

**IN THE INTERNATIONAL COURT OF JUSTICE**



**AT THE PEACE PALACE  
THE HAGUE, THE NETHERLANDS**

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**THE QUESTION ON THE RESPONSIBILITY OF STATES UNDER  
INTERNATIONAL LAW TO PROTECT FORESTS AS A RESPONSE TO CLIMATE  
CHANGE FOR THE BENEFIT OF THE PRESENT AND FUTURE GENERATIONS**

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**REQUEST FOR ADVISORY OPINION SUBMITTED BY THE ALLIANCE OF SMALL  
ISLAND STATES**

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**MEMORIAL FILED ON BEHALF OF THE AOSIS**

**World Commission on Environmental Law (WCEL) Moot Court  
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<b>I.</b>	<b>INTRODUCTION</b>	

*“Man must acquire the knowledge to maintain and enhance his ability to use natural resources in a manner which ensures the preservation of the species and ecosystems for the benefit of present and future generations”<sup>1</sup>*

It has been clear for many years now that the world is going steadily towards ecological disaster and yet, years of ignorance, cowardice and greed has further plummeted our planet towards the biggest threat to humankind – climate change.

Today we are at an important turning point. The changing climate is no longer an abstract threat lurking in our distant future – it is upon us. We can watch glaciers melting and collapsing on the internet; ice losses in Antarctica have tripled since 2012 so that sea levels are rising faster today than at any time in the last quarter-century.<sup>2</sup> According to the National Aeronautics and Space Administration (NASA) 15 warmest years ever recorded have occurred since 2000.<sup>3</sup> 2017, 2015, 2016, 2014 and 2013 have been the hottest since record-keeping began in 1880.<sup>4</sup>

The Alliance of Small Island States (AOSIS) in the front line with regard to the threat of climate change which includes acute to long-term problems.<sup>5</sup> Pertinently, the AOSIS were recognized as a special case for both the environment and development,<sup>6</sup> due to their inherent vulnerabilities to climate change. And among these imminent dangers are the rising sea level considering that populations, agricultural lands and infrastructures in AOSIS are concentrated in their coastal zone.<sup>7</sup> Although everyone is at risk, some countries like AOSIS member states are admittedly more vulnerable than others and will face the gravest consequence and have the most difficulty coping.

Addressing existing threats to climate change will not be easy. However, our forests play a great role in stabilizing this catastrophe for “they regulate ecosystems, protect biodiversity and play an integral part in the carbon cycle.”<sup>8</sup> Approximately 2.6 billion tons of carbon dioxide is absorbed

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<sup>1</sup> Preamble to the World Charter for Nature, 1982.

<sup>2</sup> Romm, J. *Climate Change: What Everyone Needs to Know*, Oxford University Press, 2<sup>nd</sup> Edition, 2018.

<sup>3</sup> Brandon Miller, “2015 Is Warmest Year on Record, NOAA and NASA Say”. Retrieved from [www.cnn.com/2016/01/20/us/noaa-2015-warmest-year/index.html](http://www.cnn.com/2016/01/20/us/noaa-2015-warmest-year/index.html) on February 18, 2020.

<sup>4</sup> Cheng, L., Zhu, J. 2017 was the warmest year on record for the global ocean. *Adv. Atmos. Sci.* **35**, 261–263 (2018).

<sup>5</sup> Barbados Plan of Action (BPOA), 1994.

<sup>6</sup> 1992 United Nations Conference on Environment and Development.

<sup>7</sup> Gomme, R., et al. "Potential impacts of sea-level rise on populations and agriculture." *FAO, UNSD* (1998).

<sup>8</sup> IUCN Issues brief on forests and climate change. Retrieved from < <https://www.iucn.org/resources/issues-briefs/forests-and-climate-change> > on February 18, 2020.

by forests every year.<sup>9</sup> Protection of forests against loss and degradation and “promoting their restoration have the potential to contribute over one-third of the total climate change mitigation that scientists say is required by 2030”<sup>10</sup> to meet the objectives of the Paris Agreement.<sup>11</sup>

At present, “the effects of climate change are felt most acutely by those who are already in vulnerable situations.”<sup>12</sup> Climate change is inherently discriminatory – usually, the most vulnerable sectors who have done the least to contribute to the problem are the most affected. Pertinently, in the coming years, although most developed countries are to blame for the catastrophe of global climate change, third-world countries, particularly coastal states such as the AOSIS, are the ones which will suffer more.

We now come before this Honorable Court with a request for an advisory opinion as our channel to express the concerns of the AOSIS member states to international legal bodies in order for states to act in accordance with their obligations under international law to protect forests under their national jurisdiction for the sake of the present and future generations of humankind.

In an attempt to combat forest loss and degradation as well as expanding protected areas to protect vulnerable sectors like the AOSIS, we request for advisory on the question of responsibility of the 193 countries under international law, with the following questions in mind:

1. What are the obligations of states in relation to the protection and preservation of the forests under treaty and customary laws?
2. What legal remedies and other policy solutions can be availed of by states against non-compliant states?

In holding States accountable to address the current climate crises, we look into the rights and obligations aspect under international law, specifically treaties and conventions such as the United Nations Framework Convention on Climate Change (“UNFCCC”), in their commitments in the 2015 Paris Agreement during the UNFCCC’s 21<sup>st</sup> Conference of Parties (“Paris Agreement”) in achieving global emissions reduction and other Sustainable Development Goals (“SDGs”). In correlating these

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<sup>9</sup> IUCN Issues brief on forests and climate change. Retrieved from <<https://www.iucn.org/resources/issues-briefs/forests-and-climate-change>> on February 18, 2020.

<sup>10</sup> IUCN Issues brief on forests and climate change. Retrieved from <<https://www.iucn.org/resources/issues-briefs/forests-and-climate-change>> on February 18, 2020.

<sup>11</sup> *Id.*

<sup>12</sup> See <[https://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_10\\_4.pdf](https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_4.pdf)>.

international obligations with the state's responsibility, we seek the aid of the Articles of State Responsibility for Internationally Wrongful Acts ("ARSIWA").

Along with the national policies of each individual state, these treaties will help us conceptualize inter-generational responsibility at the height of the current global climate crisis and at the same time, bringing inter-generational justice to the present and future generations.

## **II. IN CONTEXT: THE ALLIANCE OF SMALL ISLAND STATES ("AOSIS")**

The AOSIS has been championing the interest of forty-four (44) small island and low-lying coastal developing states since 1990. It is an intergovernmental organization that draws on partnerships with the United Nations Development Programme (UNDP) and the European Commission, to bolster its capacity to effectively influence climate negotiations.<sup>13</sup>

### **a. The role and structure of AOSIS.**

The AOSIS as an international organization can present written statements and comments regarding advisory opinions.<sup>14</sup> It was a crucial group in the negotiating period up to and during the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change (COP21), and for the entry into force of the Paris Agreement.<sup>15</sup> AOSIS is heterogeneous, with a range of geographical, cultural, social, and economic differences,<sup>16</sup> they are composed of 44 United Nations members (39 members—mainly SIDS—plus 5 observers)<sup>17</sup> representing 28% of developing states, 20% of the United Nations membership, but only about 5% of the world population.<sup>18</sup>

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<sup>13</sup> Alliance of Small Island States Declaration on Climate Change, 2009.

<sup>14</sup> ICJ Statute Art. 66.

<sup>15</sup> Ourbak, T., Magnan, A.K. The Paris Agreement and climate change negotiations: Small Islands, big players. *Reg Environ Change* 18, 2201–2207 (2018). Retrieved from <https://doi.org/10.1007/s10113-017-1247-9> on February 18, 2020.

<sup>16</sup> Ourbak, T., Magnan, A.K. The Paris Agreement and climate change negotiations: Small Islands, big players. *Reg Environ Change* 18, 2201–2207 (2018). Retrieved from <https://doi.org/10.1007/s10113-017-1247-9> on February 18, 2020.

