PART 2

The Law of the Sea and Ocean Governance

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The Rights of Nature and Legal Personhood in an Ocean Context

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Introduction

Rights of nature are on the verge of becoming a new mainstream lens to discuss and engage with environmental protection. On the one hand, this is linked with the perceived limitations of sustainable development as a framework for nature protection, in a context where the environmental polycrisis has become much worse after more than three decades of reliance on sustainable

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development as the main vehicle for sustaining environmental protection measures.[1] On the other hand, the focus on rights of nature is linked to the lasting attraction of rights discourses as a tool to transform the underlying environmental ethics driving economic activity and policy decisions.[2] The progressive recognition of the right to a healthy environment in most jurisdictions of the world,[3] now bolstered by the 2022 United Nations General Assembly (UNGA) recognition,[4] acts as a confirmation that the discourse of fundamental human rights remains potentially a crucial legal tool to uphold the values of environmental justice more broadly.

Developments concerning rights of nature so far have taken place mostly in sub-national and national contexts.[5] At the international level, the main framing of eco-centric discourses has been through Harmony with Nature, a United Nations-led effort to think about ecocentrism within the context of sustainable development.[6] This is now evolving, and rights of nature debates are progressively incorporating questions arising in a transnational or regional setting in areas beyond national jurisdiction and more broadly concerning global commons.[7]

It is in this context that questions concerning rights of nature arise in an ocean context. This think-piece engages with some of the underlying issues arising in the effort to think through the transposition of rights of nature from the national to the international level. It starts by introducing the conceptual framing for rights of nature and associated concepts such as legal personhood, then moves on to examine how the rights discourse could be applied in the

1 For example, P. Cullet, "Promises and perils of economic development," in: *Implementation of Sustainable Development in the Global South: Strategies, Innovations and Challenges*, eds., S. Khair, S. Alam and M.E. Haque (London: Hart, 2024) (forthcoming).

2 K.M.A. Chan et al., "Why protect nature? Rethinking values and the environment," *Proceedings of the National Academy of Sciences* 113, no. 6 (2016): 1462–1465, available online: <https://doi.org/10.1073/pnas.1525002113>.

3 For example, J.R. May, "The case for environmental rights: Recognition, implementation and outcomes," *Cardozo Law Review* 42 (2020–21): 983–1038, available online: <https://doi.org/10.2139/ssrn.3687070>.

4 UN General Assembly (UNGA), Resolution 76/300, The Human Right to a Clean, Healthy and Sustainable Environment, UN Doc A/RES/76/300 (July 28, 2022).

5 For example, A. May, "Realising rights of nature: Understanding the variety of legal instruments," Lawyers for Nature (2023).

6 For example, UNGA, Resolution 64/196, Harmony with Nature, UN Doc A/RES/64/196 (December 21, 2009); UNGA, Resolution 77/169, Harmony with Nature, UN Doc A/RES/77/169 (December 14, 2022).

7 H.R. Harden-Davies et al., "Rights of nature: Perspectives for global ocean stewardship," *Marine Policy* 122 (December 2020): 104059, available online: <https://doi.org/10.1016/j.marpol.2020.104059>.

context of marine protected areas, marine migratory species, and deep seabed mining, while acknowledging potential challenges that lie ahead.

Rights of Nature: Background and Evolution

Rights of nature is a legal, ethical and relational framework, as well as a growing movement, which recognizes nature as a subject of rights.[8] Proponents of rights of nature emphasize nature's intrinsic values, while affirming the human responsibility to steward nature on behalf of present and future generations of all life. Importantly, the conception of nature under rights of nature frameworks is inclusive of human beings as an inseparable part of nature. The Constitutional Court of Ecuador found that rights of nature "necessarily encompass[es] the right of humanity to its existence as a species," and demands a "new form of civic coexistence, in diversity and harmony with nature."[9] Thus, rights of nature creates a nested hierarchy of rights, where human rights operate in synergy with nature's rights.[10]

Legal recognition of rights of nature exists in approximately 40 countries in the form of constitutional provisions, national and subnational legislation, local ordinances, Indigenous and tribal codes, and judicial decisions,[11] variously granting legal personhood and/or substantive and procedural rights to species, ecosystems, individual animals or nature as a whole.[12] For example, in Ecuador's Constitution, "Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes."[13] Thus, Ecuador recognizes nature wholly as a subject of rights and in the highest form of law. In the Loyalty Islands, a province of New Caledonia,

8 C.M. Kauffman and P.L. Martin, *The Politics of Rights of Nature: Strategies for Building a More Sustainable Future* (Cambridge, MA: MIT Press, 2021), p. 4.

9 Caso No. 1149-19-JP/20 ("Los Cedros Case"), Corte Constitucional del Ecuador (November 10, 2021), paras 28, 30, 31.

10 M. Carducci et al., "Towards an EU Charter of the Fundamental Rights of Nature" (Brussels: European Economic and Social Committee, 2020), p. 64.

11 A. Putzer et al., "Putting the rights of nature on the map. A quantitative analysis of rights of nature initiatives across the world," *Journal of Maps* 18, no. 1 (2022): 89–96, available online: <https://doi.org/10.1080/17445647.2022.2079432>; "Eco Jurisprudence Monitor," available online: <https://ecojurisprudence.org/>.

12 N. Pain and R. Pepper, "Can personhood protect the environment? Affording legal rights to nature," *Fordham International Law Journal* 45, no. 2 (2021): 315–378, p. 333.

13 Ecuador Constitution, Art. 71. Ecuador became the first country to recognize Nature as a rights-being entity in its constitution.

the Environmental Code provides that "certain elements of Nature can be granted legal personality endowed with rights specific to them."[14] This provided the basis for an attempt to get sharks and marine turtles specifically recognized as "natural entities subjects of rights."[15] Yet, in 2024, the Conseil d'État, the highest administrative court of mainland France, ruled that the province was not competent to recognize the legal personality of natural entities.[16]

In Colombia, judicial decisions have interpreted existing law to declare a specific ecosystem, such as the Atrato River and Colombian Amazon, as "an entity, subject of rights, entitled to protection, conservation, maintenance and restoration."[17] However, binding legislation to put the judicial decisions into effect is still in process.[18] Finally, other jurisdictions, such as New Zealand, have recognized elements of nature as legal persons or entities. For example, in 2017, Te Awa Tupua (or the Whanganui River) was declared a "legal person" with all the "rights, powers, duties, and liabilities of a legal person."[19]

A significant share of developments concerning rights of nature have focused on water, specifically rivers.[20] In India, the High Court of Uttarakhand proposed the recognition of legal personality for Ganga and Yamuna, as well as all related elements of the rivers' ecosystems.[21] This decision has been appealed to the Supreme Court of India.[22] In Bangladesh, the higher judiciary has

14 Code de l'environnement de la Province des Iles Loyauté 2nd ed., Art. 110.3 (2024) (New Caledonia).

15 Id., Art. 242.17.

16 Conseil d'État [CE], decision no. 492621, May 31, 2024 (France).

17 Corte Constitucional [C.C.] [Constitutional Court], November 10, 2016, Sentencia T-622/16 (Atrato River Case), (Colombia), unofficial translation, p. 5, available online: <http://files.harmonywithnatureun.org/uploads/upload838.pdf>; Corte Suprema de Justicia [C.S.J.] [Supreme Court], April 5, 2018, STC 4360–2018 (Amazon Rights Case), (Colombia).

18 P. Wesche, "Rights of nature in practice: A case study on the impacts of the Colombian Atrato River Decision," *Journal of Environmental Law* 33, no. 3 (2021): 531–555, available online: <https://doi.org/10.1093/jel/eqab021>.

19 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, Public Act 2017 No. 7, pt. 2, s. 14(1) (N.Z.).

20 For example, D. Takacs, "We are the river," *University of Illinois Law Review* 2021, no. 2 (2021): 545–606.

21 *Mohd. Salim v. State of Uttarakhand & others*, 2017 SCC Online Utt 367 (India); *Lalit Miglani v. State of Uttarakhand & others*, 2017 SCC Online Utt 392 (India); see also, P. Cullet, "River rights: Framing, recognition and beyond," in: *River Rejuvenation and River Rights: Evolving Debates in India*, eds., P. Cullet and R. Shree (Hyderabad: Orient BlackSwan, 2025) (forthcoming).

22 *Union of India v. Mohd Salim*, Special Leave Petition (Civil) Diary No. 7266/2017 (India).

recognized the legal personality of all rivers.[23] All these developments have been overwhelmingly at the national level.

At the international level, rights of nature principles can already be found in the proposed UN World Charter for Nature of 1982.[24] Thirty-four nations of the Global South sponsored the Charter[25] as part of an effort to bring rights of nature understandings into action at the international level, for example, by affirming that humankind is a part of nature and that every form of life warrants respect regardless of its worth to humans.[26] In 2009, Bolivia spearheaded the adoption of a resolution of the UNGA declaring 21 April as International Mother Earth Day.[27] The further proposal for a Universal Declaration of the Rights of Mother Earth adopted at the World People's Conference on Climate Change and the Rights of Mother Earth[28] was not taken up by the UN, but instead, the UNGA kick-started what we now know as UN Harmony with Nature "promoting life in harmony with nature."[29] This initiative has led to repeated debates and reports over the past 15 years at the level of the UNGA.[30] In 2010, the Convention on Biological Diversity adopted "Living in Harmony with Nature" as its 2050 goal as part of the Aichi Targets. The 2022 Kunming-Montreal Global Biodiversity Framework, adopted at the 15th Conference of Parties (COP) of the Convention on Biological Diversity reaffirmed its commitment to Living in Harmony with Nature as its 2050 goal.[31] Moreover, it recognizes rights of nature, for those countries who recognize them, as "being

23 *Nishat Jute Mills Ltd v. Human Rights and Peace for Bangladesh & others*, Civil Petition for Leave to Appeal No. 3039 of 2019, Supreme Court Appellate Division, February 17, 2020, (Bangladesh).

24 UNGA, Resolution 37/7, World Charter for Nature, UN Doc A/RES/37/7 (October 28, 1982).

25 H.W. Wood, Jr., "The United Nations World Charter for Nature: The developing nations' initiative to establish protections for the environment," *Ecology Law Quarterly* 12, no. 4 (1985): 977–996.

