# Ko au te Awa, ko te Awa ko au: Incorporating Rights of Nature in International Freshwater Law

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*This article will examine how assigning legal rights to nature may help to improve the global management framework for transboundary freshwater resources.[1] This could help to address the global freshwater crisis. The article studies national-level rights of nature developments in New Zealand, Ecuador and the United States, and uses this as a basis to explore how language and principles could be incorporated into international law. Ideas proposed include amendments to the existing international freshwater treaty framework, and adoption of a new universal declaration.*

## 1. INTRODUCTION

We are facing a freshwater crisis at both a national and an international level — with impacts for human life and livelihoods, as well as global biodiversity.[2] The

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1 The title of this article, "Ko au te Awa, ko te Awa ko au" translates "I am the River and the River is me"; Te Awa Tupua (Whanganui River Settlement) Act 2017, s 13(c).

2 See, for example, United Nations Educational, Scientific and Cultural Organization [UNESCO] *The United Nations World Water Development Report 2018: Nature-based Solutions for Water* (UNESCO, Paris, 2018) [*UN World Water Development Report*] <https://www.unwater.org/publications/world-water-development-report-2018/>; Ministry for the Environment and Stats NZ *Our freshwater 2020* (ME 1490, Ministry for the Environment and Stats NZ, Wellington, April 2020) [MfE *Our freshwater 2020*] <https://www.mfe.govt.nz/publications/environmental-reporting/our-freshwater-2020>.

extent of this crisis indicates that the current global freshwater management regimes are not working. New approaches are required to address widespread environmental degradation, and to combat risks for global populations. One such approach that has gained momentum at a domestic level in a number of jurisdictions is the idea of assigning legal rights to natural resources, in particular freshwater resources. This includes, but is not limited to, granting legal personality to these resources.

This article will examine how assigning legal rights to nature may help to improve the global management framework for freshwater resources. It will firstly summarise the current state of the world's freshwater resources, including the implications of these failed management regimes on global health and biodiversity. It will then look at the cultural and jurisprudential underpinnings of a right of nature. It will argue that the spiritual and philosophical importance of water has been acknowledged by different cultures and communities throughout history. While most strongly associated with indigenous communities, early western societies also attached spiritual importance to water.

The article will examine how national jurisdictions have already taken novel steps to address domestic freshwater resource management by granting legal rights to nature. This includes the concept of legal personality, as seen in New Zealand, India and Bangladesh; constitutional provisions, seen in Ecuador and Bolivia; and subnational developments, most notably seen in the United States. These domestic developments have had varied practical, symbolic and catalytic consequences. However, we are seeing increasing instances of courts across the globe upholding rights of nature.

The article will use these developments to analyse how a "rights of nature" framework might be introduced at an international level. This will involve firstly examining the current global freshwater frameworks: the UN Watercourses Convention[3] and the UNECE Convention,[4] and associated customary law in this area. It will then look at the idea of legal personality in international law; an area of complexity given the focus on states as international actors. Using this framework, it will suggest how the current multilateral and bilateral treaty system could be amended to give rights to nature. This will include possible additions to the two key existing treaties in this area, as well as the idea of a new "Universal Declaration of the Rights of Nature".

The article concludes that, while there are legal and political hurdles that would need to be overcome for nature to be given rights in international law,

3 Convention on the Law of the Non-Navigational Uses of International Watercourses 2999 UNTS (opened for signature 21 May 1997, entered into force 14 September 2014).

4 Convention on the Protection and Use of Transboundary Watercourses and International Lakes 1936 UNTS 269 (opened for signature 17 March 1992, entered into force 6 October 1996).

there are also clear avenues for legal evolution. Each new development in law seems "unthinkable" at the time of its inception.[5] Moreover, the rapid increase in recognition of rights of nature at the domestic level suggests that there is increasing political appetite among states for action.[6] Finally, the extent of the freshwater crisis, and associated risks, means that the status quo of freshwater management is no longer tenable.

## 2. WATER, WATER EVERYWHERE, BUT NOT A DROP TO DRINK[7]

We are facing a freshwater crisis, both at the national and the international level.[8] Though renewable, freshwater is a finite resource. The global demand for water has been increasing at a rate of about 1 per cent per year over the past decades as a function of population growth, economic development and changing consumption patterns, and it will continue to grow significantly over the foreseeable future.[9] Freshwater systems provide human drinking water essential for life, and support human food and energy production, waste disposal, transportation and recreation.[10] The scientific community has written extensively on this topic, warning that "[a] world with diminished freshwaters will impoverish many aspects of human welfare", and arguing that the main obstacle to better ecological protection is political will.[11]

Indeed, the latest scientific reports indicate the freshwater crisis is already upon us. The World Economic Forum's annual report in 2016 predicted the global water crisis to be the biggest threat to the planet.[12] Over half of the world's largest cities, and almost five billion people, are already experiencing

5 Christopher Stone "Should Trees Have Standing? — Toward Legal Rights for Natural Objects" (1972) 45 S Cal L Rev 450 at 490.

6 See, for example, Carey L Biron "'Dramatic' global rise in laws defending rights of nature" (Reuters, 1 October 2020) <https://nationalpost.com/pmn/news-pmn/crime-pmn/dramatic-global-rise-in-laws-defending-rights-of-nature>.

7 With acknowledgement to Samuel Taylor Coleridge *The Rime of the Ancient Mariner* <https://www.gutenberg.org/ebooks/151> (Coleridge's oft misquoted line reading: "Water, water everywhere, nor any drop to drink").

8 See generally *UN World Water Development Report*, above n 2; MfE *Our freshwater 2020*, above n 2.

9 *UN World Water Development Report*, above n 2.

10 James S Albert and others "Scientists' warning to humanity on the freshwater biodiversity crisis" (2020) 50(1) Ambio 85.