<sup>17</sup> AOSIS. Retrieved from: <https://www.aosis.org/member-states/>.

<sup>18</sup> Ourbak, T., Magnan, A.K. The Paris Agreement and climate change negotiations: Small Islands, big players. *Reg Environ Change* 18, 2201–2207 (2018). Retrieved from <https://doi.org/10.1007/s10113-017-1247-9> on February 18, 2020.

**b. The AOSIS and the ‘blue carbon’.**

The term ‘blue carbon’ is coined for the carbon captured by the world’s ocean and coastal ecosystems that also provides long term storage of organic carbon.<sup>19</sup> Sea grasses, mangroves and salt marshes along our coast are considered as a carbon sink. Pertinently, seagrass meadows are essential coastal ecosystems that provide many ecosystem services such as improved water quality and light availability, increases in biodiversity and habitat, sediment stabilization, and carbon and nutrient accumulation.<sup>20</sup> Furthermore, mangrove forests provide more carbon storage than a tropical rainforest.<sup>21</sup> Suffice to say, there is growing evidence and consensus that the management of coastal blue carbon ecosystems, through conservation, to avoid loss and degradation, restoration and sustainable use has strong potential to be a transformational tool in effective global natural carbon management.<sup>22</sup>

The AOSIS has special geographical ties with the oceans, many even possessing maritime zones larger than land territory. As such, AOSIS have requested to be effectively represented in the protection of coastal ecosystems.<sup>23</sup> Also, mangrove protection projects has been actively implemented in countries like the Fiji<sup>24</sup> along with national legislations implemented by countries like Palau to protect their coral reef and seagrass ecosystems.<sup>25</sup>

Needless to say, the AOSIS has been doing their share of the work in trying to mitigate the effects of climate change through protection of ocean and coastal ecosystems that serve as ‘blue carbon’ sinks.

**c. Forest protection and AOSIS adaptation measures required of States.**

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<sup>19</sup> Nellemann C., Corcoran E., Duarte C.M., Valdes L., and De Young D. Blue Carbon: The Role of Healthy Oceans in Binding Carbon. A Rapid Response Assessment. United Nations Environment Programme, GRID, Arendal (2009).

<sup>20</sup> Hemminga M.A. and Duarte, C.M. (2000) Seagrass Ecology. Cambridge: Cambridge University Press (2000).

<sup>21</sup> The Importance of Mangroves to People: A Call to Action, UNEP, World Conservation Monitoring Centre, (2014).

<sup>22</sup> Climate Focus, Blue Carbon Policy Options Assessment Washington, DC, USA, Murray, B.C. *et al* Green Payments for Blue Carbon, Economic Incentives for Protecting Threatened Coastal Habitats, Nicholas Institute, Duke University (2011).

<sup>23</sup> Submission by the Republic of Maldives on behalf of the Alliance of Small Island States. Retrieved from <<https://sustainabledevelopment.un.org/content/documents/13572AOSIS%20Input%20for%20Our%20Oceans%20Partnership%20Dialogues.pdf>> on February 18, 2020.

<sup>24</sup> Fiji supports protection of mangrove forests. Retrieved from <<https://wwf.panda.org/?210650/Fiji-supports-protection-of-mangrove-forests>> on February 18, 2020.

<sup>25</sup> Friedlander AM *et al*, Marine Biodiversity and protected areas in Palau: Scientific report to the government of the Republic of Palau (2015); Ecological conditions of coral-reef and seagrass marine protected areas in Palau (2016). Retrieved from <<http://picrc.org/picrcpage/wp-content/uploads/2016/12/Gouezo-Ecological-Conditions-of-MPAs-in-Palau-2016.pdf>> on February 18, 2020.

Small island states have gained notoriety as the epitome of states threatened by climate change.<sup>26</sup> This is likewise especially true in terms of forest protection and preservation. It is clear that AOSIS is powerless compared to much established countries who are fortunate with their geographical structures as their “combined forest cover is insignificant in global terms”.<sup>27</sup> Even if a small island state devote majority of its land to be part of a forest cover, it still would not make a dent to the rising climate crisis.

Historically, AOSIS has favored and pursued legally-binding agreements or hard laws<sup>28</sup> to address issues such as sea-level rise<sup>29</sup> especially with regard to climate change and the environment while the rest of the international community has generally favored soft law agreements.<sup>30</sup> Corollary to this, in light of the Intergovernmental Panel on Climate Change (IPCC) Special Report on Global Warming of 1.5°C in 2018, AOSIS called for a new phase in climate negotiations, one in which countries “devote as much energy to securing our priorities on adaptation and loss and damage as we do on mitigation ambition.”<sup>31</sup> AOSIS Chairman, Thoriq Ibrahim, expressed “concern over the “dramatically higher adaptation costs” likely necessary to build resilience against the types of impacts projected by the IPCC report.”<sup>32</sup> He further noted that the estimated global cost of climate adaptation in developing countries will be between US\$280 billion and 500 billion annually by 2030.

Hence, as climate change is already upon us and the AOSIS is one of the most vulnerable regions of the world, it is not enough that States mitigate the effects of climate change by protecting forests, but they should ensure that powerless sectors like AOSIS is able to adapt to the effects of climate change.

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<sup>26</sup> Jenny Grote Stoutenburg, *Disappearing Island States in International Law* Brill (2015).

<sup>27</sup> M.L. Wilkie, et. al “Forests and forestry in Small Island Developing States” *International Forestry Review* 4.4, 257-267 (2002).

<sup>28</sup> Betzold, Carola, Paula Castro, and Florian Weiler. "AOSIS in the UNFCCC negotiations: from unity to fragmentation?." *Climate policy* 12.5, 591-613 (2012).

<sup>29</sup> Philander, George, and S. George Philander. *Encyclopedia of global warming and climate change: AE*. Vol. 1. Sage, (2008).

<sup>30</sup> Philander, George, and S. George Philander. *Encyclopedia of global warming and climate change: AE*. Vol. 1. Sage, (2008).

<sup>31</sup> See <<https://sdg.iisd.org/news/aosis-chair-urges-increased-focus-on-loss-and-damage-at-cop-24/>>.

<sup>32</sup> See <<https://sdg.iisd.org/news/aosis-chair-urges-increased-focus-on-loss-and-damage-at-cop-24/>>.

**III. OBLIGATIONS OF STATES IN RELATION TO THE PROTECTION AND PRESERVATION OF FORESTS UNDER TREATY AND CUSTOMARY LAWS.**

Under the principle of *pacta sunt servanda*, a state is bound by treaties entered by it and must perform them in good faith.<sup>33</sup> States, pursuant to the UNFCCC, acknowledge that the adverse effects of climate change are a common concern of mankind, and further state that protection of the climate system for present and future generations is of paramount importance.<sup>34</sup> This has been the foundation for the singular truth that the call for action to safeguard the earth's ecological balance is an essential interest of all states.<sup>35</sup>

**a. States have the obligation to promote, conserve and enhance carbon sinks under international law.**

The UNFCCC provides that “States have the responsibility to promote sustainable management, conservation and enhancements of sinks of greenhouse gases.”<sup>36</sup> As defined, “a sink is any process, activity or mechanism which removes a greenhouse gas or a precursor of a greenhouse gas from the atmosphere.”<sup>37</sup>

Forests are great examples of carbon sinks as they store 14% of all annual carbon dioxide (CO<sub>2</sub>) emissions.<sup>38</sup> Hence, States have the responsibility to protect and restore them. Pertinently, the most popular form of sink enhancement is growing more trees and limiting deforestation.<sup>39</sup>

**i. Reducing Emissions from Deforestation and Forest Degradation (REDD) and REDD+**

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<sup>33</sup> Vienna Convention on the law of treaties, Part III, Article 36, January 27, 1980, 1155 U.N.T.S. 331.