26 World Charter for Nature, n. 24 above.

27 UNGA, Resolution 63/278, International Mother Earth Day, UN Doc A/RES/63/278 (May 1, 2009).

28 Universal Declaration for the Rights of Mother Earth, World People's Conference on Climate Change and the Rights of Mother Earth, Cochabamba, Bolivia (April 22, 2010).

29 UNGA, Resolution 64/196, Harmony with Nature, n. 6 above, 2009, para. 1.

30 For example, UNGA, Resolution 77/169, Harmony with Nature, n. 6 above.

31 As in the Aichi Targets, "[t]he vision of the Kunming-Montreal Global Biodiversity Framework is a world of living in harmony with nature where 'by 2050, biodiversity is valued, conserved, restored and wisely used, maintaining ecosystem services, sustaining a healthy planet and delivering benefits essential for all people.'" Convention on Biological Diversity (CBD) COP, Decision 15/4, Kunming-Montreal Global Biodiversity Framework, Doc CBD/COP/DEC/15/4 (Dec. 19, 2022).

an integral part of its successful implementation."[32] Yet, on the whole, rights of nature are not widely accepted as international law.[33]

Recognition of the ocean as a living entity with inherent rights and intrinsic value[34] mirrors the broader concept and debate on rights of nature. As has been the case on land, ocean rights can be framed in various ways, ranging from recognition of rights of specific species or individuals to rights of an entire ecosystem or the ocean itself. Examples of ocean rights approaches currently being developed as well as applied include the initiative towards a Universal Declaration of Ocean Rights,[35] the He Whakaputanga Moana (Declaration for the Ocean) articulating a global call for legal personhood for whales,[36] the recognition of sea turtles as subjects of rights in Panama through National Law 371,[37] the recognition of marine turtles and sharks as natural entities subject to rights in the Loyalty Islands Province of New Caledonia,[38] the recognition of rights of waves at the mouth of the Rio Doce to existence, regeneration, and restoration by the city of Linhares in Brazil,[39] and court cases in Ecuador protecting sharks and mangroves through constitutional recognition of the rights of nature.[40]

Recognizing and applying the perspective of rights of nature to the ocean offers a particularly interesting field of inquiry as it ultimately requires international law to address marine areas beyond national jurisdiction, beyond the reach of national legislation,[41] especially in light of the 2023 adoption of the

32 CBD COP, Decision 15/4, n. 31 above, p. 5.

33 J. Gilbert, "Creating synergies between international law and rights of nature," *Transnational Environmental Law* 12, no. 3 (November 2023): 671–692, p. 673, available online: <https://doi.org/10.1017/S2047102523000195>.

34 "We Are the Ocean and the Ocean Is Us: Establishing a New Relationship between Humankind and the Ocean," report presented to the UN General Assembly, September 2023, available online: <https://www.oceanrights.com>.

35 M. Bender et al., "Universal Declaration of Ocean Rights and Ocean for Ecocide Law," *Ocean Vision Legal*, September 15, 2023, available online: <https://www.oceanvisionlegal.com/post/ocean-rights-and-ecocide>.

36 He Whakaputanga Moana Treaty (Declaration for the Ocean), March 28, 2024.

37 Ley No. 371, que establece la conservación y protección de las tortugas marinas y su hábitats en la Republica de Panama [establishes the conservation and protection of sea turtles and their habitats in the Republic of Panama], March 1, 2023 (Panama).

38 Code de l'environnement de la Province des Iles Loyauté, n. 14 above, Art. 110.3.

39 Eco Jurisprudence Monitor, "Municipality of Linhares (Brazil) Law on the Rights of the Waves," available online: <https://ecojurisprudence.org/initiatives/municipality-of-linhares-brazil-law-on-the-rights-of-the-waves/>.

40 Los Cedros Case, n. 9 above.

41 K.M. Gjerde, H. Harden-Davies and K. Hassanali, "High seas treaty within reach," *Science* 377, no. 6612 (September 16, 2022): 1241, available online: <https://doi.org/10.1126/science.ade8437>.

UN Agreement on the Conservation and Sustainable Use of Marine Biodiversity in Areas Beyond National Jurisdiction and the evolving work towards a Universal Declaration of Ocean Rights.[42]

Rights of Nature in Practice

Recognition of a special status of nature and non-humans in law is ancient. Many Indigenous legal systems conceptualize duties to the natural environment and personality of nature and its components.[43] In the Middle Ages, animals were put on trial, complete with legal representation, in a form of legal ritual that served both legal and social purposes.[44] In modern times, Western jurists began engaging with rights of nature concepts in the 1970s,[45] and have continued to draw on Indigenous concepts, environmental ethics and ecological science in shaping the growing movement.[46]

Legal Personhood and Nature's Capacity to Hold Rights

Rights of nature requires first a recognition that nature is capable of holding rights, often through an explicit codification of personhood. A "person," under the law, is one capable of holding rights and/or duties, either a natural person (a human individual) or a non-human entity granted personhood by law, variously called a *persona ficta*, a juristic person or a legal person.[47] Non-human legal persons have been recognized for centuries, from the recognition of monasteries as corporate persons in the Middle Ages to the extension of legal personality to ships by the British Admiralty and the early American Supreme

42 Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction, UN Doc A/CONF.232/2023/4 (June 19, 2023).

43 The Cyrus R. Vance Center for International Justice, Earth Law Center, and International Rivers, "Rights of Rivers: A Global Survey of the Rapidly Developing Rights of Nature Jurisprudence Pertaining to Rivers," (2020), p. 40 [Rights of Rivers].

44 S.M. Wise, "The legal thinghood of nonhuman animals," *Boston College Environmental Affairs Law Review* 23, no. 3 (1996): 471–546; B. Soderberg, "Reassessing animals and potential legal personhood: Do animals have rights or duties?," *Vermont Journal of Environmental Law* 24, no. 2 (2022): 171–195.

45 C.D. Stone, "Should trees have standing: Toward legal rights for natural objects," *Southern California Law Review* 45, no. 2 (1972): 450–501.

46 Kauffman and Martin, n. 8 above, p. 4.

47 B. Smith, "Legal personality," *Yale Law Journal* 37, no. 3 (1928): 283–299, available online: <https://doi.org/10.2307/789740>; J.W. Salmond, *Jurisprudence: Or, The Theory of the Law* (London: Stevens and Haynes, 1907).

Court.[48] In modern times, virtually all jurisdictions recognize corporations as having legal personality. Legal personhood in these cases is not based on moral worth or inherent value, but on practical considerations. In the words of Bryant Smith: "The broad purpose of legal personality, whether of a ship, an idol, a molecule, or a man, and upon whomever or whatever conferred, is to facilitate the regulation, by organized society, of human conduct and intercourse."[49]

One question that arises is whether personhood requires both rights *and* duties. This can be dispositive: a New York court found that Tommy, an imprisoned chimpanzee, could not be considered a legal person because he could not bear duties, citing a possible misprint in Black's Law Dictionary that was later corrected.[50] Kurki argues for a "bundle theory" of personhood, in which incidents of legal personhood such as rights, duties, liability, competence and standing may be held in different combinations analogous to property rights.[51] Thus it is possible for an ecosystem to be considered a "legal person" without concomitant responsibilities for harm that might be caused by, for example, floods or tidal waves, that are without intent.[52]

Jurisdictions around the world have explicitly recognized nature or components of nature as legal persons. In 2006, Tamaqua Borough, Pennsylvania, adopted an ordinance providing that "[b]orough residents, natural communities, and ecosystems shall be considered to be 'persons' for the purposes of the enforcement of the civil rights of those residents, natural communities, and

48 Smith, n. 47 above; R. Mawani, "The ship, the slave, the legal person," in: *Interrupting the Legal Person*, eds., A. Sarat, G. Pavlich and R. Mailey (Leeds, UK: Emerald Publishing Ltd., 2022); V.A.J. Kurki, *Legal Personhood*, 1st ed. (Cambridge: Cambridge University Press, 2023), available online: <https://doi.org/10.1017/9781009025614>.

49 Smith, n. 47 above, p. 296.

50 S. Lo, "What is a Legal Person? Law Dictionary Corrects Decades-Old Error," Nonhuman Rights Project, June 25, 2019, available online: <https://www.nonhumanrights.org/blog/legal-person-blacks-law-correction/>; *People ex rel. Nonhuman Rts. Project, Inc. v. Lavery*, 998 N.Y.S. 2d 248 (N.Y. App. Div. 2014).

51 Kurki, n. 48 above; V.A.J. Kurki, "Can nature hold rights? It's not as easy as you think," *Transnational Environmental Law* 11, no. 3 (November 2022): 525–552, available online: <https://doi.org/10.1017/S2047102522000358>.

52 A. Dyschkant, "Legal personhood: How we are getting it wrong," *University of Illinois Law Review* 2015, no. 5 (2015): 2075–2110 (arguing that natural persons unable to bear duties, such as children and comatose individuals, are still recognized as holding rights); E.L. O'Donnell and J. Talbot-Jones, "Creating legal rights for rivers: Lessons from Australia, New Zealand, and India," *Ecology and Society* 23, no. 1 (January 2018), available online: <https://doi.org/10.5751/ES-09854-230107>; S. Stucki, "Towards a theory of legal animal rights: Simple and fundamental rights," *Oxford Journal of Legal Studies* 40, no. 3 (September 2020): 533–560, available online: <https://doi.org/10.1093/ojls/gqaa007>.

ecosystems."[53] Some years later, a court in Argentina recognized that "great apes are legal persons, with [a] legal capacity but [are] incompetent to act."[54]

In 2014, New Zealand established the Te Urewera National Park as a legal entity with "all the rights, powers, duties and liabilities of a legal person," and established the Te Urewera Board to exercise such rights, powers and duties.[55] Three years later, New Zealand declared Te Awa Tupua (the Whanganui River system) a legal person with rights, powers and duties to be exercised by Te Pou Tupua, a legal agent comprising two people appointed to be "the human face of Te Awa Tupua and act in the name of Te Awa Tupua."[56] Courts in India and Colombia have similarly recognized particular ecosystems as legal persons with agents or guardians designated to represent them.[57] The institutional aspects of such systems are discussed below (Governance and Institutional Aspects).

