

Memorial on Behalf of the Alliance of Small Island States (AOSIS)

INTERNATIONAL COURT OF JUSTICE

REQUEST FOR AN ADVISORY OPINION CONCERNING FRESHWATER RIGHTS
UNDER INTERNATIONAL LAW IN RELATION TO THE POTENTIAL LEGAL
PERSONALITY OF RIVERS AND THE CLIMATE CRISIS



MEMORIAL FOR THE ASSOCIATION OF SMALL ISLAND STATES (AOSIS)

THE 1st WCEL INTERNATIONAL WATER JUSTICE MOOT COURT AT THE
CONFERENCE OF JUDGES AND PROSECUTORS ON WATER JUSTICE DURING THE
8th WORLD WATER FORUM IN BRASÍLIA, BRAZIL

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I. STATEMENT OF JURISDICTION

The United Nations General Assembly adopted resolution A/RES/72/Water, requesting an advisory opinion from the International Court of Justice (The Court) pursuant to Article 65 of the Statute of The Court. In accordance with Article 66, the Court invited all interested State parties entitled to appear before the Court to submit memorials through regional intergovernmental organizations as an efficient way to represent the multiplicity of State interests in the proceedings. Therefore, Alliance of Small Island States submits this memorial in answer to the question presented.

II. PROBLEM PRESENTED

Freshwater Rights under International Law in Relation to the Potential Legal Personality of Rivers and the Climate Crisis.

III. IN CONTEXT: THE ALLIANCE OF SMALL ISLAND STATES

The Alliance of Small Island States (AOSIS) are a combination of small coastal countries, who have comparable obstacles of development, and are the most vulnerable to the effects of global climate change. It is often recognised as a coalition voice for the small island developing states (SIDS) within the United Nations. It is made of 44 states and observers, drawn from the oceans of the Pacific, Indian and Atlantic constituting about 5% of the global population. AOSIS functions based on consultation and consensus, without a formal charter.¹

Climate change by global warming, is, and will continue to, threaten the existence of small island states. To completely understand the effects that climate change has on the people of the islands, we must place ourselves in their position. But to go beyond simply understanding, to feel the effect that climate change has on those people, we must become one with them, and their ideologies and beliefs, their stories of creation and way of living, their stories of death and ascent to heaven. Only then can we but merely understand the combined effects that global warming and carbon emissions have, from physical sea-level rise and acidic ocean growth, to wild storms and unprecedented weather events.

Global warming of the ocean affects the entire world, however, it particularly affects the Alliance of Small Island States. The Alliance has sixteen island members in the Pacific Ocean, which experiences the highest impact from climate change, as the world's largest ocean, The Indian Ocean, as the third largest ocean and home to four AOSIS members experiences the second highest impact from climate change. The Atlantic Ocean, as the world's second largest ocean with nineteen AOSIS members, experiences the third highest impact from climate change.² In the past decade, the global average temperature was 0.8°C higher than that of the beginning of the 20th century (1880 – 1920), and two thirds of the warming has occurred since 1975.³

The Intergovernmental Panel on Climate Change (IPCC)'s estimations of the average temperature of the earth's surface have increased over the last century. Humanity's actions are the most prevalent cause of atmospheric and oceanic warming. The hydrologic water cycles are

¹ Alliance of Small Island States. (2002). International Encyclopaedia of Environmental Politics.

² Hansen, J., R. Ruedy, M. Sato, and K. Lo (2010), Global surface temperature change, *Rev. Geophys.*, 48, RG4004, doi:10.1029/2010RG000345 at [66].