<sup>34</sup> United Nations Framework Convention on Climate Change, preamble, 1771 UNTS 107 (1994) [hereinafter “UNFCCC”].

<sup>35</sup> Gabčíkovo-Nagymaros Project (Hungary v. Slovakia) 1997 I.C.J. 7 (Apr.9). par. 5.

<sup>36</sup> 1992 Climate Change Convention, Art. 4(d).

<sup>37</sup> 1992 Climate Change Convention, Art. 1(8).

<sup>38</sup> See <<https://www.americanforests.org/blog/forests-carbon-sinks/>>.

<sup>39</sup> The Encyclopedia of World Problems and Human Potential, Enhancing Carbon Sinks.



Greenhouse gas emissions due to deforestation and forest degradation are the second largest source of greenhouse gas.<sup>40</sup> Thus, Reducing Emissions from Deforestation and Forest Degradation [hereinafter known as [“REDD], was created. REDD is considered to be an international framework to prevent deforestation. The core of this program was found in Articles 2 and 3 of the Kyoto Protocol<sup>41</sup> in which the parties in Annex I were mandated to “implement policies and measures according to their national circumstances [for the] (ii) protection and enhancement of sinks and reservoirs of greenhouse gases, promotion of sustainable forest management practices, afforestation and reforestation; (iii) promotion of sustainable forms of agriculture in light of climate change considerations.”<sup>42</sup> Net changes in greenhouse gases emissions by sources and removals by sinks were used to meet their commitments under the protocol.<sup>43</sup>

At COP 13, policy approaches and policy incentives were adopted as mitigating means to combat forest degradation in developing countries.<sup>44</sup> Under REDD, a mechanism is created where developed countries provide incentives to developing countries for the carbon offsets of their standing forests.<sup>45</sup> Some of the key points in Decision 2/CP.13 are: a) provision of support to efforts directed to reduce emissions from forest degradation and deforestation is voluntary; b) exploring of relevant actions must be in accordance to national circumstances; and c) reductions in emissions or increases resulting from the demonstration activity should be based on historical emissions, taking into account national circumstances.<sup>46</sup>

Thereafter, the scope of the REDD program was expanded to include: role of conservation, sustainable management of forests and enhancing carbon stocks to reduce emissions. This became known as REDD+.<sup>47</sup> Here, state parties

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<sup>40</sup> Fact Sheet on REDD and REDD+Low Carbon Green Growth Roadmap for Asia and the Pacific retrieved from < [https://www.academia.edu/3445440/Low\\_Carbon\\_Green\\_Growth\\_Roadmap\\_for\\_Asia\\_and\\_the\\_Pacific\\_UN\\_ESCAP](https://www.academia.edu/3445440/Low_Carbon_Green_Growth_Roadmap_for_Asia_and_the_Pacific_UN_ESCAP) > on February 18, 2020.

<sup>41</sup> Holloway, Vivienne and Esteban Giandomenico, “Carbon Planet White Paper: The History of REDD Policy”, North Terrace, Adelaide: Carbon Planet Limited, (2009).

<sup>42</sup> Article 2, Kyoto Protocol.

<sup>43</sup> Article 3, Kyoto Protocol.

<sup>44</sup> Bali Action Plan Decision 1/CP13, December 2007.

<sup>45</sup> Frequently Asked Questions and Answers – REDD+ and the UN-REDD Programme, June 10, 2010 retrieved from

<sup>46</sup> 2/CP.13 Reducing emissions from deforestation in developing countries: approaches to stimulate action.

<sup>47</sup> 1/CP.16 The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention.

voluntarily develop “forest reference emission levels” and/or “forest reference levels” that assess the performance of developing countries, including when to seek positive incentives based on the results of their REDD+ efforts.<sup>48</sup> The levels should include historical data and consistent with the capabilities of the states.<sup>49</sup>

Hence, states should conduct forestry projects like plantation program, – expanding forest ecosystems by increasing the area of plantation forests – forest conservation, forest management that contributes to the growth of forests like silvicultural strategies such as fertilization, and agroforestry programs where farmers intersperse trees on agricultural land and crop underneath them.<sup>50</sup>

Furthermore, parties must have a national strategy plan and national forest monitoring system, and share information on the implementation of REDD+. A national forest monitoring system is one of the elements to be developed by developing country Parties implementing REDD+ activities (according to paragraph 71 of decision 1/CP.16). In this regard, the COP recognized the importance and necessity of adequate and predictable financial and technology support for developing the national forest monitoring system, especially for developing country parties, such as those found in majority of the AOSIS states.

ii. **Blue-carbon related policies under International law**

More often than not, international obligations on the conservation and preservation of the ecosystem are focused on terrestrial ecosystem. However, with the growing evidence that show that the destruction of blue carbon ecosystem is linked to the increase of carbon dioxide emissions, it is imperative that the international community should develop an overarching policy or a framework for the management of the blue carbon ecosystem. To date, the following are blue-carbon related policies and activities in the international community:

1. ***Convention on Biological Diversity (CBD)***

In line with the objectives of the CBD, COP10 Decision X/2 was adopted. This COP decision provides a new strategic plan for biodiversity and created the Aichi Biodiversity Targets. Particularly relevant in this decision was Target 10

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<sup>48</sup> Decision 14/CP.19\* Modalities for measuring, reporting and verifying.

<sup>49</sup> See <<https://redd.unfccc.int/fact-sheets/forest-reference-emission-levels.html>>.

<sup>50</sup> Van Kooten, G.C (2007) Economic of Forest Ecosystem Carbon Sinks: A review. *International Review of Environmental and Resource Economics*, page 257.

which aimed for minimized multiple anthropogenic pressures on coral reefs, and other vulnerable ecosystems impacted by climate change or ocean acidification by 2015, and Target 15 which endeavored ecosystem resilience and the enhancement of the contribution of biodiversity to carbon stocks.<sup>51</sup>

Accordingly, CBD COP 10 Decision X/29 was entered into by the states. This took into consideration marine and coastal biodiversity and recognized the importance of incorporating it to national climate change strategies and action plans.<sup>52</sup> Subsequently, it was agreed upon by the parties in Decision X/33 that REDD+ can be a mechanism in achieving the goals of the UNFCCC and CBD and the inclusion of biodiversity. Also, said conference agreed to enhance the conservation and the sustainable use of coastal habitats that are vulnerable to or contribute in mitigating the effects of climate change.<sup>53</sup> In Decision X/31, the conference took a closer look on the role of marine protected areas in carbon sequestration, and in climate change adaptation and mitigation.<sup>54</sup>

## ***2. Ramsar Convention on Wetlands***

The parties under this Convention issued a resolution on COP 10 urging Contracting Parties to take action to prevent the degradation, promote restoration, improve management practices of peatlands and other wetland types that are significant GHG sinks. Research on role the of wetlands in carbon storage and sequestration, in adaptation to climate change, including for flood mitigation and water supply, and in mitigating the impacts of sea level rise, was also encouraged.<sup>55</sup>

### **b. Duty of State Parties under the UNFCC with respect to protection of vulnerable states.**

In order to address the special needs of vulnerable small island states like those found in the AOSIS, the following are international obligations of state to cooperate to help small island states in the fight against climate change.

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<sup>51</sup> COP10 Decision X/2 .

<sup>52</sup> CBD COP 10 Decision X/29.

<sup>53</sup> CBD COP 10 Decision X/33.

<sup>54</sup> CBD COP 10 Decision X/31.

<sup>55</sup> Ramsar, COP 10.

**i. Duty of the State Parties to give full consideration on the specific needs and special circumstances of the developing country parties and the protections of the most vulnerable**

Article 3(2) of the UNFCCC<sup>56</sup> states that “the specific needs and special circumstances of developing country parties, especially those that are particularly vulnerable to the adverse effects of climate change... should be given full consideration.” While Article 4(8) of the UNFCCC specifically states that “the Parties shall give full consideration to what actions are necessary under the Convention, including actions related to funding, insurance and the transfer of technology, to meet the specific needs and concerns of developing country Parties arising from the adverse effects of climate change and/or the impact of the implementation of response measures, especially on: (a) Small island countries...”