In India, the High Court of Uttarakhand recognized the Himalayan ecosystem as a legal person. The judge argued that

> [j]uristic persons being the arbitrary creations of law, as many kinds of juristic persons have been created by law as the society require for its development … Thus, the Himalayan Mountain Ranges, Glaciers, rivers, streams, rivulets, lakes, jungles, air, forests, meadows, dales, wetlands, grasslands and springs are required to be declared as the legal entity/legal person/juristic person/juridical person/moral person/artificial person for their survival, safety, sustenance and resurgence.[58]

The decision was stayed by India's Supreme Court.[59]

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53 Tamaqua Borough, Pa., "Tamaqua Borough Sewage Sludge Ordinance," Ordinance No. 612 (September 19, 2006); see also, G.J. Gordon, "Environmental personhood," *Columbia Journal of Environmental Law* 43, no. 1 (2018): 49–92, p. 58.

54 Tercer Juzgado de Garantías [Third Court of Guarantees], 3/11/2016, Presentación efectuada por A.F.A.D.A respecto del chimpancé "Cecilia"-sujeto no humano [Presentation by A.F.A.D.A regarding the chimpanzee "Cecilia"-non-human Subject], No. P-72.254/15 (Argentina), unofficial translation, p. 24, available online: <https://www.nonhumanrights.org/wp-content/uploads/2016/12/Chimpanzee-Cecilia_translation-FINAL-for-website.pdf>.

55 Te Urewera Act 2014, Public Act 2014 No. 51, pt. 1, s. 11(1) (New Zealand).

56 Te Awa Tupua (Whanganui River Claims Settlement), n. 19 above, pt. 2, ss. 14(1), 18(2).

57 Kauffman and Martin, n. 8 above, p. 4.

58 *Lalit Miglani v. State of Uttarakhand & others*, 2017 SCC Online Utt 392, para. 61 (India).

59 *Union of India v. Lalit Miglani*, Special Leave Petition (Civil) Diary No. 34250/2017 (India).

A broader framing is that chosen by Ecuador that protects the whole of nature. In this case, the Constitution of Ecuador distinguishes between persons, communities, peoples and nations as "bearers of rights" and Nature as "the subject of those rights that the Constitution recognizes for it."[60] It empowers all persons and communities to enforce these rights.[61]

Substantive Rights

Various jurisdictions have recognized specific substantive rights held by identified ecosystems, species, animals or nature as a whole. These include the right to exist, the right to flourish, the right to protection, the right to life, and the right to evolutionary capacity.[62] For example, Bolivia's Law of the Rights of Mother Earth (2010) includes rights to life, diversity of life, water, clean air, ecological equilibrium, restoration and a life free of contamination.[63] Ecuador's Constitution recognizes that Nature has the right to "integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes," as well as the right to be restored.[64] In 2019, Uganda recognized that nature has the right to "exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution."[65] Ecuador, Bolivia and Uganda, along with other jurisdictions following this model provide a right of action for any person to defend rights of nature.[66]

The Constitutional Court of Colombia in 2016 recognized the Atrato River as an "entity subject to rights of protection, conservation, maintenance and restoration" and ordered the creation of a commission of guardians.[67] A year later, the Supreme Court of Colombia recognized the Amazon as a legal entity, and courts subsequently recognized the Cauca River, the Magdalena River, the Coello, Combeima and Cocoro Rivers and the La Plata River as legal subjects.[68]

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60 Ecuador Constitution, Art. 10.

61 Id., Art. 71.

62 Y. Epstein et al., "Science and the legal rights of nature," *Science* 380, no. 6646 (May 19, 2023), available online: <https://doi.org/10.1126/science.adf4155>.

63 Ley No. 071, Ley de Derechos de la Madre Tierra [Law of the Rights of Mother Earth], December 1, 2010, Art. 7, (Bolivia).

64 Ecuador Constitution, Art s 71–72.

65 The National Environment Act, Act 5 of 2019, s. 4(1) (Uganda).

66 Kauffman and Martin, n. 8 above, p. 4.

67 Atrato River Case, n. 17 above.

68 Rights of Rivers, n. 43 above.

Procedural Rights and Standing

Access to justice, realized through the right to bring suit when aggrieved, is a fundamental procedural right. For nature and components of nature to exercise this right, they require both legal capacity to bring suit and standing to do so on their own behalf. The standing doctrine, specifically the need to demonstrate harm to the plaintiff bringing suit, has been considered a barrier to environmental protection in some jurisdictions, including the United States.[69] Rights of nature laws typically confer standing on human representatives to protect and defend nature's rights. Standing has been conferred onto designated human representatives (e.g., the case of Te Awa Tupua) or upon any and all individuals, legal entities and communities (such as in Ecuador).[70]

Standing requires courts to acknowledge the interests of nature and weigh those interests against those of the other parties.[71] This was confirmed by the Constitutional Court of Ecuador when noting that their decision taken "must be open to the best possible weighing of interests, rights, principles, and values at stake in each case,"[72] and this includes the rights of nature. In this way, standing is one way to assess and take into account the interests of nature in disputes affecting its health, and establish a form of checks and balances to hold human activity within the Earth's capacity to sustain it.

In 2021, wild rice or Manoomin (represented by the White Earth Band of Ojibwe of the Chippewa Nation) sued the Minnesota Department of Natural Resources in White Earth Tribal Court arguing that their issuance of a dewatering permit threatened its rights.[73] The case was based on the 2018 Rights of Manoomin Ordinance adopted by the Band which states the Manoomin (wild rice) possesses "inherent rights to exist, flourish, regenerate, and evolve, as well as inherent rights to restoration, recovery, and preservation."[74] It goes on to specify the specific rights of pure water and freshwater habitat and a right to a healthy climate system free from anthropogenic climate change.

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69 Stone, n. 45 above.

70 Te Awa Tupua (Whanganui River Claims Settlement), n. 19 above, pt. 3, subpt 3; Ecuador Constitution, Art. 71.

71 *Karnail Singh and others v. State of Haryana*, 2019 SCC Online P&H 703, at 93 (India).

72 Los Cedros Case, n. 9 above, p. 100, para. 4.2.

73 *Manoomin et al. v. Minnesota Dep't of Nat. Res. et al.*, Complaint (White Earth Band of Ojibwe Trib. Ct. 2021); J. Smith, "Rights of nature and tribal sovereignty: Protecting natural communities, wild rice, and salmon in the United States," *Maryland Journal of International Law* 38, no. 1 (2024), p. 178.

74 "Rights of Manoomin Ordinance," Resolution No. 001-19-009/010, White Earth Band of Chippewa Indians (2018), s. 1(a).

The White Earth Court of Appeals ultimately ruled that it did not have jurisdiction.[75] In 2022, the Sauk-Suiattle Indian Tribe filed a lawsuit against the city of Seattle in Tribal Court seeking recognition that Tsuladxw or salmon have the "inherent right to exist, flourish, regenerate, evolve, as well as an inherent right to restoration, recovery and preservation."[76] In April 2023, the city of Seattle settled and agreed to a passage system that would allow salmon to return to their native ecosystem.

Respect for Intrinsic Values, Precaution and Ecological Development

The recognition of and respect for the intrinsic values of nature is a foundational principle across rights of nature laws, for example, the interpretation of Ecuador's Constitution, Panama's National Law 287 recognizing the rights of nature,[77] and New Zealand's treaty agreements and public acts recognizing ecosystems as legal persons or entities.

Ecuador is currently the only country to recognize rights of nature at the constitutional level, though efforts have been introduced in Aruba and Chile.[78] As a result, the country has been able to extensively show implementation through over 60 lawsuits involving the interpretation of the rights of nature provisions,[79] thus demonstrating what the framework means in practice. The Constitutional Court has found that the intrinsic value of the existence of species and ecosystems established through the rights of nature creates a constitutional obligation to apply precautionary and restrictive measures when there is risk of serious or irreversible damage due to the development

75 *Manoomin et al. v. Minnesota Dep't of Nat. Res. et al.*, No. AP21-0516 (White Earth Band of Ojibwe Trib. Ct. App. 2022); "Rights of Manoomin," Center for Democratic and Environmental Rights, available online: <https://www.centerforenvironmentalrights.org/rights-of-manoomin>.

76 *Sauk-Suiattle Indian Tribe on its own behalf and in its capacity as the Sahkuméhu ex rel Tsuladx v. Seattle*, Complaint (Sauk-Suiattle Trib. Ct. 2022), pp. 1–2; Smith, n. 73 above, p. 183.

77 Ley No. 287, que reconoce los derechos de la naturaleza y las obligaciones del estado relacionadas con estos derechos [recognizes the rights of nature and the related obligations of the State with these rights], February 1, 2023 (Panama).

78 Chile considered Rights of Nature in their Constitutional Amendment Process in 2022, where the entire draft constitution was rejected, not just rights of nature (See K. Surma, "Chilean Voters Reject a New Constitution that Would Have Provided Groundbreaking Protections for the Rights of Nature," *Inside Climate News*, Septemer 4, 2022, available online: <https://insideclimatenews.org/news/04092022/chile-constitution-rights-of-nature/>); Aruba introduced a constitutional amendment in 2023 (the effort is still ongoing, see <https://ecojurisprudence.org/initiatives/aruba-constitutional-amendment-recognizing-the-rights-of-nature/>).

79 Putzer, n. 11 above.

of an activity.[80] The Constitutional Court found that applying precautionary and restrictive measures "is not a conditional power or option, but a constitutional obligation derived from the intrinsic value that the Constitution places on the existence of species and ecosystems through the rights of nature."[81] Additionally, the point of shifting the burden of proof has been raised in rights of nature cases, for example, with the Ecuadorian Constitutional Court finding that a company seeking mining activity in the Los Cedros forest did not provide substantiated scientific evidence that the impacts of mining activity would not generate irreversible harm to the forest, such as the extinction of species.[82]

In Ecuador and Panama, the precautionary principle is coupled with the principle of *in dubio pro natura*, offering a more rigorous application of precaution. For example, Panamanian National Law 287 provides that "the interpretation that applies the broadest and most favorable sense to safeguard and guarantee the rights of nature must always prevail, as well as the preservation of the environment. In case of doubt, legal loopholes, or contradictions in decision-making must be resolved by giving preference to alternatives less harmful to nature."[83] *In dubio pro natura* has a lower threshold than precaution. If the latter is triggered where there is a risk of serious or irreversible damage to the environment, *in dubio pro natura* detaches the need for preventive and restrictive measures from the seriousness of the risks of environmental damage.[84] It has also been used even outside situations of scientific uncertainty.[85]

Effective realization of rights of nature has been found to mandate that human use of the environment is subject to maintaining and ensuring the welfare of future human generations, and the conservation and intrinsic value of nature.[86] In practice, this requires animals to not only be protected from an ecosystem perspective, but also from a perspective that focuses on their individuality[87] and application of the principle of ecological development.