11 Albert and others, above n 10, at 91.

12 World Economic Forum *The Global Risks Report 2016* (World Economic Forum, Geneva, 2016) <http://www3.weforum.org/docs/GRR/WEF_GRR16.pdf>.

water scarcity.[13] Two-thirds of the population experience seasonal or annual water stress.[14] This situation will be exacerbated by population growth, climate change and human activities.[15] Many countries — both developed and developing — are already struggling to meet the water needs of their population. This increases the likelihood of civil unrest and conflict.[16] This is a problem caused by the global community's actions, or, more specifically, failure to take necessary preventative action. There is a clear "human fingerprint" on the changes to global freshwater.[17] As noted by Barbier, this global water crisis "is predominantly a crisis of inadequate and poor water management".[18]

The failure to sustainably manage global freshwater also has severe implications for biodiversity. Although rivers and lakes (excluding wetlands) only cover 1 per cent of the Earth's surface, these ecosystems sustain a disproportionate amount of biodiversity: approximately one-third of all vertebrates and half of fish species.[19] Furthermore, despite the fact that freshwater vertebrates are declining faster than land and marine vertebrates — and are some of the most threatened ecosystems globally — freshwater ecosystems are often comparatively neglected in global management regimes.[20] The latest Freshwater Living Planet Index, produced by the World Wildlife Fund in 2018, showed an 83 per cent reduction in freshwater biodiversity since 1970,[21] with a notable increase in the rate of deterioration since 2006.[22]

In addition to being a domestic issue, freshwater management crosses state borders and requires international cooperation. An estimated 264 transboundary river basins cover half of the Earth's surface area, supplying over 60 per cent

13 Fred Boltz "How do we prevent today's water crises becoming tomorrow's catastrophe?" (23 March 2017) World Economic Forum <https://www.weforum.org/agenda/2017/03/building-freshwater-resilience-to-anticipate-and-address-water-crises/>.

14 Boltz, above n 13.

15 M Rodell and others "Emerging trends in global freshwater availability" (2018) 557 Nature 651.

16 Ed Barbier *The Water Paradox: Overcoming the Global Crisis in Water Management* (Yale University Press, Yale, 2019).

17 Rodell, above n 15, at 652.

18 Barbier, above n 16, at 65.

19 Graham Lawton "The ones that couldn't get away" (3 October 2020) 248(3302) New Scientist 41 at 42.

20 Lawton, above n 19, at 42.

21 M Grooten and REA Almond (eds) *Living Planet Report 2018: Aiming higher* (WWF, Gland, Switzerland, 2018).

22 A Schmidt-Kloiber and others "The Freshwater Information Platform: a global online network providing data, tools and resources for science and policy support" (2019) 838 Hydrobiologia 1.

of global freshwater.[23] This human-induced deterioration in freshwater quality and scarcity of the resource is increasing disputes between states over the management of transboundary freshwater resources.[24] Twenty-one states are situated entirely within international basins, and 145 have an international river basin as part of their territory.[25] Human life, prosperity and global biodiversity are at risk if these resources continue to be inadequately managed.

## 3. NATURE-CENTRIC VS ANTHROPOCENTRIC WORLD VIEW

Part 2 of this article has highlighted the pressing need to rethink water management in the face of a global freshwater crisis. This part will examine how anthropocentric approaches to resource management are a relatively new phenomenon. Furthermore, it will argue that a rights of nature approach is consistent with a diverse range of moral and jurisprudential beliefs.

Different cultures have, at different times, held varied beliefs on the cultural and legal status of nature. These beliefs have included different philosophies about the way in which water should be managed. While western culture is traditionally deemed more anthropocentric in its approach, this is a relatively recent development. With the possible exception of China, most early water regulations included reference to the religious character of water, either as a gift, a reward, or punishment by nature or the gods.[26]

Ancient Egyptian civilisation, for example, believed that water belonged to the Pharaoh — a living god on Earth whose authority was administered by human representatives.[27] The Babylonian Hammurabi code reflected a belief that water was the source of life, all blessings and the element of creation. In the Old Testament, creation occurs through water as God's medium. For example, in the great flood God exercises power over humans via water.[28] In Ancient Greece, water is identified as the most important of the four essential elements.[29] This idea was progressively eroded from the enlightenment period,

23 Remy Kinna "International Water Law in Multi-scale Governance of Shared Waters in the Anthropocene: Towards Cooperation, not 'Water Wars'" in M Lim (ed) *Charting Environmental Law Futures in the Anthropocene* (Springer, Singapore, 2019) at 107.

24 Kinna, above n 23, at 107.

25 At 108.

26 Dante Caponera and Marcella Nanni *Principles of Water Law and Administration: National and International* (3rd ed, Routledge, London, 2019) at 14.

27 At 16–17.

28 Joe Williams "He Pukenga Wai" (speech delivered at the Resource Management Law Association's Annual Salmon Lecture on 12 September 2019) at 3.

29 At 3.

with 18th-century western thinkers such as Locke promoting the view that humans have a moral right to control and appropriate natural resources.[30]

Meanwhile, indigenous communities around the world have maintained the view that nature has elevated status or rights. Māori culture recognises the idea of kinship or "whanaungatanga" between people and the environment.[31] The gods of creation are Ranginui, the earth father, and Papatūānuku, the earth mother.[32] By extension, natural features such as rivers and mountains are also viewed as spiritual ancestors, or tūpuna, with intrinsic rights.[33] Andean culture in South America also recognises the concept of "Pachamama", or Mother Earth, which encompasses both physical and spiritual aspects of nature.[34]

This belief of indigenous communities has, traditionally, conflicted with traditional western legal systems. As noted by James Morris and Jacinta Ruru, while governments around the world are increasingly engaging with their respective indigenous peoples, "the English common law derived legal system continues to restrict Indigenous peoples from achieving their full aspirations".[35] Thus, as will be seen, domestic developments giving rights to nature often have a strong indigenous stakeholder element as part of their political context.