International agencies such as the United Nations and the parties to it have not adequately addressed their responsibility towards developing countries.<sup>57</sup>

In addition to the overarching obligation of States not to discriminate in the application of their environmental laws and policies, States have heightened duties with respect to members of certain groups that may be particularly vulnerable to environmental harm.<sup>58</sup> These vulnerable groups include the AOSIS.

States, acting individually and in cooperation with each other, should take steps to protect the most vulnerable from climate change. Procedurally, States should continue “to assess the effects of climate change, and of actions taken to mitigate and to adapt to it, on vulnerable communities.”<sup>59</sup> They should ensure that those who are in vulnerable situations and who are marginalized are fully informed of the effects of climate actions that they are able to take part in decision-making processes, that their concerns are taken into account and that they have access to remedies for violations of their rights.

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<sup>56</sup> The Convention (in Article 4.8 and 9) emphasizes activities that might answer the special needs and concerns of these vulnerable countries, such as investment, insurance and technology transfer.

<sup>57</sup> Reddy, B. Sudhakara, and Gaudenz B. Assenza “Climate Change – Developing Country Perspective” *Current Science*, vol. 97, no. 1, 2009, pp. 50-62. *JSTOR*, [www.jstor.org/stable/24112082](http://www.jstor.org/stable/24112082). Accessed 10 July 2020.

<sup>58</sup> UNFCCC Letter. Retrieved from <[https://www.ohchr.org/Documents/Issues/Environment/Letter\\_to\\_SBSTA\\_UNFCCC\\_May2016.pdf](https://www.ohchr.org/Documents/Issues/Environment/Letter_to_SBSTA_UNFCCC_May2016.pdf)> on February 18, 2020.

<sup>59</sup> Akande, Dapo, et al., eds. *Human Rights and 21st Century Challenges: Poverty, Conflict, and the Environment*. Oxford University Press, (2020).

Substantively, States should seek to protect the most vulnerable in developing and implementing all climate-related actions.<sup>60</sup> Even if mitigation targets are met, vulnerable communities may still suffer harm as a result of climate change.<sup>61</sup> This is supported by the United Nation’s General Assembly, thirty-first session, which reads:

“States have obligations at the national level to take adaptation actions to protect their vulnerable populations from the effects of climate change, and at the international level to cooperate in order to facilitate the protection of vulnerable communities wherever they are located. The rights of the most vulnerable must be respected and protected in all actions, including actions taken to mitigate or adapt to climate change. Renewable energy projects and efforts to protect forests, while they may be highly desirable as methods of reducing or offsetting greenhouse gas emissions, are not exempt from human rights norms.”<sup>62</sup>

**ii. Funding and Transfer of Technology are measures that will help vulnerable countries**

Given that many of the world’s poor live in or near to vulnerable natural environments, dealing with climate change and sustainable development issues and technologies is unavoidable.<sup>63</sup>

In accordance to article 4 of the UNFCCC, developed countries need to provide financial resources supporting technology transfer to developing countries. Furthermore, the achievement of developing- country commitments under the Convention will depend on the availability of such funding, while a special reference is made to the particular case of vulnerable and least-developed economies.

In the third UNFCCC conference in 1997, the Clean Development Mechanism (CDM) was developed in furtherance of the technology-transfer perspective, however, the magnitude of technology transfer is anecdotal while

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<sup>60</sup> Akande, Dapo, et al., eds. *Human Rights and 21st Century Challenges: Poverty, Conflict, and the Environment*. Oxford University Press, (2020).

<sup>61</sup> Akande, Dapo, et al., eds. *Human Rights and 21st Century Challenges: Poverty, Conflict, and the Environment*. Oxford University Press, (2020).

<sup>62</sup> See <<https://undocs.org/A/HRC/31/52>><sub>2</sub>

<sup>63</sup> See <[www.un.org/News/Press/docs/2013/sgsm15145.doc.htm](http://www.un.org/News/Press/docs/2013/sgsm15145.doc.htm)>

their impact on climate change is “barely measurable”.<sup>64</sup> Suffice to say, developed States are mandated to strengthen vulnerable States by doing this obligations in good faith and not just mere formalities with little results.

**c. States are also bound by their customary environmental law obligations to protect vulnerable states**

The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment,<sup>65</sup> as well as the no-harm rule which says a State is duty-bound to prevent, reduce and control the risk of environmental harm, to other states. In accordance with the maxim *sic uteri tuo, ut alienum non laedas*, this principle has become Customary International Law,<sup>66</sup> and is *lex lata*.<sup>67</sup> For a custom to be qualified as a Customary International Law, there must be an actual State practice and *opinio juris*.<sup>68</sup> There must also be proof of constant and uniform usage practiced by the States,<sup>69</sup> which is evident in this case.

As such, there are several state obligations under customary international environmental law that must be complied by the States:

**i. Responsibility not to cause transboundary harm**

The Stockholm Declaration<sup>70</sup> and the ICJ<sup>71</sup> have reiterated the duty to prevent transboundary harm, stating that it is every State’s obligation not to knowingly allow its territory to be used for acts contrary to the rights of other States.

Furthermore, under Principle 2 of the Rio Declaration states:

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<sup>64</sup> Transfer of technology and knowledge-sharing for development retrieved from <[https://unctad.org/en/PublicationsLibrary/dt1stict2013d8\\_en.pdf](https://unctad.org/en/PublicationsLibrary/dt1stict2013d8_en.pdf) > on Aug. 28, 2020.

<sup>65</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, pp. 241-242, ¶29.

<sup>66</sup> PATRICIA BIRNIE & ALAN BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 109 (2d ed., 2004); Trail Smelter Arbitration (U.S. v. Can.) 1938/1941, 3 R.I.A.A. 1905; Territorial Jurisdiction of International Commission on the River Oder (U.K. v. Pol.) 1959 P.C.I.J. Ser. A, No. 23 (Sept. 10); Island of Palmas Arbitration (Neth v. US) 2 R.I.A.A. 829, 831 (1928); MALCOLM N SHAW, INTERNATIONAL LAW 760 (5th ed., 2003) [hereinafter SHAW].

<sup>67</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 ¶29 (July 8) [hereinafter *Legality*]; Case Concerning the Gabčíkovo-Nagymaros Project, Judgement, 1997 I.C.J. Rep. 7 ¶53 (Sept. 25).

<sup>68</sup> Continental Shelf case (Libyan v. Malta), I.C.J Reports p. 13, ¶27

<sup>69</sup> Asylum case (Colombia v. Peru), 1950 I.C.J. 266, p. 277.

<sup>70</sup> Stockholm Declaration, Principle 21, 11 I.L.M. 1416.

<sup>71</sup> MARTINUS NIJHOFF, ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT: LEGAL PRINCIPLES AND RECOMMENDATIONS 75 (1987).

‘States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.’

Similarly, Principle 21 reflects customary law was confirmed by the ICJ’s 1996 *Advisory Opinion on The Legality of the Threat or Use of Nuclear Weapons*.

‘The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control is now part of the corpus of international law relating to the environment.’<sup>72</sup>

This principle reflects the responsibility of states to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of their national jurisdiction. Hence, states in the AOSIS are intrinsically entitled to the protection against the effects of climate change.

Moreover, this principle emphasizes ‘significant harm’ wherein the harm needs to be more than detectable and has led to real detrimental effect on matters such as human health, quality of life and to the resources of the other state.<sup>73</sup> Hence, this entails all states to: 1) enact appropriate measures; 2) to possess a certain level vigilance on the part of the State in the enforcement and in the exercise of administrative control<sup>74</sup>; and 3) act with due diligence to assess the risk posed of their activity to the rest of the international community.

