

Klaus Bosselmann and Prue Taylor, New Zealand. [A thematic essay on the significance of the Earth Charter for global law](#)

The Significance of the Earth Charter in International Law



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Prue Taylor is a Senior Lecturer at the Department of Planning, University of Auckland, New Zealand. She teaches environmental and planning law to undergraduate and graduate students. Her specialist interests are environmental ethics, international environmental law, biotechnology, climate change, and environmental governance structures. She was part of the first drafting sessions for the Earth Charter that took place at the Global Forum in Rio de Janeiro in 1992. She became involved again in 1998 as part of the team of legal experts advising on the Charter. Dr. Taylor has worked actively in support of the Charter as a member of the IUCN Ethics Specialist Working Group. She has published a number of articles exploring the Charter in a legal context, and uses the Charter regularly in her teaching of university students.

From the perspective of international law, the Earth Charter is a new and fascinating instrument (Bosselmann, 2004, 69; Taylor, 1999, 193). This is partly due to its origins. The worldwide dialogue of thousands of civil society groups and individuals, over a period of several years, is impressive in itself. Unlike Agenda 21, the state-negotiated soft law document of the 1992 Rio Earth Summit, the Earth Charter represents a much broader consensus. It is probably the first time that global civil society

has produced a document with such a wide consensus on global principles. Concepts like ecological integrity, precautionary principle, democratic decision-making, human rights, and non-violence are well-established in international law, yet not always so clearly defined as they are in the Earth Charter. More importantly, the interaction between all these concepts has not been spelled out in any other single document, not even in Agenda 21.

The reputation and credibility of the Earth Charter rest largely on its transnational, cross-cultural, inter-denominational approach. In what most perceive as a crisis of global governance, this approach is highly significant. While the Earth Charter does not represent global civil society in its entirety including, for example, corporate interests, it does represent a very significant sector of it. States will not, for example, be able to overlook its leading role in the light of their endorsement of Type 2 partnerships for sustainable development in Agenda 21 and the 2002 Johannesburg Plan of Implementation. States will certainly need partnerships with civil society if they want to gain control over anarchistic global corporate power.

Meanwhile, the Earth Charter continues to foster its moral-political leadership within global civil society. The promotion of its principles in more than fifty national Earth Charter campaigns, and the ever-increasing number of endorsing institutions, are evidence of its success and strengths.

In terms of international law principles, the Earth Charter represents *prima facie* a draft legal document. It enjoys considerable recognition and discussion among legal educators and scholars (Kiss and Shelton, 2000, 70; Taylor, 1999; Taylor, 1998, 326). While the legal status of a number of the Earth Charter's principles is disputed, most of them are frequently referred to in treaties, conventions, and other binding documents. Key concepts such as the precautionary principle or sustainable development are not (yet) recognized as custom or general principles of international law. However, they have become an integral part of international law (Birnie and Boyle, 2002, 84, 115; Kiss and Shelton, 2000, 248, 264).

In recent times, “soft law” has become an important “new” source of international law (Kiss and Shelton, 2000, 46). In contrast to “hard law” (treaties, custom, general principles), “soft law” is not legally binding. It cannot be ratified and does not have direct legal effect. However, the political strength of Agenda 21, another soft law document, has emerged as a powerful document in international environmental law. Since 1992, Agenda 21 has been recognized and implemented by wide sectors of civil society all around the world. Local governments, small and mid-sized businesses, educational institutions, and professional organizations have enacted statutes or guidelines for sustainable development, citing Agenda 21 as their main source. This new kind of “bottom-up ratification” has put enormous political pressure on governments to implement some form of governance for sustainable development. Among all the treaties and international documents promoting sustainable development, none has had as much impact on practice as the soft law Agenda 21. The Earth Charter can benefit from this precedent. Although not yet recognized as a soft law document, it has all the ingredients to become one.

Earth Charter Commissioners and the International Secretariat laboured for a year to gain the Charter recognition at the World Summit on Sustainable Development (WSSD), held in Johannesburg in 2002. In his address to the opening session of the Summit, President Mbeki of South Africa cited the Earth Charter as a significant expression of “human solidarity” and as part of “the solid base from which the Johannesburg World Summit must proceed.” In the closing days of the Summit, the first draft of the Johannesburg Declaration on Sustainable Development included recognition of “the relevance of the challenges posed in the Earth Charter” (paragraph 13).

On the last day of the Summit, in closed-door negotiations, the reference to the Earth Charter was deleted from the Political Declaration (Rockefeller, 2002, 2). However, the final version of the Political Declaration included, in paragraph 6, wording almost identical to the concluding words of the first paragraph of the Earth Charter Preamble, which states that “it is imperative that we, the peoples of Earth, declare our responsibility to one another, to the greater community of life, and to future generations.” Furthermore, Article 6 of the WSSD Plan of Implementation contains indirect reference to the Earth Charter: “We acknowledge the importance of ethics for sustainable development, and therefore we emphasize the need to consider ethics in the implementation of Agenda 21.”