³ At [67]

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affected by this through the reduction of snow and ice, global sea-level rise, and extreme climate changes. This reveals that anthropogenic forcings are the most likely cause of the observed warming since the mid-20th century.⁴ In combination, anthropogenic and natural emissions, caused by eruptions like the Mayon volcano in the Philippines early this year, have contributed to the increase in global temperature.⁵ Emissions of greenhouse gases will cause further warming and changes in all components of the climatic system, controlling our effect on climate change will require sustained decreases of our emissions.⁶

There is no best estimate for equilibrium climate sensitivity because of the lack of agreement on values across assessed lines of evidence. Therefore, assessing states around the world would need to come from a form of agreement concerning the values of equilibrium climate estimates to coherently progress in positive climatic transformation.⁷ Solutions that governments have taken and should continue to take include the progression of climatic stabilization. Such actions of commitment reduce emissions of CO₂ and positively alter the global surface warming but need an extensive commitment by all states to ensure human survival.⁸

⁴ International Panel on Climate Change, fifth assessment report summary for policy maker's climate change: The physical science basis 9 (2013), available at: http://www.ipcc.ch/pdf/assessment-report/ar5/wg1/WG1AR5_SPM_FINAL.pdf. [hereinafter "IPCC Science"] at page 17.

⁵ Bullit Marquez (Associated Press), "Mayon volcano spreads lava 3 kilometres from crater", *philstar global*, (Philippines, 24 January 2018), available at: <https://www.philstar.com/headlines/2018/01/24/1780930/mayon-volcano-spreads-lava-3-kilometers-crater>.

⁶ IPCC Science, Above n 3 at page 19.

⁷ At page 16.

⁸ At page 27.

IV. QUESTION 1: UNDER WHAT CIRCUMSTANCES DOES INTERNATIONAL LAW RECOGNIZE THE RIGHTS OF RIVERS AS HAVING LEGAL PERSONALITY?

A) APPROACH – INTERNATIONAL CUSTOMARY LAW

International law does not recognize the rights of rivers as having legal personality. However, there is a pathway

B) CIRCUMSTANCES IN NEW ZEALAND

The Alliance of Small Island States looks to other indigenous cultures of the world who have lead the way in river

1. WHANGANUI RIVER REPORT 1999 (WAI167)

The Iwi of Whanganui, known as Te-atihau-nui-a-papa-rangi (Atihau), approached New Zealand's Waitangi Treaty at the time of its signing in 1840 and was therefore a subject to be protected by her Majesty the Queen of England (the Crown). Atihau claimed the Crown and Government breached and continued to breach this protection. The tribunal decided to investigate forms of redress for the Iwi and provide an advisory opinion to the Crown.¹²

2. RURUKA WHAKATUPUA – TE MANA O TE IWI O WHANGANUI 2014

Ruruku Whakatupua, a settlement between the Crown and Atihau, followed WAI167, forming a post-settlement to settle provided a redress for the historical tribunal claims in accordance with its Article 5 of UNDRIP,¹⁴ which later led to the confirmation of a legal standing for the river, in the form of legislation.¹⁵

3. TE AWA TUPUA ACT 2017 (TATA)¹⁶

⁹ United Nations Declaration on the Rights of Indigenous Peoples 2008 at Article 13: Rights of indigenous peoples to develop their cultural practices.

¹⁰ Above n 1.

¹¹ Section 4, Treaty of Waitangi Act 1975.

¹² WAI167 1999, at Appendix III, XVI Findings, 1: The river and the people.

¹³ Above n 9 at page 1: Annex which reveals the purpose and importance of the general assembly ratifying the declaration.

¹⁴ Ibid at Article 5.

¹⁵ Ruruku Whakatupa – Te Mana o Te Iwi o Whanganui.

¹⁶ Te Awa Tupua Act 2017

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“E rere kau mai te awa nui, mai i te Kahui maunga, ki Tangaroa, ko au te awa, ko te awa ko au – The river flows from the mountain to the sea, I am the river, the river is me.”¹⁷

Whanganui Iwi and the Crown signed the Tūtohu Whakatupua agreement in 2012, stipulating that the Whanganui social, cultural and economic health and wellbeing of the river.¹⁹

This agreement came to fruition through the enforcement of TATA in 2017. Following the concept of earth juris

The legal personification of the river is in the framework of two guardians: one elected by the Crown, Dame Tariana Turia, and another by Whanganui Iwi, Turama Hawira.²¹ The guardians must protect the health and wellbeing of the river, and speak on its behalf.