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80 Los Cedros Case, n. 9 above, p. 32, para. 130.

81 Id., p. 17, para. 65.

82 Id., p. 17, paras 65, 67.

83 Ley No. 287, n. 77 above, Art. 8.

84 See A. Olivares and J. Lucero, "Contenido y Desarrollo Del Principio in Dubio pro Natura. Hacia La Protección Integral Del Medio Ambiente," *Ius et Praxis* 24, no. 3 (December 2018): 619–650, p. 631, available online: <https://doi.org/10.4067/S0718-00122018000300619>.

85 S. Baldin and S. De Vido, "The *In Dubio Pro Natura* principle: An attempt of a comprehensive legal reconstruction," *Revista General de Derecho Público Comparado*, no. 32 (2022): 168–99, p. 178, available online: <https://doi.org/10.2139/ssrn.4313438>.

86 *Caso No. 253-20-JH* ("Estrellita Monkey Case"), Corte Constitucional del Ecuador (January 27, 2022) (Ecuador).

87 Id., p. 27, para. 79.

The Constitutional Court of Ecuador found that the principle of ecological development[88] requires that the use of nature's elements may under no circumstances jeopardize "its existence, and the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes."[89] This means that sustainable development must not only be interpreted from the human dimension, but an ecological dimension, or "ecologically sustainable development." The condition under which ecological sustainability has to be achieved requires that human use of nature should not detract from or degrade the use of nature by other organisms, i.e., "human use is ultimately subordinate to healthy ecosystems."[90] This is because the economy and economic development "depends on the productive capacity of ecosystems, and, at the same time, ecosystems can only remain healthy if human economies are sustainable."[91] The use of "under no circumstances jeopardize" in the interpretation of the principle of ecological development also reveals that in instances of competing interests, if an activity jeopardizes the existence of species, leads to the destruction of ecosystems or jeopardizes the maintenance and regeneration of nature's cycles, such activities are not sustainable and should be prohibited.

In Panama, the legal recognition of intrinsic values allows for "the superior interest of nature" or "higher interest" standard in decision-making and disputes. For example, Panama's National Law, Chapter 1, Article 8 establishes principles the law will be governed by, including "1. The superior interest of nature: the special protection of fundamental rights of nature, rooted in its intrinsic value, due to its vulnerability facing human activities that may alter its ecological and vital cycles." This principle, specifically, was referenced by the Supreme Court of Panama in 2023 in declaring a proposal for the Cobre Panama Copper Mine unconstitutional. The Court stated that "our country, through Law 287 of February 24, 2022, granted 'nature' the status of subject of law. The above implies that the Panamanian State must have the necessary public policies to ensure 'the highest interest of nature,' now for its intrinsic value, and regardless of the utilitarian value it has for human beings."[92] The

88 Id., p. 20, para. 60.

89 Ecuador Constitution, Art. 71.

90 S.D.D. Pokem, "Linking Normative and Strategic Planning in a Unique Forest Management Planning Framework: A Theoretical Proposal," Working (Discussion) Paper no. 52 (University of Freiburg, Institut für Forstökonomie, 2008), p. 49.

91 Id., p. 50.

92 J. Wang, "Panama Supreme Court Rules 20-Year Concession for Canada Copper Mine Unconstitutional," *Jurist News*, November 28, 2023, available online: <https://www.jurist.org/news/2023/11/panamas-supreme-court-ruled-that-a-20-year-concession-for-a-cana

proposal was found to not meet this requirement, among other legalities, and was canceled.

New Zealand offers a complementary perspective tied to institutional reform, where the intrinsic values of ecosystems are explicitly identified and where legal duties and functions of a governing body are established to protect intrinsic values. Under the Te Awa Tupua Act, Te Pou Tupua (identified above has representatives of both the local communities and the Crown) is tasked with upholding Tupua te Kawa, or the Whanganui River's intrinsic values. These intrinsic values represent the essence of Te Awa Tupua and include: "Te Awa Tupua is a spiritual and physical entity that supports and sustains both the life and natural resources within the Whanganui River and the health and well-being of the iwi, hapū, and other communities of the River."[93]

Governance and Institutional Aspects

Governance or institutional reform through co-governance models or 'guardianship' (or stewardship or custodianship) mechanisms can give effect to rights of nature by securing the representation of nature's rights (interests) and intrinsic values in decision-making affecting its health. Guardianship can provide a proactive mechanism to protect and prevent rights violations by creating a new management body or governance structure that has a legal responsibility to uphold and act on behalf of the status of nature as a legal person.[94] Institutional and private responsibilities can ensure that rights of nature are recognized not only on paper, but in practice. The recognition of legal personhood for non-human entities is found to include "the ability through human representatives to legally restrict a potential harm or gain remediation after harm such as pollution."[95] This mechanism finds roots in Western law through "guardian ad litem" which is when an individual can be appointed by courts to represent the interests of a human being who cannot fully represent themselves, such as children or incapacitated people.[96]

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dian-copper-mine-was-unconstitutional/#:~:text=In%20its%20judgement%2C%20the%20courts,struck%20down%20the%20entire%20law>.

93 Te Awa Tupua (Whanganui River Claims Settlement), n. 19 above, pt. 2, s. 13(a).

94 Harden-Davies et al., n. 7 above.

95 B.B. Arnold, "Signs of invisibility: Nonrecognition of natural environments as persons in international and domestic law," *International Journal for the Semiotics of Law* 36, no. 2 (April 1, 2023): 457–475, p. 459, available online: <https://doi.org/10.1007/s11196-022-09920-7>.

96 See, for example, Washington Courts interpretation online: <https://www.courts.wa.gov/committee/?fa=committee.home&committee_id=105>.

The Te Awa Tupua Act of 2017 (also known as the Whanganui River Claims Settlement Act of 2017) (the 'Act') created formal guardians or Te Pou Tupua—humans who are obligated "to act and speak for and on behalf of" the River, to uphold the River's legal status and the River's intrinsic values, and to promote and protect the health and well-being of the River.[97] Te Pou Tupua comprises two persons; one nominated by the Iwi with interests in the Whanganui River and one nominated by the government. Their functions include upholding the River's intrinsic values, promoting and protecting the river's health and well-being, and administering Te Korotete (the fund set up to support the river's health and well-being).[98] Te Pou Tupua, in performing its functions, must act in the interests of Te Awa Tupua and consistently with Tupua te Kawa (the River's intrinsic values).[99] The Act allows Te Pou Tupua to "participate in any statutory process affecting" the River, leading to the representation of non-human interests and values in decision-making processes.[100]

For the Atrato River in Colombia, the Constitutional Court ordered the development of a new structure to allow for the national government and local ethnic communities to exercise legal guardianship and representation of the rights of the river.[101] The structure did not accompany the recognition of status, and took a few years of consultations and negotiations to establish. The guardianship body for Atrato River now consists of the Ministry for the Environment, and a 'Collegial Body' (seven males and seven females representing the communities of the Atrato region).[102] The Atrato River has a much larger guardianship body than the Whanganui River, and there have been significant challenges in the effective implementation of the ruling and development of plans and policies, largely "due to lack of funding and differences of opinions between the groups overseeing the protection of the river."[103] Therefore, the nature and size of the "guardianship" body and its resources, have important implications for effective implementation.

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97 Te Awa Tupua (Whanganui River Claims Settlement), n. 19 above.

98 "Rights of Nature Case Study: Whanganui River / Te Awa Tupua" (Anima Mundi Law Initiative, February 2021), p. 2, available online: <https://www.animamundilaw.org/s/FINAL-RoN-CS-New-Zealand-Whanganui-River.pdf>.

99 Te Awa Tupua (Whanganui River Claims Settlement), n. 19 above, pt. 2, s. 19(2)(a).

100 Id., s. 19(2)(e).

101 Atrato River Case, n. 17 above, p. 110, para. 10.2.1.

102 Wesche, n. 18 above, p. 544.

103 D. Perry et al., "Global analysis of durable policies for free-flowing river protections," *Sustainability* 13, no. 4 (January 2021): 2347, available online: <https://doi.org/10.3390/su13042347>; Wesche, n. 18 above, p. 551.

The benefits of guardianship, in addition to increased environmental protection, importantly have been increased participation of local communities and the uplifting of Indigenous values and rights.[104] Additionally for both the Atrato River and the Whanganui River, an "important aspect is the bipartisan nature of the guardianship body, comprising both government and affected communities, which plays a role in facilitating dialogue between both sides and in enabling participation."[105]

The legal duty to ensure the health and well-being of nature in decision-making can be carried by appointed individuals including through guardianship mechanisms or by the entire breadth of decision-making, including through collective stewardship principles or explicit duties of a management body as a whole. Overall, a guardianship model can be expected to ensure the representation of a plurality of values in decision-making, including the intrinsic values of nature itself, and help others understand Indigenous and community interests in relation to nature and amplify nature's protection.[106]

Challenges and Considerations

Rights of nature frameworks do not exist without challenges, nor are they a solve-all solution to environmental problems. Similar to existing environmental law and rights-based approaches, rights of nature laws can only be successful in mitigating severe harm to the natural world if they are legally recognized, implemented and enforced.[107] This requires, among other considerations, the development of regulatory and institutional frameworks, enforcement mechanisms, adequate resources and capacity-building, baseline knowledge and monitoring, and education to ensure understanding of the law and support shifting societal values toward nature.[108] Social, cultural and political contexts

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104 Wesche, n. 18 above, p. 534.

105 Id., pp. 534–555.

106 Office of Treaty Settlements, New Zealand, "Regulatory Impact Statement: Te Awa Tupua (Whanganui River) Framework," May 2016, p. 7, para. 25, available online: <https://www.treasury.govt.nz/sites/default/files/2016-05/ris-justice-tatf-may16.pdf>.

107 G. Chapron, Y. Epstein and J.V. López-Bao. "A rights revolution for nature," Science 363, no. 6434 (March 29, 2019): 1392–1393, available online: <https://doi.org/10.1126/science.aav5601>.