In addition to acknowledging historical and indigenous perspectives on natural resource management, the current status of the freshwater crisis gives an ecological rationale for granting legal rights to nature. In 1972, Christopher Stone promoted the idea of nature having legal rights.[36] Stone argued that legal personality would have four relevant implications for nature: to have standing in its own right; recognition of its own injuries; to be a beneficiary in its own right; and to have rights in substance.[37] Furthermore, Stone argued that legal rights should be given to natural resources to ensure the protection of those resources.[38] The granting of legal rights to nature, including through legal personality, would ensure emphasis is put on the impact of any damage to the natural resource itself. It would also ensure that remedies would apply to the

30 At 3–5. See also John Locke *Second Treatise of Government* (1690) in Crawford Brough MacPherson (ed) *Second Treatise of Government* (Hackett Publishing Co, Indianapolis, 1980) at 32.
31 Williams, above n 28, at 7–8.
32 Te Awa Tupua Act, above n 1.
33 James DK Morris and Jacinta Ruru "Giving Voice to Rivers: Legal Personality as a Vehicle for Recognising Indigenous Peoples' Relationships to Water?" (2010) 14(2) AILR 49 at 28.
34 Craig Kauffman and Pamela Martin "Constructing Rights of Nature Norms in the US, Ecuador and New Zealand" (2018) 18(4) Global Environmental Politics 43 at 55.
35 Morris and Ruru, above n 33, at 49.
36 Stone, above n 5.
37 Morris and Ruru, above n 33, at 54–55.
38 Stone, above n 5, at 490.

resource itself, rather than to an affected party's economic losses.[39] This would help to make sure any financial compensation is used for the well-being or restoration of the natural resource.[40]

A key part of Stone's argument, which has been used as the basis for many rights of nature arguments in the United States, is the comparison with corporate legal personality. Stone argued that if a corporation, as a non-human being, could have legal personality, so too could a natural object.[41] Indeed, many early United States rights of nature advocacy raised direct opposition to corporate legal rights.[42]

In examining the development of legal rights of nature it is necessary to distinguish this idea from several other ideas related to freshwater resource management: the concept of a human right to water, and the concept of an ecosystem approach to water management. The ecosystem approach is a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way.[43] While this has parallels with the idea of giving a legal right to nature, the two concepts are distinct. Current ideology around water management, which stems from Roman and Egyptian approaches, often focuses on the individual right to water.[44] This is sometimes linked to the idea of a human right to water — as recognised by the United Nations.[45] This article argues that keeping the focus on water itself may prove a more effective way of addressing water management issues.

## 4. DEVELOPMENTS AT THE NATIONAL LEVEL

Against the backdrop of global water scarcity, and reflecting traditional beliefs on the value of water, we are seeing new mechanisms to protect freshwater resources emerge at the national level. Assigning legal personhood is one such example. However, while these have all occurred recently, as noted by Catherine Iorns Magallanes, each example "is a product of historical circumstance and

39 Morris and Ruru, above n 33, at 50, quoting Stone, above n 5.
40 Morris and Ruru, above n 33, at 50, quoting Stone, above n 5.
41 Stone, above n 5, at 464.
42 Gwendolyn Gordon "Environmental Personhood" (2018) 43 Colum J Envtl L 49 at 59.
43 See Convention on Biological Diversity "Ecosystem Approach" (24 August 2020) <https://www.cbd.int/ecosystem/>.
44 Hon Justice Melissa Perry "The Duality of Water: Conflict or Cooperation" (Kirby Lecture in International Law, 2008).
45 On 28 July 2010, through Resolution 64/292, the United Nations General Assembly explicitly recognised the human right to water and sanitation and acknowledged that clean drinking water and sanitation are essential to the realisation of all human rights.

practical realities more than of legal principle".[46] Magallanes argues that, while legal personality may become part of a rights of nature approach, it is not "synonymous" with rights of nature.[47] This article will follow the argument that legal personality does, in fact, form parts of a rights of nature approach to the protection of freshwater resources.[48]

### 4.1 New Zealand

New Zealand enjoys a "clean, green" image on an international scale. However, it is widely acknowledged that the rapid rise in high-intensity dairy farming, combined with patchy resource management, has led to concern about the state of its rivers, lakes and groundwater.[49]

In 2017, New Zealand became the first country to grant legal personhood to freshwater through the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (the Act).[50] The Act states that the Whanganui River is an "indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements".[51] The Act further declares that the river "has all the rights, powers, duties, and liabilities of a legal person".[52] In terms of implementation, an authority called Te Pou Tupua is established as "the human face of Te Awa Tupua", and has guardianship, or kaitiaki, of the river.[53] This authority has a mixture of Crown and iwi representation.

The Te Awa Tupua Act follows historic claims by local Whanganui iwi for property rights in the river.[54] It therefore must be seen in the context of New Zealand's Treaty of Waitangi settlements, which continue "to provide a catalyst for the evolution of New Zealand law".[55]

46 Catherine J Iorns Magallanes "From Rights to Responsibilities: Using Legal Personhood and Guardianship for Rivers" in B Martin, L Te Aho and M Humphries-Kil (eds) (2018) *ResponsAbility: Law and Governance for Living Well with the Earth* (Routledge, London & New York, 2019) 216 at 216.

47 At 216.

48 See, for example, Mari Margil "The Standing of Trees: Why Nature Needs Legal Rights" (2017) 34(2) World Policy Journal 8 at 9–10.

49 See MfE *Our freshwater 2020*, above n 2.

50 Te Awa Tupua Act, above n 1.

51 Section 12.

52 Section 14(1).

53 Section 18(2).

54 Waitangi Tribunal *The Whanganui River Report* (Wai 167, 1999) at xi.

55 Trevor Daya-Winterbottom "Personality and Representation in Environmental Law" [2018] NZLJ 130.

### 4.2 Ecuador

Like New Zealand, Ecuador's domestic freshwater crisis (in this instance the state of the Amazon River) and its indigenous communities' view of nature were key factors leading to the granting of a right to nature in its Constitution. Ecuador amended its Constitution to give a right to nature in 2008, following a national referendum. The amended Constitution states that "nature or Pachamama, where life is reproduced and exists, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, function and evolutionary processes".[56] The Constitution further gives nature the right to be "restored" to its original state if damaged, in addition to the right of compensation for affected people or communities.[57] This creates a form of nature-centric compensation. In terms of enforcement, the Ecuadorian Constitution gives all persons and communities the ability to enforce rights on behalf of nature through Ecuadorian authorities and demands "the observance of the rights of the natural environment before public bodies".[58] Ecuador's approach thus gives a positive right to nature to be restored, regenerated and respected, and for this to be enforced by everyone.[59]