Finally, the WCEL Declaration posited in its principles that environmental rule of law is the key to the protection and restoration of environmental integrity. This is premised on the development, enactment and implementation of clear, strict and effective laws and regulations to ensure effective compliance and impose liabilities.<sup>75</sup> Hence, states must not only enact domestic legislation to

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<sup>72</sup> Sands, Philippe, and Jacqueline Peel. *Principles of international environmental law*. Cambridge University Press, 2012.

<sup>73</sup> Commentary on the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, 2001 *in* Report of the International Law Commission on the Work of its Fifty-Third Session, A/CN.4SER.A/2001/Add.1 (Part 2) 152.

<sup>74</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 2010 I.C.J. 14, ¶197 (Apr. 28, 2010).

<sup>75</sup> Foundations of the Environmental Law. IUCN World Declaration on the Environmental Rule of Law (2016).

protect and preserve their forest cover but ensure that these laws are effectively enforced.

**ii. States have the obligation to cooperate to mitigate effects of climate change**

It can be said then that the duty to cooperate both builds on and expands on the duty not to harm other states or the “no harm rule”<sup>76</sup> and the principle of “good neighbourliness”. Moreover, it has been ruled that cooperation is a fundamental principle in the prevention of pollution under general international law.<sup>77</sup> Cooperation of states is especially necessary in the mitigation of greenhouse gas emissions as aimed by the Paris Agreement.

Thus, States have an international obligation to cooperate with vulnerable sectors of the international community, such as the AOSIS by mitigating effects of climate change.

**iii. States’ common but differentiated responsibilities to adapt to climate change**

This obligation finds basis in Principle 7 of the Rio Declaration, which provides that:

“States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.”

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<sup>76</sup> See <<https://cil.nus.edu.sg/wp-content/uploads/2014/02/Session-2-Bugge-The-Principle-and-Duty-to-Cooperate-The-Case-of-Conventions-on-Transboundary-Pollution-in-Europe-27-Feb-PowerPoint.pdf>>.

<sup>77</sup> Gabčíkovo–Nagymaros Project (Hungary v Slovakia) (1997) ICJ Rep 7; Lake Lanoux Arbitration (Fr. v. Spain), 1957 R. Int'l. Arb. Awards 281 (Nov. 16, 1957; MOX Plant (Ireland v U.K.), ITLOS Case No. 10, (Dec. 3, 2001).



In the environmental law community, the concept of common but differentiated responsibility has been used to ascertain how states should be treated. As stated in Principle 7 of the Rio Declaration and in Article 3 (1) of the UNFCCC, in view of the different contributions to global environmental degradation, states have common but differentiated responsibilities. These responsibilities signify duties to be fulfilled by the states concerned.<sup>78</sup> In the context of climate change, this concept is rooted upon the fact that developed countries generate the largest emissions of greenhouse gases and that they have resources to take measures in leading environmental protection. On the contrary, developing states are entitled to less stringent commitments and financial and technical assistances as they are more susceptible to the adverse effects of climate change.<sup>79</sup> Basically, their commitments differ because of socio-economic status of the states.

Hence, this common but differentiated responsibilities can be effected through financing climate change activities in developing countries, sharing technologies and scientific research with developing countries, submitting annual reports of their greenhouse gas emissions, stopping deforestation, and other avenues of initiatives.

Nonetheless, the concept also presupposes that every state has common responsibilities to the environment such as the obligation to protect nature through promotion of its well-being and placing limits on its use and exploitation.<sup>80</sup>

#### **iv. Precautionary Principle**

Principle 15 in the Rio Declaration provides that scientific uncertainty should not be permit states to postpone the implementation of protective measures.<sup>81</sup> This principle had been adopted in different multilateral conventions such as in the Convention of Biological Diversity, Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, Convention for the Protection of the Marine

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<sup>78</sup> Japan Branch Committee on Climate Change. *The Legal Principles relating to Climate Change*. (2009).

<sup>79</sup> Christopher D. Stone, “Common but Differentiated Responsibilities in International Law,” *American Journal of International Law*, Vol.98 (2004), pp.276-30.

<sup>80</sup> Principle 1. Obligation to Protect Nature. IUCN World Declaration on the Environmental Rule of Law (2016).

<sup>81</sup> Principle 15. United Nations Conference on Environment and Development, June 3- 14, 1992, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/Rev.1 (16 June 1992).

Environment of the North-East Atlantic, and the Biosafety Protocol and served as a guide for tribunals such as the International Court of Justice<sup>82</sup> and the Court of the European Justice<sup>83</sup> in settling disputes and in deciding cases.

Said principle imposes upon states the need to continuously review their obligations of prevention to keep abreast of the advances in scientific knowledge,<sup>84</sup> which can be done through the conduct of environmental impact assessments. The UNFCCC also incorporated the same in its articles wherein parties, in the light of their different socio-economic contexts, should take “precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects.”<sup>85</sup> Furthermore, some elements were considered in invoking this principle to justify the measures taken such as: proportionality, non-discrimination, based on the best available science, objective risk assessment and the consistency of measure to be taken.<sup>86</sup> The aim of this principle is also reflected in Principle 13 of the WCEL Declaration wherein, in order to achieve the progressive development and enforcement of the environmental rule of law, shall regularly revise and enhance laws and polices based on the most recent scientific knowledge and policy developments.<sup>87</sup>

Thus, while states have the responsibility to ensure the aforementioned responsibilities to enact and enforced legislative measures to ensure protection and preservation of forests and carbon sinks in order to mitigate effects of climate change, they likewise have the responsibility to constantly review these measures and adopt policies, such as REDD+ and the blue carbon initiatives, based on the precautionary principle.

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<sup>82</sup> See *Dispute concerning the MOX Plant, International Movements of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea (Ireland v UK)*.

<sup>83</sup> See *European Communities — Measures concerning Meat and Meat Products (Hormones)*, WTO Doc WT/DS26/AB/R, WT/DS48/AB/R, AB-1997-4 (1998) [16] (Report of the Appellate Body).

<sup>84</sup> LC, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with commentaries, ILC Report on the work of its fifty-third session. General Assembly Official Records Fifty-Sixth Session Supplement No. 10 (A/56/10), pp. 366-436 (2001).

<sup>85</sup> Article 3(3), UNFCCC.

<sup>86</sup> EC-Measures Concerning Meat & Meat Products (Hormones), Report of the Appellate Body: WT/DS26/AB/R & WT/DS48/AB/R, January 16, 1998, paras. 124 and 125. 15; European Commission, Communication From the Commission on the Precautionary Principle, COM(2000) 1, February 2, 2000.

<sup>87</sup> Principle 13 Progression, IUCN World Declaration on the Environmental Rule of Law (2016).

v. Principle of Intergenerational Responsibility

In the 1993 landmark case of *Minors Oposa et. Al v. Hon. Fulgencio Factoran Jr. et.al*<sup>88</sup>, the Supreme Court of the Philippines applied the principle of Intergenerational Responsibility to ensure the protection of forest cover in the Philippines. The court rendered a decision in favor of the petitioners who were suing on behalf of their [present] generation and generations yet unborn in so far as the right to a healthful and balanced ecology<sup>89</sup> and the rhythm and harmony of nature. This has now been used in *Juliana v. United States*<sup>90</sup> where the court articulated the fundamental right to a climate system capable of sustaining human life and more importantly, the court, in this case, recognized that the plaintiffs have legal standing, meaning, the court has recognized that the youth have endured a “direct harm” and share that harm with most of the population or future population. Thus affirming that such suit is valid by virtue of the principle of intergenerational responsibility.