108 M.V. Berros, "Challenges for the implementation of the rights of nature: Ecuador and Bolivia as the first instances of an expanding movement," *Latin American Perspectives* 48, no. 3 (May 2021): 192–205, <https://doi.org/10.1177/0094582X211004898>; C.M. Kauffman, "Why Rights of Nature Laws are Implemented in Some Cases and Not Others: The Controlled Comparison of Bolivia and Ecuador," International Studies Association Annual Conference (March 29, 2019). <http://files.harmonywithnatureun.org/uploads/upload861.pdf>; Epstein, n. 62 above.

all influence the effectiveness of rights of nature, and not all laws and policies have clear implementation and enforcement mechanisms. Tangible or comprehensive results for many rights of nature laws and judicial decisions are lacking, for example, in Bolivia, where the Mother Earth Law (Ley de Madre Tierra) has existed since 2010 with little to no implementation.[109]

The form of recognition of rights of nature or legal personhood can influence its effectiveness in practice. For example, Ecuador has seen roughly 60 cases adjudicated on behalf of nature, with some requested by the Constitutional Court itself to substantiate and establish binding jurisprudence to inform implementation of the Constitution.[110] In Ecuador, recognition of rights of nature is at the highest normative level, meaning that they are connected to and impacted by all other elements of the legal order, and thus must be taken into consideration when creating policy or deciding court cases.[111] Aotearoa (New Zealand) has seen progress in part due to adequate resources from the Crown, the establishment of a co-governance model in the Te Awa Tupua Act and the identification of how the law interacts with other existing laws.[112] For example, a section of the Act specifically identifies how Te Awa Tupua is to be treated, including as a 'public body' for the purposes of the Local Government Act.[113] Finally, most judicial decisions on rights of nature have not been implemented, demonstrating further challenges in jurisdictions where a law does not yet exist and the government is tasked with doing so after the recognition of legal personhood by the courts.[114]

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109 Kauffman, n. 108 above; M. Moutrie, "The rights of nature movement in the United States: Community organizing, local legislation, court challenges, possible lessons and pathways," *Environmental and Earth Law Journal* 10, no. 1, Article 2 (2021).

110 C.M. Kauffman and P.L. Martin, "How Ecuador's courts are giving form and force to rights of nature norms," *Transnational Environmental Law* 12, no. 2 (July 2023): 366–395, available online: <https://doi.org/10.1017/S2047102523000080>.

111 C.M. Kauffman and L. Sheehan, "The rights of nature: Guiding our responsibilities through standards," in: *Environmental Rights: The Development of Standards*, eds., S.J. Turner et al. (Cambridge: Cambridge University Press, 2019), p. 353.

112 M. Cribb, E. Macpherson and A. Borchgrevink, "Beyond legal personhood for the Whanganui River: Collaboration and pluralism in implementing the Te Awa Tupua Act," *The International Journal of Human Rights* (February 16, 2024): 1–24, available online: <https://doi.org/10.1080/13642987.2024.2314532>; Te Awa Tupua (Whanganui River Claims Settlement), n. 19 above, pt. 3 & 2, s. 17.

113 Te Awa Tupua (Whanganui River Claims Settlement), n. 19 above, pt. 2, s. 17.

114 E. Macpherson, J. Torres Ventura and F. Clavijo Ospina, "Constitutional law, ecosystems, and Indigenous peoples in Colombia: Biocultural rights and legal subjects," *Transnational Environmental Law* 9, no. 3 (November 2020): 521–40, available online: <https://doi.org/10.1017/S204710252000014X>.

Secondly, it must be noted that rights are inherently anthropocentric and derive meaning within Western legal systems. Many Indigenous and customary legal systems are grounded in relations and reciprocity rather than rights, and therefore, it is important not to overstate the connection between rights of nature and Indigenous philosophies, as doing so can further the subordination and subjugation of Indigenous legal agency.[115] For example, in the instance of Te Awa Tupua, legal personhood was presented as a compromise to bring Indigenous worldviews into the Western legal system, and communities sought reconciliation for historical treatment of the Whanganui River and their communities by the Crown.[116] In this way, incorporating rights of nature into the inherently human-focused rights discourse can serve as an urgently needed tool to protect the interests of nature against irreversible harm, while acting as a bridge towards a more holistic system of harmony with nature on the basis of reciprocity.

Thirdly, not all harm to nature constitutes a violation of rights. For example, when predators such as human beings kill prey for food, the "right to life of an animal is not illegitimately violated."[117] Additionally, conflicting interests will continue to exist and need to be balanced in decision-making. In human rights law, the balancing of conflicting interests and rights is dealt with pursuant to the proportionality principle.[118] In the *Estrellita* case in Ecuador, the balancing

115 M. Tănăsescu, "Rights of nature, legal personality, and Indigenous philosophies," *Transnational Environmental Law* 9, no. 3 (November 2020): 429–453, available online: <https://doi.org/10.1017/S2047102520000217>; J. Ojeda et al., "Reciprocal contributions between people and nature: A conceptual intervention," BioScience 72, no. 10 (September 30, 2022): 952–962, available online: <https://doi.org/10.1093/biosci/biac053>; A. Kearney et al., "Conceptualising Indigenous law," in: *Indigenous Law and the Politics of Kincentricity and Orality*, eds., A. Kearney et al. (Cham, Switzerland: Springer International Publishing, 2023), 1–30, available online: <https://doi.org/10.1007/978-3-031-19239-5_1>.

116 Cribb et al., n. 112 above.

117 Estrellita Monkey Case, n. 86 above, para. 107, p. 34.

118 M. Curtice et al., "The proportionality principle and what it means in practice," *The Psychiatrist* 35, no. 3 (March 2011): 111–116, available online: <https://doi.org/10.1192/pb.bp.110.032458>; M. Klatt and M. Meister, *The Constitutional Structure of Proportionality* (Oxford: Oxford University Press, 2012), available online: <https://doi.org/10.1093/acprof:oso/9780199662463.001.0001>; G. Bongiovanni and C. Valentini, "Balancing proportionality and constitutional rights," in: *Handbook of Legal Reasoning and Argumentation*, eds., G. Bongiovanni et al. (Dordrecht: Springer Netherlands, 2018), 581–612, available online: <https://doi.org/10.1007/978-90-481-9452-0_20>; J. Sieckmann, "Proportionality as a universal human rights principle," in: *Proportionality in Law: An Analytical Perspective*, eds., D. Duarte and J.S. Sampaio (Cham, Switzerland: Springer, 2018), 3–24, available online: <https://doi.org/10.1007/978-3-319-89647-2_1>.

of interests in order to determine if the use of nature is legitimate was guided by the three principles of appropriateness, necessity and proportionality:

(i) it aims to "guarantee the production and reproduction of the material and immaterial conditions that make a good way of living possible," without jeopardizing the good way of living of future generations—appropriateness;
(ii) the methods, actions and tools employed are the least harmful and cause the minimum possible environmental impact—necessity; and,
(iii) the greater the degree of non-satisfaction or affectation of Nature, the greater must be the importance of satisfying the good way of living regime—proportionality.[119]

According to this view, the use of nature is still legitimate when guided by concepts of ecological sustainability, inter- and intra-generational equity, and life in harmony with nature, and concerns of nature's rights always prevailing over human rights can be transparently addressed in the context of these principles of appropriateness, necessity and proportionality.

Fourthly, some may argue that recognizing legal personhood or rights of the ocean may allow the ocean to be sued, for example, for sea level rise. As introduced above, legal personhood does not necessarily require concomitant duties or liabilities, and legal rights have been found to impose duties *upon other persons* to ensure and respect said rights (emphasis added).[120] This is indeed what we see with human rights, where others, including governments, hold the responsibility to respect and ensure human rights within their jurisdiction. Additionally, we argue that the duties or responsibilities of the ocean, if necessary, can be likened to its intrinsic values,[121] such as its contribution to

119 Estrellita Monkey Case, n. 86 above, para. 62, p. 20, list formatting added.

120 A. Dyschkant, "Legal personhood: How we are getting it wrong," *University of Illinois Law Review* 2015, no. 5 (2015): 2075–2110 (arguing that natural persons unable to bear duties, such as children and comatose individuals, are still recognized as holding rights); E.L. O'Donnell and J. Talbot-Jones, "Creating legal rights for rivers: Lessons from Australia, New Zealand, and India," *Ecology and Society* 23, no. 1 (January 2018), available online: <https://doi.org/10.5751/ES-09854-230107>; Stucki, n. 52 above; *State of Rajasthan v. Union of India*, 1977 AIR 1361, 1978 SCR (1)1 (India).

121 Stucki, n. 52 above, p. 542; O. Herstein, "Legal rights," in: *The Stanford Encyclopedia of Philosophy*, eds., E.N. Zalta and U. Nodelman (Metaphysics Research Lab, Stanford University, 2023), available online: <https://plato.stanford.edu/archives/win2023/entries/legal-rights/>.

a functioning and stable climate system, the production of oxygen and sequestration of carbon dioxide, which can only be fulfilled if its rights and intrinsic values are respected and protected.

Finally, with less than ten percent of approved rights of nature decisions explicitly mentioning or specific to the ocean, there exists little discourse on the application of rights of nature within ocean law and policy.[122] Therefore, the following analysis demonstrates its application largely through the utilization of case law and studies that exist in the context of land-based ecosystems and species.

Rights of Nature in Areas beyond National Jurisdiction

Despite our carving of the ocean into distinct jurisdictional zones, we in fact have one ocean, with connected currents, shared ecosystems, ecological processes and species ranges, as well as pipelines, undersea cables and shipping routes. What happens in areas within national jurisdiction affects areas beyond and vice versa.[123] States have legal obligations under international law, including customary law, relating to ocean conservation, as well as treaty obligations under the United Nations Convention on the Law of the Sea (UNCLOS) to, *inter alia*, protect and preserve the marine environment (Article 192), prevent, reduce and control pollution (Articles 194, 207–212), assess the environmental impact of potentially harmful activities (Article 206) and conserve living resources (Articles 61, 117–120), including by regulating ships, corporations, ports and other activities under their jurisdiction or control (Articles 94, 117, 194, 213–222), among others. For example, Article 194(5) explicitly obliges States to take the measures "necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life." Ocean rights could be considered to be a part of the "necessary measures" to take. UNCLOS further requires States to cooperate to develop international rules, standards and recommended procedures for the protection and preservation of the marine environment, at the global or regional level, consistent with UNCLOS rules regarding high seas freedoms, etc. (Article 197). Effectuating these legal obligations requires

122 Putzer, n. 11 above; "Eco Jurisprudence Monitor," n. 11 above.

123 E. Popova et al., "Ecological connectivity between the areas beyond national jurisdiction and coastal waters: Safeguarding interests of coastal communities in developing countries," *Marine Policy* 104 (June 2019): 90–102, available online: <https://doi.org/10.1016/j.marpol.2019.02.050>.

international cooperation and collective action, given that "the problems of ocean space are closely interrelated and need to be considered as a whole" (UNCLOS, Preamble).