Ecuador's legal developments came against a specific political and cultural backdrop. Litigation since the 1990s in Ecuador centred on pollution of the Amazon River by multinational companies.[60] Both environmental NGOs and indigenous groups formed part of a class action, and argued that the Andean view of nature (Pachamama) as having its own rights should be recognised in Ecuadorian law. This had significant influence on the eventual amendments to the Constitution in 2007.[61]

### 4.3 United States

Christopher Stone's aforementioned article ("Why Trees Should Have Standing") was provoked by a specific resource claim in a Californian court, and

56 Constitution Politica de la Republica del Ecuador, art 71, translated in *Rights of Nature Articles in Ecuador's Constitution* <https://therightsofnature.org/wpcontent/uploads/pdfs/Rights-for-Nature-Articles-in-Ecuadors-Constitution.pdf>.

57 Article 72.

58 Article 72.

59 Mihnea Tanasescu "Rivers Get Human Rights: They Can Sue to Protect Themselves" (19 June 2017) *The Conversation* <https://www.scientificamerican.com/article/rivers-get-human-rights-they-can-sue-to-protect-themselves/>.

60 Kauffman and Martin, above n 34, at 55.

61 At 55.

"was aimed at persuading the judges in this case".[62] It was, therefore, "clearly situated within the United States legal framework and concept of rights and legal standing".[63] The discussion of these issues in the United States has been going on for some time. As noted, this is often in direct opposition to the legal rights bestowed on corporations. Developments in the United States have largely been at the subnational level, with a focus on the drafting of ordinances that include rights of nature, and enable citizens to exercise rights on nature's behalf.[64] Pittsburgh, for example, has passed an ordinance aimed at preventing fracking, which states "natural communities and ecosystems, including, but not limited to, wetlands, streams, rivers and aquifers and other water systems, possess inalienable and fundamental rights to exist and flourish within the city of Pittsburgh".[65] The city of Santa Monica in California has passed a similar ordinance. In 2019, citizens in Toledo, Ohio, voted on a "Lake Erie Bill of Rights", giving the lake the right to "exist, flourish and naturally evolve". This was the first rights of nature law for a specific ecosystem and allowed citizens to file lawsuits on behalf of the lake. However, following a lawsuit against the city, a federal judge ruled the legislation invalid in February 2020, and an appeal was lost in March 2020.

In addition to these examples, there have been increasing instances of countries adopting rights of nature provisions across the globe — from Brazil to Australia.[66] This approach is gaining momentum in a number of jurisdictions.

### 4.4 Effectiveness of National-level Measures

It cannot be argued that, in any of these jurisdictions, granting some form of legal right to nature was by any means a complete solution to the problem at hand. There are no easy answers to environmental protection and each advancement has not been without its setbacks. As noted, subnational developments around rights of nature, such as the Lake Erie Bill of Rights, have been overturned by US federal courts. Ecuadorian judicial decisions ruling in favour of nature have still not been implemented. New Zealand water consents are still granted by the government as part of its Resource Management Act

62 Magallanes, above n 46, quoting Stone, above n 5 — the case was *Sierra Club v Morton* 405 US 727 (1972).

63 Magallanes, above n 46, at 217.

64 At 218.

65 City of Pittsburgh, The Pittsburgh Code, Title Six, Art 1, Ch 618.3(b) <http://files.harmonywithnatureun.org/uploads/upload673.pdf>.

66 Community Environmental Legal Defence Fund "Rights of Nature Timeline" <https://celdf.org/advancing-community-rights/rights-of-nature/rights-nature-timeline/>.

1991 [RMA]. However, there have been both practical and precedential consequences of these scenarios.

In New Zealand, there has not yet been any litigation to test the scope of the Te Awa Tupua Act and what this would mean in practice. However, a surface-reading of the Act indicates that consents would still be given under the RMA, although statutory decision-makers are required to have regard to the states of the river when exercising their functions, powers, and duties.[67] Subsequent to the Act, the concept of "Te Mana o Te Wai", closely linked to legal personality, has been adopted in the National Freshwater Policy Statement and in the establishment of a new government freshwater regulator.[68]

In Ecuador, the Court upheld the rights of nature in the case of the Vilcamba River, where it was ruled that the provincial government's actions in dumping rocks and excavation materials into the river as part of a road-widening project violated nature's rights under art 72 of the Constitution.[69] As a result, the provincial government was ordered to "prevent any future such dumping and submit a plan to remedy the existing damage".[70] In the United States, a state was pressured to enforce local rights of nature for the first time in 2020, in Pennsylvania.[71]

These rights, while not a silver bullet, show a remarkable evolution in the law: an alternative paradigm centred on respect for the Earth and its natural systems has been inserted into mainstream legal and political systems.[72]

## 5. THE EXISTING INTERNATIONAL FRAMEWORK: NATURE WITHOUT RIGHTS

### 5.1 The Existing Water Management Treaties

Part 4 of this article demonstrated how certain national-level jurisdictions have taken steps to address their domestic freshwater management issues through the granting of legal rights to freshwater resources. While this has been more successful in some instances than others, it nevertheless presents a novel way

67 Te Awa Tupua Act, sch 2.

68 Ministry for the Environment "National Policy Statement for Freshwater Management" (August 2020); Taumata Arowai — the Water Services Regulator Act 2020.

69 Magallanes, above n 46, at 220.

70 As cited in Joel Colon-Rios "The Rights to Nature and the New Latin American Constitutionalism" (2015) 13 NJPIL 107 at 111 — to note that it is unclear whether the Court's orders have been fully complied with.

71 "Rights of Nature Timeline", above n 66.

72 Magallanes, above n 46, at 235.

to address the global freshwater crisis. However, this rights of nature approach has not yet been seen in instances of transboundary water management, where freshwater crosses international boundaries.