4. ANSWER

The international law outlined in the United Nations Declaration on the Rights of Indigenous Peoples assisted in paving the way for Ruruku Whakatipua. International law has started to recognise the rights of a river as a legal person through UNDRIP’s acknowledgment that indigenous people have the right to protect their cultural history, allowing the people of Atihau to claim that recognising the Whanganui River as a legal person is the best way to protect their culture..

¹⁷ Waitangi Tribunal, *The Whanganui River Report* (WAI167 1999) at 3.2.10.

¹⁸ Whanganui River Māori Trust Board, *Tūtohu Whakatupua* (30 August 2012).

¹⁹ Waitangi Tribunal, above n 18 at 2.5.1.

²⁰ Above n 8, s 42.

²¹ Above n 8, s18.

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VI. QUESTION 2: IS INTERNATIONAL WATER LAW ADEQUATE TO RESPOND TO THE GLOBAL CLIMATE CRISIS, WHICH CAUSES SIGNIFICANT DISRUPTION IN THE HYDROLOGIC CYCLE, BY PROVIDING A FRAMEWORK FOR PREVENTING AND RESOLVING DISPUTES AMONG STATES OVER THE PROTECTION FROM POLLUTION AND SHARING OF WATER QUANTITIES FROM TRANSBOUNDARY RIVERS, LAKES, AND AQUIFERS?

A) PRINCIPLES OF CUSTOMARY INTERNATIONAL ENVIRONMENTAL LAW

The principles of international environmental law provide a binding obligation on all States. The interpretation and approaches of international law should be consistent with the essence of some local-indigenous perspectives, as most of the people of AOSIS are the indigenous people of their islands.²² The people have suffered and continue to suffer from the environmental damage of climate change caused by other states. Therefore, it is important that the environmental damage can be attributed to a state's activities with a sufficient nexus to invoke liability. This then involves the positive action of states to fulfil their duties to conserve, preserve, protect, and use precaution for the benefit of all mankind concerning the rights and freedoms to exploit natural resources on the high seas.

1) PRECAUTION

The precautionary principle mandates States to use precaution prior to engaging in activities that can potentially cause harm to the environment, even in the absence of scientific certainty.²³ Established in principle 15 of the 1992 Rio Declaration, the precautionary approach applies States in accordance with their capabilities and their likelihood of causing serious damage to prevent environmental degradation.²⁴ It encourages states to continually use precaution in activities that may cause harm to the environment and places the evidentiary burden on the State

²² Above n 1.

²³ Bergen Ministerial Declaration, Art. 7, Mar. 20-21, 1990; Rio Declaration on Environment and Development, prin. 15, June 14, 1992, 31 I.L.M. 874, U.N. Doc. A/CONF.151/26 [hereinafter "Rio Declaration"]; United Nations Framework Convention on Climate Change, Art. 4(1)(f), July 1992, 31 I.L.M. 849 (1992).

²⁴ Principle 15, Rio Declaration 1992.

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to prove no a risk of damage.²⁵ Analysis of the principle reveals an obligation for States to avoid damaging the environment, which has already been applied in cases of State activities breaching transboundary laws.²⁶ Furthermore, the principle is also a safeguard against States who rely on scientific uncertainty as a defence to its failure to prove a risk of danger, such as emissions created by a State or its domestic entities.

