires all economic activities to meet non-negotiable "environmental bottom lines". Initially, court decisions followed this strong sustainability

¹⁰ K. Bosselmann, *The Principle of Sustainability: Transforming Law and Governance*, 2nd ed., Routledge, Abingdon & New York, 2017, 176-203.

¹¹ K. Bosselmann, "Global Environmental Constitutionalism: Mapping the terrain", 21/2 *Widener Law Review* (2015), 171-185.

¹² Bosselmann, *Principle of Sustainability*, (above 10), 154-157.

¹³ K. Bosselmann, "Germany's *Energiewende*: What can environmental law scholarship learn from it?", in: Jaria, J., Kotzé, L. and Chalifour (eds.), *Energy, Governance and Sustainability*, Edward Elgar, Cheltenham, 2016, 11-29. See also K. Bosselmann, *Im Namen der Natur: Der Weg zum ökologischen Rechtsstaat*, Scherz, Munich, 1992; K. Bosselmann and M. Schröter, *Umwelt und Gerechtigkeit: Leitlinien einer ökologischen Rechtslehre*, Nomos, Baden-Baden, 1998; M. Schröter, *Mensch, Erde, Recht: Grundfragen ökologischer Rechtslehre*, Nomos, Baden-Baden, 1999 and the series *Rights of Nature/Biocracy*, ed. by Haus der Zukunft, Volumes 1-20, Metropolis Verlag 2016; <https://www.rechte-der-natur.de>

¹⁴ Bosselmann, *Principle of Sustainability* (above 10), 73-82.

approach of the Act, but eventually resorted to the more traditional idea of trade-offs between environmental and economic interests. In 2014, the Supreme Court of New Zealand specifically rejected this so-called “overall broad judgment” approach as not in line with the purpose of the Act.¹⁵ So we are now moving back to making economic development conditional to preserving the integrity of ecological systems.

In March this year, the NZ government passed legislation to give the Whanganui river legal personality.¹⁶ The associated trusteeship function has its origins in the Maori concept of *kaitiakitanga*¹⁷ and is jointly performed by the Crown and local Maori tribes. For the first time, a Western nation is acknowledging legally enforceable trusteeship over natural objects. Clearly, the leadership of states such as Bolivia and Ecuador has helped here.

You may also be aware of a recent court decision in India to grant the Ganga and Yamuna rivers the status of ‘juristic persons’.¹⁸ And three weeks ago, another Indian court did the same with respect to the Himalayan mountain ranges, glaciers, rivers, lakes, air, forests and so on, adding that the rights of these legal entities shall be equivalent to the rights of human beings.¹⁹

These and many other²⁰ examples signal a general trend towards Earth trusteeship. What is missing, however, is a clear loud voice to remind states of this trend and the trusteeship duties they have agreed on in international agreements. We cannot simply wait until 2030 to see whether the Sustainable Development Goals have been achieved. So there is an opportunity for the General Assembly to articulate the importance of Earth trusteeship with respect to the SDG process.

The United Nations has a tradition of trusteeship institutions including the (now inactive) Trusteeship Council, the Human Rights Council, the Department of Economic and Social Affairs, the World Health Organisation, among others, but it lacks a forum for overarching dialogue between states

¹⁵ Ibid., 76-79.

¹⁶ Ibid., 163-166.

¹⁷ *Kaitiakitanga* means stewardship and guardianship and protection and is also incorporated in the Resource Management Act 1991.

¹⁸ <http://www.livelaw.in/first-india-uttarakhand-hc-declares-ganga-yamuna-rivers-living-legal-entities/>

¹⁹ <http://www.livelaw.in/uttarakhand-hc-declares-air-glaciers-forests-springs-waterfalls-etc-legal-persons/>

²⁰ Bosselmann, *Principle of Sustainability* (above 10), 158-175. For examples concerning bioregions see GreenPrints <http://www.earthlaws.org.au/our-programs/greenprints/>

and civil society on long-term responsibilities.²¹

We have now arrived at a juncture of human history that makes it absolutely unavoidable to think beyond the paradigm of sovereign nation-states²² and embrace Earth trusteeship. This has not seriously occurred at UN level, yet the United Nations may be our only hope. Despite the inbuilt, deeply rooted conservatism in the UN system and despite the fact that the idea of transforming the Trusteeship Council²³ has been rejected, the problems are not going to go away. In fact, they will only get worse if states fail to embrace a deeply embedded concept of Earth trusteeship.

The Planetary Integrity Project - an interdisciplinary network of universities, research centers, NGOs and leading environmental experts²⁴ - is currently working on a concept for Earth trusteeship governance. The concept will be developed in a comprehensive report²⁵ and lead to a proposal to the UN General Assembly to set up a mechanism that examines the implications of Earth trusteeship governance for all aspects of sustainable development. Nation-states need to engage in a long overdue ethical dialogue on socio-economic development within the parameters of the Earth system. We believe, that an Earth Trusteeship Council would be the most suitable platform for such a dialogue. It would greatly enhance the legitimacy of nation-states and it would help the implementation of the Sustainable Development Goals.

Ladies and gentlemen, I urge you to welcome this proposal for the good of humanity and our common home when it comes before you and to do what you can to make Earth trusteeship a reality of law.

Thank you for your attention.

²¹ Bosselmann, *Earth Governance* (above 7), 198-232.

²² "Global Studies: The Challenge of Governance in the 21st Century", *Policy Quarterly Special Issue* Vol.13/1 (2017), Victoria University of Wellington.

²³ K. Gautam, "Transforming the United Nations Trusteeship Council for Protection of the Earth System", in: P. Magalhaes, W. Steffen, K. Bosselmann, A. Aragao and V. Soromenho-Marques (eds), *The Safe Operating Space Treaty: A New Approach to Managing Our Use of the Earth System*, Cambridge Scholars Publ., Newcastle upon Tyne, 2016, 263- 274.

²⁴ Bosselmann, *Principle of Sustainability* (above 10), 42-51.

²⁵ The Planetary Integrity Project: Creating a Safe Operating Space in Law and Governance, 2016
<http://planetaryboundariesinitiative.org/wp-content/uploads/2016/10/PIP-Report-Sept-2016.pdf>