As noted, a large number of the world's rivers cross international boundaries. Yet, the legal framework for the management of international freshwater resources is fragmented.[73] There are a range of bilateral and regional treaties in place, but these have inconsistent coverage over different global regions: in total, only 158 of the world's 268 transboundary river basins are accounted for in international treaties.[74] A number of international treaties include reference to some kind of freshwater management.[75] However, the two key international treaties this article will consider are the UN Watercourses Convention and the UNECE Convention.

### *5.1.1 The United Nations Watercourses Convention*

The Convention on the Law of the Non-Navigational Uses of International Watercourses (UN Watercourses Convention or UNWC) is the primary international treaty for freshwater management. Yet, it currently only has 37 parties (out of 193 UN member states). Its provisions, like most international treaties, focus on the rights of states, and thus take a state-centric view of resource management. It focuses on the principle of "equitable and reasonable utilization" of international watercourses, and states that parties shall aim for "optimal and sustainable" use of, and "benefits [from]", the resource.[76] Parties must take "into account the interests of the watercourse States concerned" — again focusing on the state rather than the resource.[77]

Article 24 of the UNWC requires watercourse states to enter into consultations concerning the management of an international watercourse, including planning the sustainable development and "[o]therwise promoting the rational and optimal utilization, protection and control of the watercourse".[78] Again, while the principle of sustainable management and protection of the

73 See "The Legal Architecture for Transboundary Waters" from UN Watercourses Convention Online User's Guide <https://www.unwatercoursesconvention.org/importance/the-legal-architecture-for-transboundary-waters/>.

74 "The Legal Architecture for Transboundary Waters", above n 73; these include the Ramsar Treaty which promotes protection of wetlands, the Convention on Biological Diversity, and the United Nations Framework Convention on Climate Change (UNFCCC).

75 "The Legal Architecture for Transboundary Waters", above n 73.

76 UN Watercourses Convention [UNWC], art 5(1).

77 Article 5(1).

78 Article 24(2)(b).

resource is included, this sits alongside "optimal utilization" and "control". These concepts are potentially contradictory, and reflect an anthropocentric view of human superiority over natural resources.

The UNWC lists a number of factors that are to be balanced in determining what constitutes equitable and reasonable utilisation.[79] While this includes some environmental considerations (art 6(1)(a) and (f)), these considerations must be balanced against factors such as the social and economic demand of the watercourse states, and the population dependent on the watercourse in each state.[80] Thus, environmental concerns do not take precedence over economic considerations.

The strongest provision to protect the environment is perhaps the requirement to protect and preserve ecosystems, under art 20.[81] The Convention also includes an obligation not to cause significant harm, although this is focused on harm to other watercourse states rather than harm to the actual watercourse.[82] Hence, while the Convention is not devoid of environmental considerations, it is clear that water is not given any elevated status or superior rights akin to the domestic developments we have seen in part 4 of this article.

Parts of the UNWC have also been accepted as customary international law.[83] In two cases concerning transboundary water disputes — the *Gabcíkovo-Nagymaros* case and the *Pulp Mills on the River Uruguay (Argentina v Uruguay)* case — the International Court of Justice (ICJ) stated that the UNWC is a reflection of the status of international water law.[84] This was despite none of the parties in these disputes having ratified the UNWC, and the Convention only having been in force for a short time. In *Gabcíkovo-Nagymaros*, the UNWC had only been adopted four months earlier, had no signatories, and had not entered into force.[85] The Court in this case arguably "leapfrogged" in order to efficiently manage a transboundary water dispute.[86]

79 Article 6.
80 Article 6(1)(b) and (c).
81 Article 20; see definition of ecosystems, above n 43.
82 Article 7(1).
83 Customary international law requires both state practice and *opinio juris* — the belief that the aforementioned state practice is done on the basis of a perceived legal obligation: see James Crawford *Brownlie's Principles of Public International Law* (9th ed, Oxford University Press, Oxford, 2019) at 22–25.
84 See *Gabcíkovo-Nagymaros Project (Hungary v Slovakia) (Merits)* [1997] ICJ Rep 7; *Pulp Mills on the River Uruguay* (*Argentina v Uruguay*) [2010] ICJ Rep 14.
85 Eyal Benvenisti *Sharing Transboundary Resources* (Cambridge University Press, Cambridge, 2002) at 201.
86 At 202–203.

### *5.1.2 The UNECE Convention on the Protection and use of Transboundary Watercourses and International Lakes*

The other major convention in this area is the United Nations Economic Commission for Europe (UNECE) Convention on the Protection and use of Transboundary Watercourses and International Lakes (the UNECE Convention).[87] The UNECE Convention, despite being European, currently has more members than the UNWC (44 compared to the UNWC's 37), including non-European members. It also has comparatively robust environmental provisions, with parties obligated to take measures "with the aim of ecologically sound and rational water management, conservation of water resources and environmental protection"[88] and "[t]o ensure conservation and, where necessary, restoration of ecosystems".[89] Unlike the UNWC, the UNECE Convention includes the precautionary principle, where measures must be taken to limit transboundary impact even if relevant science is not completely proven, which strengthens the balance of environmental protection.[90]

Another key difference between the UNECE Convention and the UNWC is that the UNECE Convention has a comprehensive institutional framework to promote its implementation — including a funded secretariat, working groups, and meeting of the parties, which can assess the treaty's implementation.[91] The UNWC does not have such a framework. Both conventions encourage states to form bilateral or plurilateral treaties to manage transboundary water resources. However, the UNECE Convention is more specific in its requirements for independent "fact-finding commissions" in the event of disputes between parties. While it is established that the two treaties are, for the most part, "complementary and mutually reinforcing in both their interpretation and implementation",[92] the greater level of specificity in the UNECE Convention means that it may provide a sounder basis from which to explore the incorporation of rights of nature. Thus, although the UNECE Convention does not incorporate ideas of legal personality, or, indeed, give elevated rights to nature, it goes further in prioritising environmental protection in freshwater management.