2) DUTY TO COOPERATE AND NOTIFY

The duty to cooperate is established in treaty law²⁷ and customary law,²⁸ which directs States to notify and consult each other before engaging in a possible transboundary activity.²⁹ A wider approach to the duty directs States in the position of causing environmental transboundary harm to consider the interests of possible affected states.³⁰ Practically, the State proposing a potentially harmful action must notify the potentially affected State early enough to enable active participation and fulfilment. Specifically, this can be achieved through the proactive presentation of an Environmental Impact Assessment (EIA), where a state proposing the activity is required to notify affected parties and provide equal opportunity to participate in the EIA process.³¹ The International Law Commission (ILC) draft articles on the Prevention of Transboundary Harm for Hazardous Activities articulate the obligation to take adequate measures to protect other states' interests.³² Relevant to the matter of watercourses, a riparian State on an international watercourse has a duty to conduct, in good faith, consultations and negotiations with other

²⁵ Ibid.

²⁶ *U.S. v. Can*, 3 R.I.A.A. 1905, 1965 (Perm. Ct. Arb. 1938). While the Trail Smelter arbitration award refers to the “territory” of a State, subsequent references (the Stockholm Declaration, Declaration of the United Nations Conference on the Human Environment, A/Conf.48/14/Rev. 1, principle 21; the Rio Declaration, principle 2; and *Nuclear Weapons Advisory Opinion*, *supra* note 28 ¶ 29) consistently referred to “activities within their jurisdiction or control.”

²⁷ United Nations Convention on the Law of the Sea (UNCLOS), art. 197 Dec. 10, 1982, 21 I.L.M. 1261.

²⁸ *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. Rep. 14 ¶ 113 (Apr. 20)

²⁹ Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX) U.N. Doc. A/RES/29/3281(XXIX) (Dec. 12, 1974).

³⁰ *Lake Lanoux Arbitration (Fr. v. Spain)*, 24 I.L.R. 101, 130 (Arb. Trib. 1957)

³¹ Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, 1989 U.N.T.S. 309 [hereinafter *EIA Convention*].

³² Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with Commentaries Articles, 53 I.L.C 148 (2001), available at <http://legal.un.org/avl/ha/apthha/apthha.html>

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affected states, and the failure to notify affected states of potential dangers could entitle harmed States to reparations.³³

3) DUTY TO DO NO HARM

The duty to do no harm is a reputable principle of international environmental law. It requires a State to prevent, reduce, and control the risk of environmental harm on other States as a result of a State's own actions.³⁴ The application of this principle restricts a State along an international watercourse by not allowing them to use the water for the purpose of causing significant environmental harm. This is recognised as a due diligence obligation of prevention rather than a complete prohibition on transboundary harm.³⁵ Overall compliance of Article 7 of the UN Convention on the Law of Non-Navigational Uses of International Water Courses is determined by a State's reasonable conduct in terms of preventative behaviour to avoid the harm in question.³⁶

4) POLLUTER PAYS

The polluter pays principle³⁷ provides a basis of liability for environmental damage.³⁸ When a State violates its international environmental obligations, the duty obligates the State to pay reparations for the wrong committed. Therefore, the State undertaking the activity may be obligated to compensate for any environmental damage and significant harm caused.³⁹ The polluter pays principle embodies and re-enforces avoidance of possible hazardous situations by taking preventative and protective measures, and if breached, the principle purports that States

³³ Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 244, 248 (Dec. 15) (failure to warn warranted liability for subsequent damage).

³⁴ Ian Brownlie, "Principles of Public International Law", (7th ed. 2008) at pages 275-285.

³⁵ United Nations – "Convention on the Law of the Non-Navigational Uses of International Watercourses" (1997), at Article 15: Obligation not to cause significant harm.

³⁶ *Ibid.*

³⁷ Principle 16, Rio Declaration 1992.

³⁸ Stockholm Declaration of the United Nations Conference on the Human Environment, prin. 21-22, June 16, 1972, 11 I.L.M. 1416, U.N. Doc. A/CONF.48/14/Rev.1; S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 8, 1991); S.C. Res. 692, U.N. Doc. S/RES/692 (May 20, 1991); International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 9 I.L.M. 45

³⁹ Trail Smelter, at 1932-33 (the smelter plant itself was not an internationally wrongful act - providing that an operator of significant transboundary damage is liable for a hazardous activity *not* prohibited by international law).

