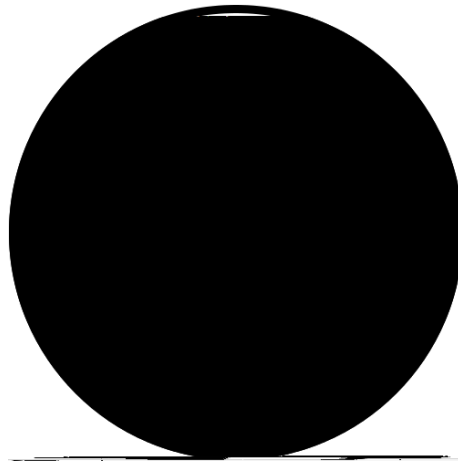


Memorial on Behalf of the European Union (EU)

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 EUROPEAN UNION
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
MARCH 2018

AGENT FOR THE EUROPEAN UNION:

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II. STATEMENT OF JURISDICTION

The United Nations General Assembly adopted resolution A/RES/72/Water, requesting 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, the European Union submits this memorial in answer to the questions submitted.

III. PROBLEM PRESENTED

Contemporary management of freshwater rights, and ensuing challenges are complex, interconnected and constantly changing. Sharing of water resources, water scarcity, water pollution, the risk of floods and increased risks caused by the climate crisis coupled with financial difficulties and other externalities all complicate both regional and international policy approaches to water resources.¹

The existence of these complex and interconnected problems calls for a common strategy to carry out effective management of freshwater resources in light of the negative impacts of the climate crisis. Recent news, literature and research all lead to the same conclusion: water-related risks affect economic, social, environmental security and citizen well-being without concern for regional and national borders.² No region is without affliction, and no region is without fault. Furthermore, all societies are dependent upon readily available freshwater for domestic needs, cultural practices, food production, livelihoods, power generation and industry.³

This is true for most of the European Union and its partners, who participate in water initiatives like the European Union Water Initiative (EUWI).⁴ The European region benefits from an

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the increase in the frequency of extreme weather events to outdated patterns of food production and insufficient wastewater treatment capacities.⁵

conflict resolution as potentially adequate responses to the global climate crisis.

⁵ Idem, 2015.

IV. IN CONTEXT: EUROPEAN UNION

The UNECE Convention on the *Protection and Use of Transboundary Watercourses and International Lakes* aims to protect and ensure the quantity, quality and sustainable use of transboundary water resources by facilitating cooperation, beyond that of European Union or ECE Member States.⁶ Initially negotiated as a regional instrument, it turned into a universally available legal framework for transboundary water cooperation on March 1, 2016. Since then, countries outside the ECE region have been able to accede to the Convention.⁷

At the European Union level, water Directives such as the *Water Framework Directive* or other European instruments such as

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connected with the river.

III. The Philosophy behind the Legal Personality of Rivers

The philosophical notion for giving rivers legal standing, comes from the Whanganui Iwi surrounding environments. Namely, to the river is characterized by their belief that they are interconnected with the river I am the river. The river is me. ¹⁹ In various parts of the world, elements in nature are viewed differently; thus, the extent to which this kind of legal philosophy can be extended in European or International frameworks will vary greatly from region to region. In the European context, the law views rivers simply as objects over which one can claim and enforce property rights. ^{2015QBT1 0 0 1 132.24 298.58} This viewpoint, shared by most of the population, could prove difficult to align with the proposal granting rivers legal personality.

Approaches to legal standing of natural elements, similar to those of New Zealand Whanganui Iwi, have been developing in different parts of the world. For instance, in the United States as early as 1972 Justice Douglas wrote a dissenting judgement for the case of *Sierra Club v. Morton*,²¹ in which he asserted that natural resources ought to have standing to sue for their own protection.

Furthermore, the Ecuadorian government has added a new Chapter
Constitutive, in order to

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Derechos de la Madre Tierra The Law of Mother Earth.²³ This was the first piece of legislation to grant the planet absolute protection against those who would seek to exploit or destroy

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environmental human rights.