87 Convention on the Protection and Use of Transboundary Watercourses and International Lakes 1936 UNTS 269 (opened for signature 17 March 1992, entered into force 6 October 1996) [UNECE Convention].
88 Article 2(2)(b).
89 Article 2(2)(d).
90 Article 2(5)(a).
91 UN Watercourses Convention Online User's Guide, above n 73.
92 Kinna, above n 23, at 109.

### 5.2 International Legal Personality

In addition to existing water management treaties, it is necessary to consider how the idea of legal personality works in international law, as this is quite different from its application in domestic legal systems. As noted, the concept of assigning legal personality to non-sentient beings is a well-established principle in western legal jurisdictions.[93] This is most commonly seen in the area of corporate law, where companies are granted legal rights — including the right to sue and be sued. In addition, writers such as Stone have, since the 1970s, argued that legal personality can and should be granted to nature. This was developed further, in particular in an indigenous rights concept, in the lead-up to the passing of the Te Awa Tupua Act in New Zealand.[94]

Yet, what is the status of legal personality in international law? In comparison to domestic law, international legal personality is a relatively understudied topic.[95] While it is accepted that states have legal personality in international law, the scope of legal standing for other entities — for example, individuals, NGOs and corporations — is less clear.

Rather than being discussed in the context of international legal personality, international law often uses the language of "actors" or "participants" in international law.[96] These include states, international organisations and NGOs, and are "functionally similar to being a legal person".[97] There is also a requirement for participants to be taking part in an "authoritative decision-making process of an international kind".[98] This has mainly been used in the context of entities which are attached to a domestic legal system but have international characteristics — for example, a bank[99] and the International Tin Council.[100] It has also been seen in the case of states being found non-compliant in contracts with corporations.

Accepting this conception of international legal personality, where would legal personality in nature, or rights of nature, fit? To be ascribed legal

93 See, for example, "Legal person" Merriam-Webster Law Dictionary <https://www.merriam-webster.com/legal/legal%20person>.

94 See, for example, Morris and Ruru, above n 33.

95 Roland Portmann *Legal Personality in International Law* (Cambridge University Press, Cambridge, 2010) at 1.

96 At 210.

97 At 211.

98 At 212.

99 At 228. See also David Bederman "The Unique Legal Status of the Bank for International Settlements Comes into Focus" (2003) 16 Leiden Journal of International Law 787 at 788.

100 Portmann, above n 95, at 233. See also Romana Sadurska and CM Chinkin "The Collapse of the International Tin Council: A Case of State Responsibility?" (1990) 30 Virginia Journal of International Law 845 at 849–851.

personality, nature would need to be accepted as an "actor" in the international system. This would likely need to be prescribed through an international treaty, and later accepted as part of customary international law. And, even accepting nature as an "actor", the structure of international law would still present some restrictions. The ICJ, for example, only adjudicates disputes between states. Indeed, while some institutions such as the International Criminal Court deal with individuals, most international tribunals are mandated to deal with state-level issues. This makes participation of individuals, let alone nature, difficult. In the case of the UNWC, the arbitration provisions are restricted to parties to the Convention, which are, invariably, states.

## 6. INCORPORATING RIGHTS OF NATURE INTO INTERNATIONAL TREATY PROVISIONS

As noted in the previous part of this article, there are already multiple international treaties on international watercourses. However, these international instruments do not assign any form of legal right to natural resources. Rather, they take an anthropocentric (or "state-centred") view, with states as the key legal actors.

This part will posit several avenues by which a rights of nature approach could be incorporated into international law. The domestic examples in part 4 provide useful examples of possible language on which to base these hypothetical case studies, as in many cases rights of nature are established as part of a wider legal framework. For Te Awa Tupua, for example, the granting of legal personhood is part of broader legislation for the settlement of the Whanganui River as part of New Zealand's Treaty of Waitangi settlement process. In the case of Ecuador, rights of nature is a small part of the nation's Constitution. In the United States, both local ordinances and the Lake Erie Bill of Rights provide useful frameworks which can be expanded upon.

### 6.1 Amending the UN Water Courses Convention

The first option to consider is an amendment to the existing international water treaty framework to include provision for rights of nature. This section will focus on hypothetical drafting amendments to the two international water treaties.

For the UN Watercourses Convention, amendment could take the form of an additional clause similar to the language that has been used in either the Ecuadorian Constitution or the Lake Erie Bill of Rights. There are several different places in the treaty where this could be inserted. Firstly, language could be inserted into the preamble of the UNWC. For example:

> Considering *that nature, including international watercourses, has intrinsic rights, including the right to exist, flourish and naturally evolve* ...

While this would be a strong signal of parties' acknowledgment of rights of nature, it would be difficult to enforce as preambles are not considered legally binding.[101] A stronger amendment option (which could be in addition, or as an alternative, to the preamble) would be in art 2 of the UNWC, under the definitions section ("Use of Terms") of the Convention. Article 2(a) defines a watercourse as "a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus".[102] This definition could be extended to state that watercourses not only "flow into a common terminus" but also "have the right to exist, flourish and naturally evolve". Alternatively, a whole new term could be added in this section to define "Rights of Watercourses", as the right to exist, flourish, or have standing in international law.

> *2(e) "Rights of Watercourses": means the right to exist, flourish, and naturally evolve.*

This is more akin to the Te Awa Tupua Act, which defines the river as having the status of a legal person in its "Interpretation" provisions section.[103] Specifically defining rights of nature may help to clarify this concept for the purpose of the Convention.

In addition to amendments to the preamble and definitions sections of the UNWC, provision for rights of nature could be added into the body of the treaty text. This would be more analogous to the inclusion of rights of nature in the Ecuadorian Constitution, and would have the advantage of signalling that rights of nature is a key principle of the Convention, on the same level as other key principles such as "equitable and reasonable utilization". Such a provision would be added under pt II, following art 6 ("Factors relevant to equitable and reasonable utilization"). A proposed new art "X" would read:

> *Watercourse states shall recognise that watercourses have intrinsic rights, including the right to exist, flourish, and evolve.*

Such an amendment could be followed by additional minor amendments to other provisions — for example, the "obligation not to cause significant harm"

101 See Jan Klabber "Treaties and Their Preambles" in Michael Bowman and Dino Kritsiotis (eds) *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press, Cambridge, 2018) 172.