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may have to compensate for the damage caused to any victim it serves an economic function to internalize all costs of externalities.⁴⁰

B) GLOBAL CLIMATE CRISIS – SIGNIFICANT DISRUPTION IN THE HYDROLOGIC CYCLE

1) CRISIS

Disruption of the hydrologic cycle is important to address for the continued existence of the Alliance of Small Island States because the islands' greatest and most imminent threat of danger, sea-level rise, results largely from the increased ice-melt of glaciers from the arctic.⁴¹ The mean rate of global average sea level rise was 1.7 mm per year between 1901 and 2010, 2.0 mm per year between 1971 and present, and 3.2 mm per year between 1993 and 2010.⁴² Ocean acidity, a related effect of global warming has decreased pH levels by 0.1 units. With acidity increase, the pH is projected to decrease to between 0.14 and 0.35 units this century.⁴³ This has caused a 30% increase in seawater acidity and is a problem for marine plants and animals that rely on carbonate minerals in their production of skeletal structures.⁴⁴

2) DISRUPTION – FOOD AND WATER

The islands' food production has been, and will continue to be weakened, as coral bleaching and death continue. Coral is vital to the entire ecosystem.⁴⁵ Closer to the people of AOSIS who heavily rely on the hydrologic cycle and the consumption of fish, coral depletion will lead to a decline in fish stocks thereby leading to a scarcity of food sources and an increase in fish market

⁴⁰ International Law Commission, "First Report on the Legal Regime for Allocation of Loss in Case of Transboundary Harm Arising Out of Hazardous Activities," (Mar. 21, 2003).

⁴¹ Douglas A. Kysar, "Climate Change and the International Court of Justice", public law research paper, No. 315, 4 (Yale L. Sch. 2013), *available at* <http://archive.envirocenter.yale.edu/uploads/publications/Climate%20Change%20ICJ%208.23.13.pdf>.

⁴² IPCC Science, above n 3 at page 9.

⁴³ Douglas A. Kysar, above n 8.

⁴⁴ Robert Callum, "The Ocean of Life: The Fate of Man and Sea", Penguin Books, (2012).

⁴⁵ Charles R. Taylor, "Fishing with a Bulldozer: Options for Unilateral Action by the United States Under Domestic and International Law to Halt Destructive Bottom Trawling Practices on the High Seas" (2010).

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prices.⁴⁶ Twenty to thirty percent of the species are at risk of extinction if the global average temperature exceeds 1.5-2.5°C from those recorded in 1999.⁴⁷

Coral depletion also affects the depletion of other species in the food web. With declining populations of sea species, there is a threat not only to the ocean ecosystems but also to the survival of people in AOSIS who depend on marine ecosystems for their subsistence. With rising sea-levels and destructive storms, such climate change impacts will inhibit the islands' ability to sustain themselves. Considering the sea-level rise that comes and goes on the islands, salinity in the sea-water reduces the fertility of the affected soil on the islands of Tuvalu (the "sinking island") and those of the Solomon (that aren't already lost).⁴⁸

In addition to agricultural problems, rising sea-level will affect wells and sources of fresh-water on the islands, which is often the only source of safe consumable water, thereby completely threatening the most basic human necessities for the guaranteed survival of the people of AOSIS.

C) FRAMEWORK FOR PREVENTING AND RESOLVING DISPUTES AMONG STATES OVER PROTECTION FROM POLLUTION AND SHARING OF WATER QUANTITIES FROM TRANSBOUNDARY RIVERS, LAKES, AND AQUIFERS

1) CONVENTION ON THE LAW OF NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES 1997⁴⁹ - PROTECTION

The Convention aims to ensure that the uses of international watercourses are performed in an effort to preserve and protect.⁵⁰ It broadly defines "watercourses" as "a system of surface waters" and "ground waters"⁵¹ as well as "international watercourses," which are "watercourses situated in different states."⁵² International water courses may fit into the meaning of "transboundary"

⁴⁶ Kjellrun Hiis Hauge, Belinda Cleeland & Douglas Clyde Wilson, "Fisheries Depletion and Collapse", International Risk Governance Council, (2012) available at: http://irgc.org/wp-content/uploads/2012/04/Fisheries_Depletion_full_case_study_web.pdf.