In 2023, States adopted the Agreement under UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (BBNJ Agreement) to clarify and support implementation of these obligations.[124] The BBNJ Agreement does not stand alone, but rather will need to operate within an already complex and fragmented ocean governance landscape comprising, *inter alia*, the 1995 Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks, agreements establishing a number of regional fisheries management organizations, the 1994 Agreement on Part XI of UNCLOS which updated the provisions under UNCLOS for seabed mining and the International Seabed Authority, the numerous International Maritime Organization (IMO) conventions on shipping and pollution control, the FAO Agreement on Port State Measures, and 14 Regional Seas Conventions.[125]

Existing ocean governance is ultimately tied to an anthropocentric "oceanic ethic," especially with regards to areas beyond national jurisdiction.[126] For example, the freedom of the high seas emphasizes the primacy of human use of the ocean, *inter alia*, navigation, cables and pipelines, fishing and scientific research, and the common heritage of mankind in UNCLOS vests ownership of the seabed and its mineral resources in areas beyond national jurisdiction (ABNJ) in humankind as a whole ("common heritage of humankind" in the BBNJ Agreement), but does not explicitly recognize non-human interests (though it does have a strong environmental component). Modern ocean governance remains rooted in Western European legal and ethical traditions,

124 Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction, UN Doc A/CONF.232/2023/4 (June 19, 2023).

125 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, August 4, 1995, 2167 *United Nations Treaty Series* 88; Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, July 28, 1994, 1836 *United Nations Treaty Series* 42; "List of IMO Conventions," International Maritime Organization, available online: <https://www.imo.org/en/About/Conventions/Pages/ListOfConventions.aspx>.

126 Chan et al., n. 2 above; T. Stephens, "Global ocean governance in the Anthropocene: From extractive imaginaries to planetary boundaries?," *Global Policy* 13 (December 5, 2022): 76–85, p. 77, available online: <https://doi.org/10.1111/1758-5899.13111>; J. Gaunce et al., "Anthropocentric ocean connectivity: A pluralistic legal-regulatory model," *Arctic Review on Law and Politics* 12 (November 23, 2021): 222–237.

largely ignoring Indigenous and non-Western world views, including views of island cultures with unmatched histories, experience and expertise in navigating and understanding the ocean.[127] The combination of regime fragmentation, exclusion, and narrow focus on human use has contributed to the ongoing degradation of the ocean environment, underscoring the need to explore alternative approaches.

The BBNJ Agreement offers a new opportunity for States to collaborate to integrate rights of nature to support a more eco-centric approach to ocean governance and management in general.[128] Its preamble grounds implementation on a common vision of stewardship, one where States desire

> to act as stewards of the ocean in areas beyond national jurisdiction on behalf of present and future generations by protecting, caring for and ensuring responsible use of the marine environment, maintaining the integrity of ocean ecosystems and conserving the inherent value of biological diversity of areas beyond national jurisdiction.

This preambular text sets a context for interpretation of the Agreement and all of the obligations it contains, and informs our understanding of the purpose of the Agreement.[129]

To support this vision of stewardship and the potential application of ocean rights, the BBNJ Agreement provides several foundational principles and approaches, as well as specific substantive and procedural provisions that include: establishing marine protected areas (MPAs) and other types of area-based management tools; conducting environmental impact assessments; and in the future, performing strategic environmental assessments.[130] Its provisions for capacity-building and transfer of technology will be vital in broadening management capacity to all States, not just those with the existing ability to access and exploit particular resources.[131]

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127 E. Hau'ofa, "Our sea of islands," in: *Asia/Pacific as Space of Cultural Production* (Durham, NC: Duke University Press, 1995), 86–98.

128 Harden-Davies, n. 7 above.

129 Vienna Convention on the Law of Treaties, May 23, 1969, 1155 *United Nations Treaty Series* 331, Art. 31.

130 Gjerde, n. 41 above.

131 K.M. Gjerde, S. Reiter and A. Pouponneau, "New High Seas Treaty Prepares International Community for Sustainable and Equitable 'Blue Economy,'" Just Security, April 26, 2023, available online: <https://www.justsecurity.org/86089/new-high-seas-treaty-prepares-international-community-for-sustainable-and-equitable-blue-economy/>.

However, these rights, duties, principles and approaches could be significantly strengthened and made applicable to areas within and beyond national jurisdiction via the adoption of the proposed Universal Declaration of Ocean Rights. In March 2022, the initiative towards a Universal Declaration of Ocean Rights was launched and is championed by Cape Verde and a coalition of organizations and individuals with the goal to introduce a draft declaration, or similar, by 2030.[132] Universal declarations are typically adopted by the UN General Assembly as resolutions. Although these resolutions do not have legally binding force, they establish moral obligations and set forth standards (rights) and principles, as well as responsibilities or actions required from States and other actors in order to uphold the rights and principles established in the declaration.[133] Such a framework could transform international ocean governance by aligning practices and updated principles with a conservation-oriented approach that recognizes, respects and ensures the maintenance of the ocean's critical role in global ecological stability.

The proposed principles underpinning ocean rights recognize the ocean as a living entity with intrinsic value and inherent rights to existence, ecological health and integrity, biodiversity, the preservation and functionality of vital cycles, freedom from irreversible harm, persistent pollution and degradation, and to representation, participation, restoration and remediation, among others.[134] Additionally, they establish the responsibility of all peoples, communities, entities and States to ensure the ocean's interests and intrinsic values are represented in decisions and legal actions that could impact its health and functioning.[135] Further, they affirm the precautionary principle and the principle of "*in dubio, in favorem Oceani*"—when in doubt, err on the side of the ocean.[136]

Adoption of these or similar principles of ocean rights through a universal declaration offers several novel opportunities through which ocean issues can be considered as an interrelated whole.[137] They could create a higher standard of protection for the ocean, and support transparent and inclusive governance processes that take ecological considerations into account, resulting in more

132 Bender et al., n. 35 above.

133 E. Suy, "International law-making in the United Nations: A look at the future," *Proceedings of the American Branch of the International Law Association* (1975–1976): 23–33, p. 28.

134 We Are the Ocean and the Ocean Is Us, n. 34 above.

135 Id.

136 Id.; see A. Trouwborst, *Evolution and Status of the Precautionary Principle in International Law* (The Hague: Kluwer Law International, 2002), 362.

137 United Nations Convention on the Law of the Sea, December 10, 1982, 1833 *United Nations Treaty Series* 397, Preamble.

ecologically sustainable use and development. They could clarify legal responsibilities around assessing, monitoring and preventing damage, and create additional legal pathways for ocean protection.

Below we explore how a universal declaration may influence decision-making and activities in the context of marine protected areas, marine migratory species, and deep seabed mining in ABNJ.

Area-Based Management Tools (*Marine Protected Areas*)

Area-based management tools, in particular MPAs, are increasingly recognized as pivotal tools for the conservation and protection of ocean health, including in ABNJ.[138] MPAs will thus be a key mechanism for protecting the rights of the ocean and promoting ecologically sustainable activities that could affect them.

Covering a vast proportion of the ocean, the high seas and international seabed beyond national jurisdiction are hotspots for biodiversity yet are also the regions most affected by unsustainable activities such as overfishing.[139] Instituting MPAs within these areas offers a crucial strategy for mitigating human impacts and fostering long-term ecological resilience.[140] Notably, the establishment of MPAs is an endorsed objective under both the Convention on Biological Diversity (CBD) and the BBNJ Agreement, with the specific target confirmed by the CBD Global Biodiversity Framework to protect 30 percent of the ocean by 2030 in an interconnected and integrated manner.[141]

The BBNJ Agreement sets out a process for establishing MPAs in areas beyond national jurisdiction (Part III). It stipulates use of the precautionary approach, an ecosystem approach and an "approach that builds ecosystem resilience, including to adverse effects of climate change and ocean acidification, and *also maintains and restores ecosystem integrity*, including the carbon

138 R. Jiang and P. Guo, "Sustainable management of marine protected areas in the high seas: From regional treaties to a global new agreement on biodiversity in areas beyond national jurisdiction," *Sustainability* 15, no. 15 (January 2023): 11575, available online: <https://doi.org/10.3390/su151511575>; J. Claudet, C.M. Brooks and R. Blasiak, "Making protected areas in the high seas count," *Science* 380, no. 6643 (April 28, 2023): 353–54, available online: <https://doi.org/10.1126/science.adh4924>.

139 FAO, *The State of World Fisheries and Aquaculture 2020: Sustainability in Action* (Rome: FAO, 2020), available online: <https://doi.org/10.4060/ca9229en>; G. Ortuño Crespo and D.C. Dunn, "A review of the impacts of fisheries on open-ocean ecosystems," *ICES Journal of Marine Science* 74, no. 9 (December 1, 2017): 2283–2297, available online: <https://doi.org/10.1093/icesjms/fsx084>; A.D. Rogers et al., "The High Seas and Us: Understanding the Value of High-Seas Ecosystems" (Global Ocean Commission, 2014), available online: <https://fisheries.sites.olt.ubc.ca/files/2023/01/high-seas-and-us.pdf>.

140 Jiang and Guo, n. 138 above; Claudet et al., n. 138 above.

141 CBD COP, Decision 15/4, n. 31 above, Target 3.

cycling services that underpin the role of the ocean in climate" (Article 7 (emphasis added)). It further promotes the use of the best available science and relevant traditional knowledge (Articles 7 and 19). It also includes extensive requirements for consultation with "all relevant stakeholders," including civil society, the scientific community, the private sector, Indigenous peoples and local communities (Articles 19, 21).