102 UNWC, art 2(a).

103 Te Awa Tupua Act, s 7.

would apply both to preventing causing harm to other watercourse states, as well as preventing harm to watercourses themselves.[104] In other, similar, instances, "watercourses" would need to be added alongside "watercourse states". Following this, there would likely be a need for watercourses to have standing. For example, in the creation of "Fact-finding Commissions" to aid in dispute resolution, under art 33(4): these bodies could be given the authority to act in the best interests of the watercourse. Alternatively, watercourses themselves could be granted legal personality and the explicit permission to enter into arbitration for dispute resolution. This would need to be built into the provisions of the annex to the UNWC.

In summary, there are a number of different ways in which rights of nature language could be incorporated into the UNWC. There are, of course, a number of unresolved questions and issues that would result from such amendments. Who would be given authority to act on behalf of the watercourse? Would this be limited to an impartial body such as a fact-finding commission, as posited, or would this be limited to the relevant watercourse state? Could this be any state, organisation, or individual? This article does not purport to resolve these questions, but rather proposes some initial suggestions for how rights of nature might be incorporated into international law. Any such amendments, regardless of implementation, would have significant symbolic significance as having elevated status in international law. However, in terms of political "buy-in", it is important to note that the UNWC has already had limited uptake internationally, with only 37 state parties. It is therefore likely that any amendments that impose further obligations on parties may be difficult to reach consensus on, and may further decrease interest in accession by other countries.

### 6.2 Amendments to the UNECE Convention

As an alternative, or indeed in addition to, amendments to the UNWC, amendments to the UNECE Convention may provide an avenue to include rights of nature in the framework of international freshwater law. As noted in part 5 of this article, while the UNECE Convention has many similarities to the UNWC, it also has some key differences. Therefore, the suggestions as to how to incorporate rights of nature differ. While a clause could, similarly, be added to the preamble, beyond this it is suggested that rights of nature be added under art 2 — "General Provisions". This could take the form of either a new subparagraph, or a subparagraph under art 2(5), which outlines principles that parties must take into account when taking appropriate water management measures. For example:

104 UNWC, art 7.

> 5. *In taking the measures referred to in paragraphs 1 and 2 of this article, the Parties shall be guided by the following principles:*
>
> *(x) The rights of nature: Nature, including watercourses, has the right to exist, flourish, and naturally evolve.*

A clause could also be added under art 3(1) — "Prevention, Control and Reduction", making it explicit that parties adopt management measures to ensure that rights of nature are upheld; for example:

> *To prevent, control and reduce transboundary impact, the Parties shall develop, adopt, implement and, as far as possible, render compatible relevant legal, administrative, economic, financial and technical measures, in order to ensure, inter alia, that:*
>
> *(x) The rights of nature to exist, flourish, and be restored, are upheld.*

As noted, the UNECE Convention has an advantage over the UNWC in its clear requirement for parties to establish bilateral or multilateral agreements or arrangements for the management of international watercourses, which must provide for the establishment of "joint bodies". Thus, similar to the suggestion for the "fact-finding commission" under the UNWC, under art 9(2) of the UNECE Convention a subparagraph could be added mandating these joint bodies to act on behalf of the relevant watercourse.

Again, and inevitably, these hypothetical amendments to the UNECE Convention leave questions of implementation, and in particular standing, unresolved. A key consideration in the domestic-level rights of nature examples in part 4 of this article, and in Stone's article, is the need for nature to be able to enforce its rights. In the case of Te Awa Tupua, Te Pou Tupua is the "kaitiaki", or guardian, that can act on behalf of the Whanganui River. In the Ecuadorian model, any person or group can enforce the rights of nature. At the international level, it could, by extension, be that any state, NGO, or individual (noting the aforementioned limitations of non-state actors in international tribunals) is able to enforce the rights of a particular watercourse. While potentially unpalatable to the international community given the potential for large-scale litigation, and limited by the mandate of specific international tribunals, this option would allow for the broadest application of legal standing. Another option would be to limit representatives to those countries who have the watercourse in their territory. This would prevent instances of a third country taking a claim on behalf of a watercourse that does not directly relate to them — for example, the United States taking a claim on behalf of the Mekong, or New Zealand on behalf of the Nile, or an NGO on behalf of the Yangtze. Allowing for this possibility would be politically unpopular, and may discourage states from entering into these treaties.

A more politically palatable option may be the establishment of a rights of nature framework through existing institutions. This would be more easily applicable to the UNECE Convention, where there is already a functioning secretariat in existence. The Secretariat could be given powers similar to Te Pou Tupua in the case of the Whanganui River. That is, power to act on behalf of the various transboundary watercourses that fall within the scope of the Convention. This would mean that parties to the Convention would need to accept that, firstly, transboundary watercourses within their territory had legal rights and, secondly, that the Secretariat was mandated to enforce these rights. As noted, there is also the possibility that either the "joint commission" or the "fact-finding commission" be given powers to enforce rights on behalf of nature.

Stepping back from these practical hurdles of implementation, inclusion of rights of nature in any international water treaty has clear symbolic significance. Like all three of the domestic examples, there is clear precedent setting, and this could serve as a catalyst for further international action. Furthermore, given that the UNWC has been established as customary international law by the ICJ, it is also possible that, if followed, amendments to the UNWC or UNECE Convention would, eventually, be also accepted as customary international law.

### 6.3 Adoption of a Universal Declaration of the Rights of Nature

Another option to consider, outside of amending the existing treaties, is adoption of a new instrument. Environmental NGOs have argued for a "Universal Declaration of the Rights of Mother Earth".[105] This follows a similar idea and structure as the Universal Declaration of Human Rights.[106] The proposed Declaration calls Mother Earth a "living being"[107] and prescribes a number of inherent rights, including "the right to life and to exist",[108] "the right to be free from contamination, pollution and toxic or radioactive waste"[109] and "the right to full and prompt restoration" of rights in the Declaration.[110]

The Declaration recognises the inherent rights of all beings — both human and natural — and creates a need for humans not to violate these rights.