⁴⁷ Id.

⁴⁸ Id.

⁴⁹ Convention on the Law of the Non-Navigational Uses of International Watercourses 1997.

⁵⁰ Ibid at Article 1.

⁵¹ Above n 37 at Article 2 (a)

⁵² Ibid at (b)

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Furthermore, “rivers, lakes and aquifers” are water systems that can be both on surface or ground, fitting within the meaning of “watercourses” in the convention.

The Convention does not provide a framework that prevents State disputes. Nevertheless, it does provide some guidelines to resolve and settle disputes by outlining the requirement of States to seek a peaceful means of settlement through negotiation, mediation, conciliation, or submission to arbitration or the International Court of Justice. This can also be further achieved through a fact-finding commission, which enforces the obligation upon the states to provide required information and ensure all relevant matters of disputes are addressed accordingly.

2) UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (UNCLOS) - PREVENTION

States adopted UNCLOS to address the need for states to peacefully manage and conserve a true common ocean and its resources. As multi-lateral treaty, it creates a norm that is built on the principles of customary international environmental law, and because of its widespread ratification and adherence, many parts of UNCLOS are considered customary international law.⁵³

With the projected sea-level rise, ocean acidification, coral bleaching, species extinction and the disastrous effects of climate change on the oceans, it is likely that the inclusion of measures to protect ocean environments will overlap with measures to reduce climate change. The general obligations outlined in the Convention on parties are to prevent, reduce, and control marine pollution, cooperate on a global or regional basis, notify other parties of imminent or actual damage to the oceans, adopt contingency plans and provide technical assistance to developing countries in combating marine pollution.⁵⁴

D) ANSWER

The embodiment of principles such as the precautionary principle, held within Articles 192 and 194 (2) of the Rio Declaration (see A, 1), which implies that States have an obligation to refrain from activities that cause damage to other states and their environment, safeguarding the possible

⁵³ UNCLOS, above n 14, article 25.

⁵⁴ Articles: 192-206, 207-211, 212, 213-221.

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pollution from incidents or activities under one State's jurisdictions to another.⁵⁵ However, no single framework exists that prevents and protects transboundary water quantities. To effectively address the effect of the climate crisis on transboundary freshwater intercourses, international law needs to develop a framework that includes principles of protection and prevention.

VII. CONCLUSION

A) SOUL OF THE DRAFT: BRASILIA DECLARATION OF JUDGES ON WATER JUSTICE

The standing of the draft should be in a pool of consideration for those in the Alliance of Small Island States that are in high-risk situations by water, from sea-level rise to lack of fresh water. Without diving too deep into the pool of analysis of the draft, "water justice" is a term not used enough, and because of that, it requires the adoption of considering the indigenous people of the Alliance of Small Island States and their different spiritual and holistic connections to the waters at hand, which may benefit all.

B) REQUEST FOR RELIEF

In consideration of the outstanding crisis events (see IV, B, 1) and the threat to human survival, and fulfilment of basic human rights, members of the Alliance of Small Island States need further assistance in the matters of water climate change immediately. To address the problem, AOSIS requests confirmation by the United Nations that is consistent with the island members' perspectives on their water problems, like their cousins of the Pacific Islands in New Zealand. The international legal framework that recognises rivers as legal persons should consist of two representatives, one from the United Nations, and the other from AOSIS. This would also allow for the creation of a dispute resolution framework for transboundary river disputes, which may hold as an example for lakes, aquifers, and more.

⁵⁵ Lawrence A. Kogan, "What Goes Around Comes Around: How UNCLOS Ratification Will Herald Europe's Precautionary Principle as U.S. Law" (2009).

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