While it is true that the detailed doctrine of intergenerational Responsibility has not been incorporated into international law, nevertheless, given the repeated recognition of environmental obligations towards future generations in soft law instruments, and in international jurisprudence, there is ample evidence that this has become Customary International Law.<sup>91</sup>

As such, maintaining the rhythm and harmony of nature indispensably includes the utilization, management, renewal and conservation of the country's forest and this responsibility not only bestowed upon the present generation, but also to generations yet to be born.

**IV. SMALL ISLAND STATES ALSO HAVE THE CONCURRENT OBLIGATION TO STRENGTHEN THEIR RESPONSE TO THE THREAT OF CLIMATE CHANGE.**

**a. States parties have the duty to prepare and maintain nationally determined contributions to the global response to climate change.**

Unlike the rest of the international community, small island states are the most threatened by the effects of climate change, and as a result, they are given special recognition within related agreements.<sup>92</sup> This aided them first when they formulated the AOSIS Protocol wherein it

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<sup>88</sup> *Minors Oposa et.al. v. Hon. Fulgencio Factoran*, G.R. No. 101083, July 30, 1993, 224 SCRA 792.

<sup>89</sup> The 1987 PHIL CONST. art 2, sec. 16.

<sup>90</sup> *Juliana v. United States*, 339 F. Supp. 3d 1062 (D. Or. 2018).

<sup>91</sup> Lynda M. Collins, “Revisiting the Doctrine of Intergeneration Equity in Global Environmental Governance”, *The Dalhousie Law Journal* 132 (2010).

<sup>92</sup> Gillespie, Alexander (2003). *Small Island States in the Face of Climatic Change: The End of the Line in International Environmental Responsibility*. *UCLA Journal of Environmental Law and Policy*, 22. 120.

emphasized that developed countries must reduce their greenhouse gases emission to at least 20%.<sup>93</sup> However, this was met with little success. Eventually, its significant effort resulted in the successful mention of the 1.5 degrees Celsius limit in the Paris Agreement which have to be met by nationally determined contributions.<sup>94</sup>

In *Urgenda v. Netherlands*, for the state to protect its citizen from climate change, it is not necessary for individual identification of prospective victims of climate change related issues and of immediate risks of harm if there is evidence of “long-term” risks.<sup>95</sup> Thus, as part of the global effort to reduce the impact of climate change by limiting the temperature increase to 1.5 degrees Celsius above pre-industrial levels, states parties are required adopt mitigation and adaptation measures, and to prepare, communicate and maintain successive nationally determined contributions.<sup>96</sup> In the case of small island states, their actions for low greenhouse gas emissions should reflect their special circumstances.<sup>97</sup>

**i. States parties shall pursue domestic mitigation measures.**

Mitigation pertains to actions needed for stabilizing greenhouse gases (GHG) concentrations in the atmosphere, through human intervention in a form of reduction GHG emissions, and enhancement of sinks and reservoirs.<sup>98</sup> Since parties are expected to undertake domestically prepared and intended nationally determined contributions, mitigation efforts are diverse.<sup>99</sup>

Accordingly, efforts have been undertaken by small island developing states to reduce fossil fuel dependency and increase electricity services. These include the Mauritius-based GEF Funded Removal of Barriers to Energy

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<sup>93</sup> Introduction of the AOSIS Protocol and the German Proposal. Retrieved from <https://enb.iisd.org/vol12/1211015e.html>.

<sup>94</sup> Bolon, Cecelia. "1.5 to Stay Alive: The Influence of AOSIS in International Climate Negotiations." *E-International Relations Students* (2018).

<sup>95</sup> *Urgenda Foundation v. The Netherlands* [2015] HAZA C/09/00456689 (June 24, 2015); aff'd (Oct. 9, 2018), pars. 2.54, 2.59/60

<sup>97</sup> Article 2, Paris Agreement.

<sup>98</sup> Article 4, Paris Agreement Introduction to Mitigation. Retrieved from <https://unfccc.int/topics/mitigation/the-big-picture/introduction-to-mitigation> on February 18, 2020.

<sup>99</sup> Briner, G., Kato, T., Konrad, S., & Hood, C. (2014). Taking Stock of the UNFCCC Process and its Inter-linkages. Paris: OECD/IEA, (2014).

Efficiency and Energy Conservation in Buildings<sup>100</sup> that ensure efficient and effective use of energy and the five-year Pacific Islands Greenhouse Gas Abatement through Renewable Energy Project<sup>101</sup> which made use of renewable energy.<sup>102</sup>

**ii. States parties are encouraged to take adaptation measures.**

Although small island states contribute a minimum amount of greenhouse gases in the atmosphere, they are susceptible to the negative effects of climate change. Thus, adaptation is vital. Adaptation mainly focuses on adjustment in ecological, social, or economic systems in response to actual or expected climate and their effects or impacts.<sup>103</sup> The use of traditional knowledge and customary decision processes in identifying priority adaptation projects is important as it promotes participation on the local scale. Adaptation processes and projects may also involve enabling activities and mainstreaming of climate change into government policies; and prevention and removal of maladaptive processes.<sup>104</sup>

Adaptation measures are the most effective and relatively inexpensive such as management of water resources and food supply; buffering of coastal zones through mangrove swamp planting and reef restoration and the development of agricultural policies; and climate-proofing of infrastructure and relocation of vulnerable communities.<sup>105</sup> Evidently, adaptation comprises a wide range of actions that are flexible to respond to expected and new impact of climate

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<sup>100</sup> Global Environment Facility. Removal of Barriers to Solar PV Power Generation in Mauritius, Rodrigues and the Outer Islands. Retrieved from <<https://www.thegef.org/project/removal-barriers-solar-pv-power-generation-mauritius-rodrigues-and-outer-islands>> on February 18, 2020.

<sup>101</sup> SPREP. Pacific Islands Greenhouse Gas Abatement Through Renewable Energy Project (PIGGAREP) Retrieved from <<https://www.sprep.org/publications/pacific-islands-greenhouse-gas-abatement-through-renewable-energy-project-piggarep-project-document>> on February 18, 2020.

<sup>102</sup> UNDP. Responding to Climate Change in Small Island Developing States.

<sup>103</sup> UNFCCC. What do adaptation to climate change and climate resilience mean? Retrieved from <<https://unfccc.int/topics/adaptation-and-resilience/the-big-picture/what-do-adaptation-to-climate-change-and-climate-resilience-mean>> on February 18, 2020.

<sup>104</sup> Nurse, L., et al, 2001, Small island states, In Climate Change 2001: Impacts, Adaptation, and Vulnerability, J.J. McCarthy et al (eds.), Contribution of Working Group II to the Third Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge University Press, Cambridge, pp. 842-975.

<sup>105</sup> Submission by AOSIS Dialogue on long term Cooperative Action to Address Climate Change by Enhancing the Implementation of the Convention. August 27-31, 2007. Retrieved from <<https://unfccc.int/files/meetings/dialogue/application/pdf/wp14-aosis.pdf>> on February 18, 2020.

change to lessen the vulnerability of the state.<sup>106</sup> An example of a small island state undertaking these measures is Tuvalu. Tuvalu is a small, isolated island which is 3 meters above sea level and its economy is dependent to subsistence farming and fishing, and foreign aid.<sup>107</sup> With the help of the UNDP, AusAid and the Green Climate Fund, the Tuvalu National Adaptation Programme of Action (NAPA) NAPA-I and NAPA-I+ Projects were implemented. They seek to increase the resilience of coastal areas and community settlements to climate change and include adaptation activities for agriculture and water.<sup>108</sup> This was done through developing a disaster plan, plant-a-tree programme, community water tank projects and, constructing a seawall and spreading awareness on the importance of the NAPA by the public and private sectors.