Recognition of ocean rights could serve as a powerful tool to fulfill the preamble's goal of ocean stewardship and elevate the stature of its principles and approaches. As noted above, ocean rights emphasize the ocean's intrinsic value, and the responsibility of humans to respect and protect it, including by recognizing the ocean as a living entity with the right to participate in decisions affecting it. This could translate into recognizing the ocean itself as a relevant stakeholder and including its representative, for example, as an observer in the COP,[142] as well as an active participant in the consultation and management processes for establishment and implementation of MPAs. Giving the ocean a voice in these processes would allow its intrinsic interests that are not tied to the interests of other stakeholders to be heard and thus considered.[143]

Ocean rights could also provide leverage to prompt States to establish comprehensively protected systems of MPAs in ABNJ and to ensure that activities outside an MPA do not undermine its ecological integrity. Recognizing the ocean as a living entity with inherent rights would create a duty on the part of States to respect, protect and fulfill these rights. In the context of fulfilling human rights, this has been interpreted as an obligation of due diligence, requiring active measures to prevent harm to rights, which might include regulation and monitoring of harmful activities and use of environmental impact assessments.[144] MPAs are one of the most accepted forms of protection for marine areas, making them a key mechanism for protecting the rights of the ocean and promoting ecologically sustainable activities that could affect them.

Responsibility for overseeing day-to-day management and effective implementation of management plans could be allocated to a small group of MPA custodians, perhaps a mix of States and stakeholders to ensure strong representation of scientific, conservation, traditional and local community interests,

142 Harden-Davies et al., n. 7 above.

143 M. Bender, R. Bustamante and K. Leonard, "Living in relationship with the ocean to transform governance in the UN Ocean Decade," *PLOS Biology* 20, no. 10 (October 17, 2022): e3001828, available online: <https://doi.org/10.1371/journal.pbio.3001828>; M. Bender, "An Earth Law Framework for Marine Protected Areas," (Earth Law Center, 2017).

144 *The Environment and Human Rights*, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, p. 72 (November 15, 2017).

and charged with acting in the best interests of the MPA's health, resilience and productivity. Giving the MPA custodians or management council procedural rights and standing to represent the MPA in legal proceedings could further pave the way for effective implementation of agreed MPA objectives.

Recognizing ocean rights can also address the problem of environmental externalities.[145] The costs of environmental degradation, particularly costs that are long-term, widely distributed, or affect non-human interests, are often ignored or undervalued in environmental decision-making. Where only human interests are considered in decision-making, externalities, such as the pollution and environmental health impacts related to fossil fuels and the harm to the ecosystem or loss in ecosystem functioning due to overfishing, are often left out or downplayed. Often the human impacts of environmental degradation are attenuated, long-term, cumulative or widely dispersed, while the economic benefits of exploitation may be direct, immediate and concentrated on politically powerful interests.[146] Providing a voice for the ocean and its ecosystems more broadly, via a designated representative can help bring these concerns to the forefront. In the long-term, this can benefit everyone, as the less immediate impacts of environmental degradation, such as the loss of important ecosystem services, can threaten human as well as non-human welfare.

This lack of incentive for traditional cost-benefit analysis to capture externalities may contribute to the lack of strict protection among existing MPAs. Only 2.9 percent of the approximate 8 percent of the ocean that is protected is in the form of fully or highly protected areas such as no-take zones or sanctuaries.[147] By requiring the intrinsic values of the ocean to be reflected in cost-benefit analyses, and including an ocean representative in the cost-benefit analysis processes, ocean rights may help us internalize the costs of harming the marine environment leading to the stronger and more effective MPAs that conserve the inherent values of biodiversity for present and future generations.

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145 An externality is "a positive or negative outcome of a given economic activity that affects a third party that is not directly related to that activity." "What Is an Externality?," International Institute for Sustainable Development, available online: <https://www.iisd.org/savi/faq/what-is-an-externality/>.

146 N.A. Watson, "Cost Benefit Analysis: A Policy Tool of Anthropocentric Utilitarianism" (University of Mississippi, 2009), available online: <https://egrove.olemiss.edu/hon_thesis/2270>.

147 "The Marine Protection Atlas," Marine Conservation Institute, available online: <https://mpatlas.org/>.

Migratory Species

Migratory marine species are protected under multiple international and regional regimes, including UNCLOS (e.g., Articles 64–67) and the Convention on the Conservation of Migratory Species of Wild Animals (CMS).[148] The impacts of fragmented ocean governance are particularly relevant with regards to migratory species, where the lack of adequate standards and best management practices across multiple jurisdictions thwart effective conservation.[149] A predominant approach emerging in ocean rights focuses on specific migratory species, such as whales, sea turtles and sharks.

By highlighting the species' rights to a healthy environment, a species-specific rights of nature approach may be more tractable,[150] while providing long-term benefits to ecosystems.[151] For example, both the Loyalty Islands Provincial Code and Panama's national sea turtle conservation law recognize migratory species as possessing the right to a balanced natural environment, free of pollution and anthropocentric impacts.[152] In fact, the Constitutional Court of Ecuador found that "the right to respect and conserve the areas of distribution and migratory routes" is a right that is explicit to migratory species and can only be protected in those species of animals with migratory behaviors.[153]

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148 Convention on Migratory Species of Wild Animals, 23 June 1979, 1651 *United Nations Treaty Series* 333.

149 B.S. Santos et al., "Beyond boundaries: Governance considerations for climate-driven habitat shifts of highly migratory marine species across jurisdictions," *npj Ocean Sustainability* 3, no. 1 (April 9, 2024): 1–8, available online: <https://doi.org/10.1038/s44183-024-00059-5>; V.J. Meretsky, J.W. Atwell and J.B. Hyman, "Migration and conservation: Frameworks, gaps, and synergies in science, law, and management," *Environmental Law* (*Northwestern School of Law*) 41, no. 2 (Spring 2011), available online: <https://pubmed.ncbi.nlm.nih.gov/29332970/>; A.L. Harrison et al., "The political biogeography of migratory marine predators," *Nature Ecology & Evolution* 2, no. 10 (October 2018): 1571–1578, available online: <https://doi.org/10.1038/s41559-018-0646-8>.

150 K. Stilt, "Rights of nature, rights of animals," *Harvard Law Review Forum* 134 (December 11, 2020): 276–285, available online: <https://doi.org/10.2139/ssrn.3746727>.

151 G. Ortuño Crespo et al., "Beyond static spatial management: Scientific and legal considerations for dynamic management in the high seas," *Marine Policy* 122 (December 1, 2020): 104102, available online: <https://doi.org/10.1016/j.marpol.2020.104102>; S.M. Maxwell et al., "Mobile protected areas for biodiversity on the high seas," *Science* 367, no. 6475 (January 17, 2020): 252–254, available online: <https://doi.org/10.1126/science.aaz9327>.

152 Code de l'environnement de la Province des Iles Loyauté, n. 14 above, Art. 242–18; Ley No. 371, n. 37 above, Art. 29.

153 Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, 1651 *United Nations Treaty Series* 333; Estrellita Monkey Case, n. 86 above, p. 30, para. 99.

Recognizing rights of migratory species can create a mechanism for protecting the ecosystems they inhabit.

Migratory species in particular offer a perspective on how substantive rights can protect marine species and their habitats. Ecuador, for example, considers the right to exist (or life) as the main right of a wild animal.[154] The integral respect for the existence of life depends on "the maintenance and regeneration of its vital cycles."[155] Nature's right to maintenance and regeneration means that an ecosystem has the ability to recover from a natural or human impact,[156] that is, resilience.[157] The Constitutional Court of Ecuador found that a wild animal's right to exist creates a "prohibition to carry out activities that may lead to the extinction of species, the destruction of the ecosystems they inhabit and the permanent alteration of their natural cycles."[158] If applied globally to migratory marine species, this would require States to remove obstacles to migration as called for by the CMS, by, for example, restricting or prohibiting fishing techniques that may destroy key habitats, such as bottom trawling,[159] or capture unintended species such as large-scale driftnets, longlines, or purse seines that threaten species populations,[160] or regulating shipping to reduce the risk of collision or generation of noise.[161]

Ocean rights could also recognize the right of marine species to free development of animal behavior. Several cases from Ecuador have explored this right. The Constitutional Court of Ecuador described this right as "the general freedom of action of wild animals; i.e. the right to behave according to their instinct, the innate behaviors of their species, and those learned and transmitted among the members of their population … the right of animals to freely develop their biological cycles, processes and interactions."[162] In a

154 Estrellita Monkey Case, n. 86 above, p. 34, para. 111.

155 Los Cedros Case, n. 9 above, p. 6, para. 16.

156 Center for Democratic and Environmental Rights, Amicus Curiae Rio Dulcepamba, Caso No. 502-19-JP, Sec. 5.1.2.

157 Ecuador Constitution, Art. 395(1).

158 Estrellita Monkey Case, n. 86 above, p. 34, para. 111.

159 L. Victorero, L. Watling and M.L.D. Palomares, "Out of sight, but within reach: A global history of bottom-trawled deep-sea fisheries from >400 m depth," *Frontiers in Marine Science* 5 (April 11, 2018): 322663, available online: <https://doi.org/10.3389/fmars.2018.00098>.

160 "Driftnet Fisheries and Their Impacts on Non-Target Species: A Worldwide Review," FAO, available online: <https://www.fao.org/4/T0502E/T0502E04.htm>.

161 D.J. McCauley, "The future of whales in our Anthropocene ocean," *Science Advances* 9, no. 25 (June 2023), available online: <https://doi.org/10.1126/sciadv.adi7604>.

162 Estrellita Monkey Case, n. 86 above, p. 35, para. 113.

2012 case involving iguanas, a judicial ruling in the municipality of Santa Cruz, Galapagos Islands, Ecuador "set the precedent that obstructing the migration and breeding patterns of species violates the rights of nature."[163]

The rights of marine species would constitute a specific dimension of ocean rights. In fact, ocean rights could logically be extended to not only species or populations of marine species, but also individual animals. The He Whakaputanga Moana (Declaration for the Ocean), signed on March 28, 2024 by indigenous leaders of Aotearoa (New Zealand), the Cook Islands, Tahiti, Tonga, Hawaii, and Rapanui (Easter Island) recognizes whales as legal persons with inherent rights to a healthy environment, freedom of movement and the ability to thrive.[164] However, conflict exists between advocates for an all of nature approach and animal-specific approaches, where one is seen as a more holistic and systemic perspective where harm to an animal may be legal and the latter seen as an individualist view where harm to an animal is not.[165]

While whales do not necessarily have greater intrinsic value or rights than any other marine species (migratory or otherwise), they can serve as an example for how species-specific rights can support marine conservation. Recognition of rights of whales could include the right to free development of animal behavior and the maintenance of their biological cycles, processes and interactions.[166] International recognition of these rights would create a legal obligation for States to protect and ensure a whale's development of behavior, including through the adoption of legislative measures to that end, subject to the principles discussed above of appropriateness, necessity and proportionality. Activities that may hinder this development, such as increased vessel traffic and noise pollution, including through interference with echolocation or other sensory mechanisms and changes in breeding and feeding areas, may violate the right to free development of whales. Activities that obstruct their migration and breeding patterns may constitute a violation of their right to free and safe passage and of free development of animal behavior and may need to be regulated or restricted.