The WSSD documents reflect growing international support for sustainability ethics, as expressed in the Earth Charter. Since Johannesburg, international recognition has progressed. In October 2003, the 32nd General Conference of the United Nations Educational Scientific and Cultural Organization (UNESCO) adopted a resolution recognizing the Earth Charter “as an important ethical framework for sustainable development.” In November 2004, the International Union for the Con-

servation of Nature and Natural Resources (IUCN) World Conservation Congress in Bangkok, approved a resolution recognizing the Earth Charter “as an ethical guide for IUCN policy” and encouraging its Member states “to determine the role the Earth Charter can play as a policy guide within their own spheres of responsibility.”

A decisive step toward soft law recognition would be a resolution of recognition by the United Nations General Assembly. But, even without such recognition, there can be little doubt about the Earth Charter’s potential. A number of pathways could lead to the Earth Charter being acknowledged as a legally binding international instrument.

One of these pathways is the continued promotion of the Earth Charter within countries and among international organizations. The target here is to increase endorsements (in their various forms) up to a point where the Earth Charter reaches a certain omnipresence. This process could lead to its gradual transformation from soft law into a hard law instrument, in much the same way as nascent principles of law gradually gain recognition and status as binding “customary” international law.

Another path would be its conversion into a United Nations Draft Earth Charter, either together with the IUCN Draft Covenant on Environment and Development, or as a stand-alone document, eventually opening it up for negotiation among states. A further path could be to focus on the Earth Charter’s content and seek dialogues with governments on desirable principles and their implementation in law and policy. Here the Charter could have a “blueprint” function not dissimilar to Agenda 21.

However, the most promising path of all is to insist on the Earth Charter’s validity as a novel instrument of global law. Never before have so many people, in so many different countries, representing so many cultures and religions, reached a consensus on a central theme of humanity. To some extent, the Earth Charter can be celebrated as global civil society’s first and foremost founding document. Such an achievement, both in terms of quantity and quality, puts the world’s states on the back foot. States, having failed for so long to fulfil their promise of sustainable development, are rapidly losing their political and intellectual leadership.

Since the Westphalian Age (1648), we have seen international law, i.e. law between nation states – but not transnational law or global law. Transnational or global legal thinking is not new: civil society promoted universal human rights in the French and American revolutions, for example. It found its international legal recognition in the Universal Declaration of Human Rights in 1948. States have reluctantly, and not without setbacks, accepted the idea of human rights as pre-state, universal entitlements. Equally, the UN Charter 1945 is a document of transna-

tionalism, at least in its underlying principle of collective responsibility for peace and security. The fact that states have, by and large, struggled to foster human rights, peace, and security does not discredit global agreements such as the Universal Declaration or the UN Charter. To the contrary, the failure of states stresses the need for such instruments.

The Earth Charter qualifies as a founding document for global law, as no other international document has described the failure of states and peoples so clearly and forcefully. It is the failure to accept a three-fold imperative: "...that we, the peoples of the Earth, declare our responsibility to one another, to the greater community of life, and to future generations" (Preamble, Earth Charter).

In law, such imperatives and responsibilities are usually captured by notions of distributive justice. But what concept of justice is intended when we think of responsibilities to one another, to the greater community of life, and to future generations?

The Brundtland Report (WCSD, 1987) derived two forms of justice from the idea of sustainable development, i.e. intragenerational justice (between people living today) and intergenerational justice (between people living today and in the future). Responsibility to the greater community of life is not reflected in this idea – an omission common among state-negotiated documents on sustainable development (e.g. 1992 Rio Declaration, 2002 Johannesburg Declaration).

By contrast, care and respect for the community of life are central to the Earth Charter. They are central simply because, in an evolutionary process, human life cannot be separated from other forms of life. From the perspective of ecological integrity and sustainability, care for one another and for future generations is useless if we ignore the community of life that we are part of. If this is a moral imperative, it should also be a legal imperative.

Thus, lawyers debate whether the nonhuman world can be part of the *justitia communis* or must stay excluded from the *justitia communis*? The former approach reflects a new concept, the latter follows the traditional, anthropocentric concept of justice.

John Rawls, who shaped contemporary theories of justice more than anyone, has been very clear: "(the) status of the natural world and our proper relation to it is not a constitutional essential or a basic question of justice" (Rawls, 1993, 246). Rawls acknowledges "duties" to the nonhuman world, but he describes them as mere "duties of compassion and humanity" rather than duties of justice. To him, any "considered beliefs" to morally include the nonhuman world "are outside the scope of the theory of justice." (Rawls, 1999, 448). Efforts to reconcile Rawls' political liberalism with ecological justice (Wissenburg, 1998; Barry, 2001; Bell, 2002) underestimate the persistence of

paradigms. How could Rawls, or any legal theorist, trade their anthropocentric liberalism for non-anthropocentric ecologism? The Earth Charter challenges the anthropocentric idea of justice. As humans have put the Earth's ecological integrity at risk, no level of social organization – economics, politics, law – can be exempt from the moral imperative of care and respect for the community of life. The test lies in the current state of affairs. If the Earth Charter is right, then we are in desperate need of a new framework of thinking. Justice needs to include the community of life (Bosselmann, 1999; 2005). Perceived in this way, people of all cultures and nations may be able to give the dream of global law some solid foundation. ●

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