**V. STATES PARTIES MUST RECOGNIZE THE IMPORTANCE OF MINIMIZING AND ADDRESSING LOSS AND DAMAGE CAUSED BY CLIMATE CHANGE UNDER THE WARSAW INTERNATIONAL MECHANISM ON LOSS AND DAMAGE.**

The Warsaw International Mechanism for Loss and Damage [hereinafter known as “Warsaw”] was established under the Cancun Adaptation framework to address loss and damage associated with the impacts of climate change in developing countries.<sup>109</sup> This includes negative effects brought by extreme events, such as drought flood and storm surge, and slow onset events, such as loss of biodiversity, rising temperature, and sea level rise.<sup>110</sup> The Warsaw undertakes the following function: enhance knowledge and understanding of comprehensive risk management approaches, strengthen dialogue and coordination among stakeholders, and enhance action and support, including finance, technology, and capacity-building.<sup>111</sup>

To implement its functions, an Executive Committee was organized under the same COP. Its role is reiterated in the Paris Agreement in which the parties are mandated to cooperate and facilitate<sup>112</sup> the understanding, action and support to respond to the losses and damage incurred

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<sup>106</sup> UNFCCC Background Paper for the Expert Meeting. Vulnerability and Adaptation to Climate Change in Small Island Developing States. Retrieved from <[https://unfccc.int/files/adaptation/adverse\\_effects\\_and\\_response\\_measures\\_art\\_48/application/pdf/200702\\_sids\\_adaptation\\_bg.pdf](https://unfccc.int/files/adaptation/adverse_effects_and_response_measures_art_48/application/pdf/200702_sids_adaptation_bg.pdf)> on February 18, 2020.

<sup>107</sup> Ministry of Natural Resources and Environment [MNRE] (2007). Tuvalu's National Adaptation Programme of Action. Retrieved from <http://unfccc.int/resource/docs/napa/tuv01.pdf>

<sup>108</sup> Bruce Jefferies (2016). *Final Report*. Terminal Evaluation of the Tuvalu National Adaptation Programme of Action (NAPA) NAPA-I and NAPA-I+ Projects

<sup>109</sup> COP Decision 2/CP.19.

<sup>110</sup> COP Decision 1/CP.16.

<sup>111</sup> COP Decision 2/CP.19, para. 5.

<sup>112</sup> Areas for cooperation and facilitation: (a) Early warning systems; (b) Emergency preparedness; (c) Slow onset events;

as adverse effects of climate change and collaborate prior to the implementation of the respective action.<sup>113</sup> Also, under COP 21, the Executive Committee was tasked to develop a clearing house for risk transfer and a task force on displacement.

***a. Approaches to managing losses and damage***

Losses and damage caused by climate change are classified into two :those caused by extreme events, and those caused by slow onset events. Risk-based approaches, namely: risk reduction, risk transfer, and risk retention, are deemed suitable to address those caused by extreme events.<sup>114</sup> Risk reduction anticipate future risks, reduce existing exposure, vulnerability or hazard, and strengthen resilience.<sup>115</sup> These efforts can be done through structural measures such as construction of dams, retrofitting of existing infrastructure, and the introduction of extreme event-safe building-codes, and through contingency and disaster planning, early warning systems and forecasting, and behavioral change. Risk retention measures are those increases the resilience of countries through financial means in the form of reserve funds and contingency loans.<sup>116</sup> Lastly, risk transfer measures are undertaken by the country, when upon assessment, the potential loss and damage is greater than the ability to manage them. Subsequently, in conformity with COP 23, the Fiji Clearing house for Risk Transfer was launched. It serves as a repository for information on insurance and risk transfer that will aid the parties in developing risk management strategies.<sup>117</sup>

As to those caused by slow-onset events, measures can be implemented through institutional arrangements and governance schemes. Since there is no universal definition on what are losses and damages, it is imperative for agencies to cooperate with one another. Concerted efforts in assessing present and future climate stressors, consulting stakeholders for policy

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(d) Events that may involve irreversible and permanent loss and damage; (e) Comprehensive risk assessment and management; (f) Risk insurance facilities, climate risk pooling and other insurance solutions; (g) Non-economic losses; and (h) Resilience of communities, livelihoods and ecosystems.

<sup>113</sup>Article 8, Paris Agreement, FCCC/CP/2015/10/Add.1.

<sup>114</sup> Puig, D., Calliari, et.al (2019). Loss and damage in the Paris Agreement’s transparency framework. Technical University of Denmark, University College London, and Independent University Bangladesh. Copenhagen, London and Dhaka.

<sup>115</sup> UNISDR (2015). Making development sustainable: the future of disaster risk management. Global assessment report on disaster risk reduction. United Nations Office for Disaster Risk Reduction. Geneva.

<sup>116</sup> UNFCCC (2012). A literature review on the topics in the context of thematic area 2 of the work programme on loss and damage: a range of approaches to address loss and damage associated with the adverse effects of climate change (FCCC/SBI/2012/INF.14). United Nations Framework Convention on Climate Change. Bonn.

<sup>117</sup> COP 23, See <<http://unfccc-clearinghouse.org/>>.

formulation and implementation can greatly help the state.<sup>118</sup> Furthermore, since these events cause migration and the depletion of resources, regional agreements are of great help in managing them.<sup>119</sup> United Nations Convention to Combat Desertification is an existing transboundary agreement which provides mechanism for managing affected resources,<sup>120</sup> while the Global Compact for Migration was entered into to promote international cooperation on planned and unplanned migration.<sup>121</sup> Likewise, the Task Force for Displacement began its first phase in developing a workplan that will avert, minimize, and address displacement caused by climate change. It collaborates with relevant stakeholders within and outside UNFCCC, and upon finishing, it delivers its recommendations and assessment on the issue for negotiations.<sup>122</sup>

### ***b. Reporting of losses and damage***

The policy brief suggested that in reporting, four areas must be covered: measurement, costs, financing, and policies. Assessing losses and damage requires the use of qualitative data and indicators.<sup>123</sup> Therefore, countries should have centralized data collection, based on existing infrastructure and approaches, and the co-production of new knowledge with those directly affected by loss and damage, through surveys, appraisals, and briefings and debriefings.<sup>124</sup> To estimate the costs of loss and damage, it should consider both infrastructure costs and the costs associated with policy planning and implementation.<sup>125</sup> Regional bodies can be tap to assist in estimating the costs and mobilizing funds.<sup>126</sup> Domestic policies that institutionalize losses and damage are also instrumental. Based on the UNFCCC, information should be based on these areas which are the key elements on loss and damage: slow-onset events; non-economic losses; risk management approaches; human mobility (including migration, displacement and planned

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<sup>118</sup> Roberts, E. and Pelling, M. (2018). Climate change-related loss and damage: translating the global policy agenda for national policy processes. *Climate and Development*, 10(1), 4-17.

<sup>119</sup> UNFCCC (2012). Slow-onset events: technical paper (FCCC/TP/2012/7). United Nations Framework Convention on Climate Change. Bonn.

<sup>120</sup> Serdeczny, O. (2017). What does it mean to “address displacement” under the UNFCCC? An analysis of the negotiations process and the role of research. German Development Institute. Bonn.

<sup>121</sup> IOM (2018). World migration report 2018. International Organization for Migration. Geneva.

<sup>122</sup> See <<https://unfccc.int/wim-excom/sub-groups/TFD>>.

<sup>123</sup> Puig, D., et.al (2019). Loss and damage in the Paris Agreement’s transparency framework. Technical University of Denmark, University College London, and Independent University Bangladesh. Copenhagen, London and Dhaka.

<sup>124</sup> Barnett, J., et.al . (2016). A science of loss. *Nature Climate Change*, 6(11), 976-978

<sup>125</sup> Roberts, J.T. et.al (2017). How will we pay for loss and damage? *Ethics, Policy & Environment*, 20(2), 208-226.