105 See Rights of Nature "Universal Declaration of the Rights of Mother Earth" (22 April 2010) <https://therightsofnature.org/wp-content/uploads/pdfs/FINAL-UNIVERSAL-DECLARATION-OF-THE-RIGHTS-OF-MOTHER-EARTH-APRIL-22-2010.pdf>. See also Cormac Cullinan "The legal case for the Universal Declaration of the Rights of Mother Earth" (2010) <www.therightsofnature.org>.

106 See United Nations "Universal Declaration of Human Rights" (1948) <https://www.un.org/en/universal-declaration-human-rights/>.

107 "Universal Declaration of the Rights of Mother Earth", above n 105, art 1(1).

108 Article 2(1)(a).

109 Article 2(1)(h).

110 Article 2(1)(j).

Cullinan argues that, while implementation of this kind of declaration may be challenging, "it is difficult to see how humans will be able to prevent the continuing destruction of Earth … without adopting governance systems that are effective in ensuring that humans comply with the fundamental rules of the Earth community of which they form a part". The Declaration notably does not grant new rights to nature, but instead recognises rights that already exist. It argues that if human beings are to claim inherent and inalienable rights that arise from their existence, all beings must have similar rights.[111]

In 2010, following the Cochabamba World Conference on Climate Change and the Rights of Mother Earth, the Declaration was presented to the United Nations. Importantly, adoption of this kind of declaration may help to overcome the international legal personality issue for natural resources, as it was international human rights law (with the 1948 Declaration of Human Rights a key step) that helped to normalise the idea of individuals having legal personality in international law.[112] Adoption of such a declaration would require states to implement this concept domestically, and would also shape customary international law on this issue. Yet, following the draft in 2010, there have not been any moves to adopt this text at the United Nations, indicating that consensus among states on this issue is not, currently, forthcoming.

None of the options proposed in this part of the article to incorporate rights of nature into international law are straightforward, and further analysis is required for a comprehensive solution. While there are multiple ways in which the language of both the UNWC and UNECE Convention could be amended, enforcement of any rights raises difficult questions. It would also likely be difficult to reach consensus amongst the international community on this issue, as demonstrated by the silence since the Declaration of the Rights of Mother Earth was proposed to the United Nations in 2010. However, the symbolic importance of any international development in this area cannot be understated.

## 7. CONCLUSIONS

This article has established that the world is facing a global freshwater crisis. Instances of water scarcity are being seen on a more regular basis, while freshwater ecosystems are deteriorating at an alarming rate. Against this backdrop, there is a need for novel approaches to the protection of freshwater resources: the status quo is simply not sustainable.

111 Cullinan, above n 105, at 3.

112 Icelandic Human Rights Centre "International Legal Personality" <https://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/human-rights-actors/international-legal-personality>.

This article has illustrated that ancient communities around the world, including western communities, have long viewed nature as having inherent superior rights. This view has only been eroded in the 1800s with the Lockean view of man's authority over nature; a view that became entrenched in the western legal system. Indigenous communities around the world, meanwhile, from the Americas to New Zealand, have maintained their belief in nature's inherent rights.

Further, we are seeing increasing instances of rights of nature being applied in domestic courts. This includes constitutional provisions, as seen in Ecuador; through legislation granting legal personality to freshwater, as seen in New Zealand; and through local-level ordinances, as seen in the United States. These developments have had varying consequences — with some more practical, and others more symbolic. Recently, we have seen courts rule in favour of rights of nature in both Ecuador and the United States.

However, implementing rights of nature approaches on an international scale is more complicated. This article has outlined the existing — fragmented — international legal framework that manages freshwater resources. The UN Watercourses Convention and the UNECE Convention, in their focus on equitable and sustainable use of resources, are state-centric rather than eco-centric in their approach. The article has also looked at the concept of legal personality in international law, noting that this is more complicated than in domestic legal systems. International law's focus on states as actors means that the discussion is still focused on whether NGOs, corporations, or individuals have legal personality. Including nature as an international actor could have challenges both in state buy-in, and more practically in the current state-focused dispute resolution structure of the international legal system.

Notwithstanding these difficulties, the article posits several different scenarios by which nature could be granted rights at international law. These scenarios are theoretical, and designed to stimulate further discussion and research on these topics. The first such possibility is an amendment of the UN Watercourses Convention to include reference to the rights of nature. Several different drafting possibilities for this are proposed. The second is amendment to the UNECE Convention. Any additions would come with a range of difficulties around implementation and compliance mechanisms, which this article does not purport to resolve. As the UNECE Convention has an existing secretariat, the article suggests that this would be easier to implement, as the Secretariat could be given authority to uphold rights of relevant transboundary watercourses. A more localised approach would be for the UNECE Convention to require bilateral and regional transboundary resource agreements to include rights of nature provisions, and for these to be administered through the secretariats of the various bilateral agreements.

Another option posited for incorporating rights of nature into international

law is through adoption of a "Universal Declaration of the Rights of Nature". This is not a new concept, as in 2010 a draft "Universal Declaration of the Rights of Mother Nature" was drafted and presented to the United Nations, following a similar structure to the existing Universal Declaration of Human Rights. However, there has been no action from the UN on this front in the subsequent decade.

The article concludes that the political and practical hurdles to these proposals mean that adoption is unlikely in the current climate. However, this is a conversation that must be started. The status quo is not working, and stakes for human health and global biodiversity are too high not to take significant action to change. Furthermore, as Stone argued in his original work in the 1970s, each major development in international legal norms seems radical at the time.[113] This was the same for corporate legal personality before this concept was widely adopted. Stone's article also seemed radical when it was written, but we have now seen rights of nature provisions adopted in various jurisdictions, and upheld by a number of courts, including the United States. It is therefore entirely conceivable that rights of nature could be extended to international law, in order to improve freshwater conservation for transboundary watercourses.

113 Stone, above n 5, at 490.