At the EU level, the Charter of Fundamental Rights of the European Union codifies a
improvement of the quality of the environment.²⁸
Even though the European Convention on Human Rights does not enshrine a specific right to a
healthy environment, the European Court of Human Rights has been called upon to develop its
case law on environmental matters.²⁹ This case-law development is hugely important because the
exercise of certain Convention rights could be undermined by the existence of harm to the
environment and exposure to environmental risks.³⁰ Case law in this area includes *Guerra and
Others v. Italy*,³¹ *McGinley et Egan v. the United Kingdom*,³² and *Vilnes and Others v. Norway
and others*.³³

Environmental protection in the EU is further evolved by
regulatory competence in the creation and maintenance of a common market, over which it can
legislate on matters of environmental maintenance.³⁴ It is through this respect of human rights
values that the European Union sees a movement towards granting rivers *locus standi* as a
beneficial and necessary step in minimizing the climate crisis in some regions of the world. The
current environmental protections and benefits, which have been catered for in environmental
legal regimes, are simply not enough to ensure the level of environmental protection called for
by the United Nations Framework Convention on Climate Change (UNFCCC).³⁵ The granting of

²⁸ Article 37 of the Charter of Fundamental Rights of the European Union, [2010] OJ C 83/389

²⁹

(2014).

³⁰ *Idem*, 2014.

³¹ *Guerra and Others v. Italy*, ECHR 1998.

³² *McGinley et Egan v. the United Kingdom*, ECHR 1998.

³³ *Vilnes and Others v. Norway and others*, ECtHR 2013.

³⁴ *Idem*, 2014.

³⁵ UNFCCC, United Nations Framework Convention on Climate Change, 2004.

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legal personality to rivers would reaffirm the principles in Article 3 of the convention.³⁶ This article emphasizes the precautionary principle and reaffirms the no-harm principle which has become, through its inclusion in ICJ case law and international declarations, a core part of the general principles of international law and customary international law.³⁷ Looking into the possibility of giving rivers in certain regions of the world legal standing, would grant a much greater legal right to protection for those specific rivers, their health and the maintenance of their resources for future generations.

The European Union encourages further constructive debate with representatives of fellow world regions, and legislative propositions with clear aims and definitions on which entities would represent the rights of rivers in a legal setting.

³⁶ UNFCCC, United Nations Framework Convention on Climate Change, 2004, Article 3.

³⁷ Yale Center for Environmental Law and Policy, Climate Change and the International Court of Justice. *Yale Law School*, (2012), 31.

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forth liability claims in transboundary issues.³⁹ There is currently no international framework in place that harmonizes settlement disputes in these areas.

I. Water Dispute Resolution and Prevention at the European Level

Due to many water-conservation and dispute resolution initiatives of European organizations such as the European Union Water Initiative (EUWI), taking place in non-European regions of the world, one could assume that the European Union has resolved many of its own water-related issues.

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I. A solution in the International Legal Framework

In the above identified areas where the legal framework of the European Union is limited, the international legal framework can offer support. A significant number of liability sources are available at the international level. These include the transboundary harm principle⁴⁷ and international human rights law.⁴⁸ To accompany these sources of liability (which are also to an extent available in EU law), international law offers several less-apparent liability claim sources in other areas. For instance, a claim can be made that rising sea levels can implicate issues of state survival, which involve various legal doctrines that can be seen as going beyond the principle of transboundary harm.⁴⁹ Another claim of climate crisis liability might be grounded in the unjust enrichment principle, which finds a party liable in the case that one party became enriched to the detriment of another party because of the same act.⁵⁰ The final example of an alternative liability claim which can be made in an environmental case is that the processes of climate crises trigger vast refugee flows, under which further international legal obligations may be implicated.⁵¹

All these liability claims can be argued for under international law; however, no concise framework for preventing and resolving water sharing and protection disputes among states, on the basis of some of these principles, exists. The European Union encourages the creation of such a legal instrument of international environmental customary law, to improve harmonization

⁴⁷

principle under customary international law.

⁴⁸ Yale Center for Environmental Law and Policy, (2012), 40.

⁴⁹ *Idem*, 41.

⁵⁰ *Idem*, 41.

⁵¹ *Idem*, 41.

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in the global issues of protection, pollution and sharing of water quantities from transboundary rivers, lakes and aquifers.

II. A solution at the Local and Community Level

The Final Report of the 7th World Water Forum has outlined that under the impetus of regional organizations such as the European Commission (EC) and UNECE, the European management.⁵² At the pan-European level, forty parties have ratified the UNECE Water Convention and therefore have legal obligations to cooperate and jointly manage transboundary resources.⁵³ We encourage the further ratification of these instruments and activation of states at the international and regional level; however, this is not where we believe all the major solutions to transboundary water conflicts will take place.

European Water Law is in transition,⁵⁴ and major changes have been brought about through directives like the Water Framework Directive (WFD). These changes include new approaches, such as the river basin approach (from the Helsinki Convention), which focuses on ecology, the sustainable use of water, more attention to the ecological protection of the aquatic environment, the relationship with other policy fields like nature, product policy, agriculture, as well as a greater role for financial or economic instruments and public participation.⁵⁵ Despite

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limited the success of the new approach in the WFD are.⁵⁶

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stakeholders