<sup>126</sup> Thomas, A. et.al (2018). Policies and mechanisms to address climate induced migration and displacement in Pacific and Caribbean small island developing states. *International Journal of Climate Change Strategies and Management*, 10(1), 86-104.



relocation); and action and support (including finance, technology and capacity building.<sup>127</sup> Lastly, discussions on compensation for loss and damage have been elusive. As a result, it worsens financing gaps, and the lack of accountability for both donors and recipients of climate funds. Nevertheless, in the case of developing states, it can still be made possible if they align their practices with international fiduciary standards on climate -change finance and loss and damage finance.<sup>128</sup>

## **VI. LEGAL REMEDIES AND OTHER POLICY SOLUTIONS AGAINST NON-COMPLIANT STATES**

### **a. The rights to be protected against climate change under human rights instruments**

The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and other human rights instruments require States to guarantee effective remedies for human rights violations. Those affected, now and in the future, must have access to meaningful remedies including judicial and other redress mechanisms. The obligations of States in the context of climate change and other environmental harms extend to all rights-holders and to harm that occurs both inside and beyond boundaries. States should be accountable to rights-holders for their contributions to climate change including for failure to adequately regulate the emissions of businesses under their jurisdiction regardless of where such emissions or their harms actually occur.

The duty to mitigate climate change and to prevent its negative human rights impacts<sup>129</sup> is recognized in the 1972 Stockholm Declaration on the Human Environment. Thus, it states that:

‘adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself’, but it also asserts that ‘every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for Failure to take affirmative measures to prevent human rights harm caused by

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<sup>127</sup> UNFCCC (2016). Report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts (FCCC/SB/2016/3). United Nations Framework Convention on Climate Change. Bonn.

<sup>128</sup> UNDP (2011). Blending climate finance through national climate funds: a guidebook for the design and establishment of national funds to achieve climate change priorities. United Nations Development Programme. New York, NY.

<sup>129</sup> Climate Change. Retrieved from <<https://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf>> on

climate change, including foreseeable long-term harms, breaches this obligation. Yet, the threat of more serious impacts of climate change continues to grow and interfere with our exercise and enjoyment of our basic human rights.

Thus, in the *Öneriyıldız Case*, the European Court of Human Rights emphasized that,

“the positive obligation to take all appropriate steps to safeguard life entails a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life”.<sup>130</sup>

Likewise, as pronounced in the *Advisory Opinion Requested by the Republic of Colombia*,<sup>131</sup> human rights to a healthy environment constitute a universal value that is owed to both the present and the future generations. There is an indivisible relationship between the protection of the environment and the realization of human rights as environmental damage affects the full enjoyment of these rights. A healthy environment is a fundamental right for our existence. Since forests are great examples of carbon sinks, then their protection is of paramount importance to the protection of the whole environment.

Despite the sustainable development goals developed in the 2015 United Nations Conference on Sustainable Development<sup>132</sup> to strengthen commitments towards protecting our terrestrial<sup>133</sup> and marine<sup>134</sup> ecosystems, as well as in addressing issues like poverty<sup>135</sup> and the overall climate action<sup>136</sup> of states, among others, there still exists unsustainable practices and exploitative consumption which are pushing our environment

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<sup>130</sup>*Öneriyıldız v. Turkey*, 41 EHRR (2005) 20, at para. 89.

<sup>131</sup> *Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia: The Environment and Human Rights*, Inter-American Court of Human Rights (IACrTHR), 15 November 2017, available at: <https://www.refworld.org/cases,IACRTHR,5e67c7744.html> <accessed 28 February 2020>.

<sup>132</sup> UN General Assembly, *Implementation of Agenda 21, the Programme for the Further Implementation of Agenda 21 and the Outcomes of the World Summit on Sustainable Development*, UN Doc. A/RES/64/236 (2010) (31 March 2010) at 20 (a).

<sup>133</sup> *Transforming Our World: UN 2030 Agenda for Sustainable Development*, UN A/Res/70/1. [hereinafter UNSDG], SDG15: *Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss*.

<sup>134</sup> *Id.*, SDG 14: *Conserve and sustainably use the oceans, seas and marine resources for sustainable development*.

<sup>135</sup> *Id.*, SDG1: *Ending Poverty in All Forms*.

<sup>136</sup> *Id.*, SDG13: *Take Urgent Actions to Combat Climate Change and Its Impacts*.

to and even beyond its limits. Such acts deprive the future generations the opportunity to enjoy the wonders of nature. With these issues in mind, we must take special consideration to certain regions, peoples and communities which are particularly vulnerable to the effects of climate change. Included in that category are the AOSIS states.

Under core human rights treaties, States acting individually and collectively are obligated to mobilize and allocate the maximum available resources for the progressive realization of economic, social and cultural rights, as well as for the advancement of civil and political rights and the right to development. The failure to adopt reasonable measures to mobilize available resources to prevent foreseeable human rights harms caused by climate change breaches this obligation. The mobilization of resources to address climate change should complement and not compromise other efforts of governments to pursue the full realization of all human rights for all including the right to development. Innovative measures such as carbon taxes, with appropriate safeguards to minimize negative impacts on the poor, can be designed to internalize environmental externalities and mobilize additional resources to finance mitigation and adaptation efforts that benefit the poorest and most marginalized.

The UN Charter, the International Covenant on Economic, Social and Cultural Rights, and other human rights instruments impose upon States the duty to cooperate to ensure the realization of all human rights. Climate change is a human rights threat with causes and consequences that cross borders; thus, it requires a global response, underpinned by international solidarity. States should share resources, knowledge and technology in order to address climate change. International assistance for climate change mitigation and adaptation should be additional to existing ODA commitments. Pursuant to relevant human rights principles, climate assistance should be adequate, effective and transparent, it should be administered through participatory, accountable and nondiscriminatory processes, and it should be targeted toward persons, groups, and peoples most in need.

Therefore, states should engage in cooperative efforts to respond to climate-related displacement and migration and to address climate-related conflicts and security risks.

## **VII. CONCLUSION AND PRAYER**

Climate change is now simply impossible to ignore. It seems that the richer human society becomes, the more we poison the world. However, figuring out what must be done at this late stage is tricky because at this point, the mission is longer just to reverse climate change but to also to mitigate its worst effects especially to vulnerable sectors like the AOSIS. Presently, climate crisis lacks sufficient and sound international jurisprudential reference, hence, the determination of responsibilities, obligations and liabilities is vital.

It is difficult to imagine a world if climate change is continuously ignored. As such, securing clarity and consistency in relation to protecting our forests as a way to mitigate the effects of climate change and to help vulnerable sectors like the AOSIS, in both legal theory and application is of utmost importance. The obligations of States to the abovementioned treaties and laws should be recognized as true guiding principles.

Truly, it is a lot of work and in order to comply with this obligation, states should conduct forestry projects like plantation programs to expand their forest ecosystems by increasing the area of plantation forests. Forest conservation and management that contributes to the growth of forests like silvicultural strategies such as fertilization, and agroforestry programs where farmers intersperse trees on agricultural land and crop underneath them should likewise be implemented. In relation to this, a national forest monitoring system as one of the elements to be developed by developing country Parties implementing REDD+ activities (according to paragraph 71 of decision 1/CP.16), is likewise to be put in place. Adequate and predictable financial and technology support for developing the national forest monitoring system is intended under the REDD+ mechanism.

Hence, we ask this Honorable Court to lay down and determine responsibility of States so as to ensure compliance of the state's obligation to protect forests and blue carbon sinks under their national jurisdiction to help mitigate and adapt to the effects of climate change and the extent of their liability for its failure to act with regard to the climate crisis for the benefit of ours and that of the future generations. Particularly, we respectfully request for this Court to:

1. Require the adoption of a new phase of climate negotiations in securing AOSIS's priorities on mitigation and adaptation and loss and damage;
2. Promote the harmonization of national laws to ensure a higher threshold of protection of the forests and blue carbon sinks; and
3. Call for action on loss and damage to help vulnerable countries and provide stringent amendments to further strengthen the Warsaw International Mechanism for Loss and Damage.

Respectfully,

Representatives of the AOSIS  
Mary Jeanelly Bontilao  
Mary Therese Maurin