At the international level, if implemented via shared principles and processes for representation and standing, such rights could serve as a powerful tool to protect not just whales, but the larger ocean.

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163 *Juicio No. 269–2012*, Second Civil and Commercial Court of Galapagos (June 28, 2012) (Ecuador).

164 He Whakaputanga Moana Treaty (Declaration for the Ocean), n. 36 above.

165 Y. Epstein and E. Bernet Kempers, "Animals and nature as rights holders in the European Union," *The Modern Law Review* 86, no. 6 (November 2023): 1336–1357, available online: <https://doi.org/10.1111/1468-2230.12816>.

166 He Whakaputanga Moana Treaty (Declaration for the Ocean), n. 36 above.

Deep-Seabed Mining

Deep-seabed mining (DSM), an emerging activity that could soon become a reality, presents a significant threat to ocean health and marine biodiversity, as well as to human rights.[167] Under UNCLOS, the International Seabed Authority (ISA) is the international agency responsible for managing all mineral resources in the Area (i.e., seabed areas beyond the limits of national jurisdiction), which are the common heritage of humankind (Article 136). Entrusted to act on behalf of humankind as a whole (Article 137(2)), the ISA is charged with a dual role to both protect and preserve the marine environment (Article 145) and oversee the regulation of exploration and exploitation of DSM in the Area (Article 153).

Though these deep-sea ecosystems remain poorly understood, there is already ample scientific evidence that they provide extremely important services with respect to climate regulation and sustaining the marine food web.[168] The deep-sea also harbors unique species and complex ecological processes that are vulnerable and not used to direct human disturbances, which could be irreversibly damaged by disruptive and invasive mining methods.[169] Yet, concerns grow due to the drive by a few nations to commence exploitation activities in the absence of the necessary scientific information needed to close existing knowledge gaps that will support informed decision-making at the ISA.[170] Moreover, the harmful effects of deep-sea mining will extend far beyond

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167 P. Singh and A. Jaeckel, "Undermining by mining? Deep seabed mining in light of international marine environmental law," *American Journal of International Law Unbound* 118 (2024): 72–77, available online: <https://doi.org/10.1017/aju.2024.8>; UN Human Rights Special Procedures, "Open Letter by the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, the Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes and the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment to the International Seabed Authority," March 15, 2024, available online: <https://www.ohchr.org/sites/default/files/documents/issues/business/activities/2024-03-15-open-letter-to-isa.pdf>.

168 A.R. Thurber et al., "Ecosystem function and services provided by the deep sea," *Biogeosciences* 11, no. 14 (July 29, 2014): 3941–3963, available online: <https://doi.org/10.5194/bg-11-3941-2014>.

169 C.L. Van Dover et al., "Biodiversity loss from deep-sea mining," *Nature Geo-science* 10, no. 7 (July 2017): 464–465, available online: <https://doi.org/10.1038/ngeo2983>; H.J. Niner et al., "Deep-sea mining with no net loss of biodiversity: An impossible aim," *Frontiers in Marine Science* 5 (March 1, 2018): 316039, available online: <https://doi.org/10.3389/fmars.2018.00053>.

170 D.J. Amon et al., "Assessment of scientific gaps related to the effective environmental management of deep-seabed mining," *Marine Policy* 138 (April 1, 2022): 105006, available online: <https://doi.org/10.1016/j.marpol.2022.105006>.

the seafloor, through the spread of seabed plumes and discharge plumes, as well as noise, light and vibration, and could be far-reaching both spatially and temporally.[171] Studies have found that human activities conducted in areas beyond national jurisdiction will affect coastal communities, particularly in developing countries, due to the connectedness of the ocean.[172]

The relevance of rights of nature and ocean rights in the context of deep seabed mining are clear. In 2022, the Constitutional Court of Ecuador delivered a landmark verdict involving mining concessions in the Los Cedros cloud forest, "the Los Cedros case."[173] The Court found that the concession violated the rights of nature (and the respect for nature's intrinsic values), the human right to a healthy environment, water and health, and the precautionary principle itself. The court verified through scientific evidence and understanding of the ecosystem the presence of endemic, threatened, unique and rare species in Los Cedros. It therefore observed a high level of risk of irreversible damage due to the fragile and rare nature of the ecosystem and the threat of extinction for multiple species of plants and animals and the permanent alteration of the forest's natural cycles.[174] The Los Cedros case and others around the world offer insights on how rights of nature, if recognized in international law, may contribute to the growing debate on the legalities of deep-seabed mining.

For example, concerns emerged in 2019 following a report prepared for the ISA that explored the "implications of alternative financial payment mechanisms upon the economics of both the ISA, on behalf of mankind, and of seabed mining contractors [by defining] the rules and rates associated with payments from contractors to the ISA under future exploitation contracts concluded with the ISA."[175] Notably, there was no discussion of environmental risks or costs, which were left out due to the belief that there was not an explicit obligation to do so.[176] Subsequently, owing to the insistence of a large group of States, the topic of the environmental costs of deep-sea mining and

171 J.C. Drazena et al., "Midwater ecosystems must be considered when evaluating environmental risks of deep-sea mining," *PNAS* 117, no. 30 (July 28, 2020): 17455–17460, available online: <https://doi.org/10.1073/pnas.2011914117>.

172 Popova et al., n. 123 above.

173 Los Cedros Case, n. 9 above.

174 Id., p. 30, para. 118.

175 R. Kirchain et al., "Report to the International Seabed Authority on the Development of an Economic Model and System of Payments for the Exploitation of Polymetallic Nodules in the Area" (Massachusetts Institute of Technology, 2019), p. 4.

176 Id., p. 10.

the need to reflect this into the payment mechanism was brought back on the table.[177] Currently, Member States of the ISA are negotiating how future exploitation contractors would be required to pay additional royalties to the ISA in order to internalize the environmental externalities of exploitation activities. As described above, providing a voice for those harmed by externalities can help bring them into the cost-benefit calculation. Recognition of ocean rights could provide a firm grounding for this internalization exercise and present a clear balancing mechanism for determining what environmental costs are acceptable, based on the three principles of appropriateness, necessity and proportionality. Ocean rights would further support the polluter pays principle whereby States are obligated to hold polluters responsible to prevent, internalize or compensate for environmental harm as opposed to leaving such burdens to be borne by society.[178] Therefore, in creating a system of payments and benefit sharing, the ISA would have the obligation to include environmental costs and externalities such as biodiversity loss, impairment of ecosystem services such as effects on carbon sequestration and nutrient cycling, and impacts on fish populations, among many others, in its considerations. Perhaps most importantly as part of this process, the polluter pays principle cannot be used as an excuse to carry out polluting or harmful activities, especially one as potentially destructive as DSM, simply by making payment. Here, ocean rights would impose an obligation to consider whether these rare and fragile ecosystems, threatened species and ecosystem services, all of which are at risk from DSM activities, can be restored or replaced, and at what cost, and whether the obligation to prevent harm and the precautionary principle indicates the need to refrain from such activities to begin with.[179]

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177 Decision of the Council of the International Seabed Authority relating to the commissioning by the secretariat of a study on the internalization of environmental costs of exploitation activities the Area into the production costs of minerals from the Area, ISBA/27/C/43 (Nov. 11, 2022), available online: <https://www.isa.org.jm/wp-content/uploads/2022/12/2225708E.pdf>.

178 This obligation also arguably already exists under UNCLOS Article 192 to protect and preserve the marine environment and Article 145 on the need to adopt regulations that can ensure "effective protection of the marine environment from harmful effects of mining related activities." S. Christiansen et al., "Towards a contemporary vision for the global seafloor: Implementing the common heritage of mankind," *Publication Series Ecology*, Volume 45 (IASS Potsdam and TMG, 2019); J. Hunter, P. Singh and J. Aguon, "Broadening common heritage: Addressing gaps in the deep sea mining regulatory regime," *Harvard Environmental Law Review* (2018), <https://journals.law.harvard.edu/elr/2018/04/16/broadening-common-heritage/>; see also Rio Declaration on Environment and Development, June 13, 1992, 31 *International Legal Materials* 874 (1992).

179 Niner et al., n. 169 above.

In this context, the burden of proof must shift to the proponent to show that DSM activities allowed by the ISA will be "carried out of the benefit of mankind as a whole" (Article 140(1) UNCLOS), which requires consideration of the needs and interests of future generations as well. As explored above, for DSM to be considered legitimate and lawful under the three criteria for ecologically sustainable development, DSM would need to demonstrate that it is appropriate, necessary and proportional. The Constitutional Court of Ecuador has found that an activity is appropriate when "it aims to 'guarantee the production and reproduction of the material and immaterial conditions that make a good way of living possible,' without jeopardizing the good way of living of future generations,"[180] echoing the internationally accepted concept of sustainable development.[181] An activity is necessary if "the methods, actions and tools employed are the least harmful and cause the minimum possible environmental impact,"[182] and proportional if "the greater the degree of non-satisfaction or affectation of Nature, the greater must be the importance of satisfying the good way of living regime."[183] Following this model, in assessing whether an activity violates the rights of the ocean, all three criteria would need to be met, meaning that the intrinsic values of the ocean (as immaterial conditions that make a good living possible) are respected and protected, the least harmful alternative is the alternative employed, and any violation of the rights of the ocean is sufficiently justified in satisfying good living for all.

Accordingly, if DSM is likely to cause irreversible and serious damage to the seabed, while providing little benefit to humankind as a whole, it would fail to meet the three criteria for ecologically sustainable development. In fact, it is entirely possible that allowing DSM to commence at this stage would result in a negative outcome, whereby the bulk of humankind, particularly future generations, will be forced to carry significant burdens (which are wide-ranging: environmental, economic societal, cultural and equity) in return for tiny or marginal benefits to a few.[184] As a result, it would be unlikely to meet the three criteria at this time. Conversely, it is more likely that exploitation of the deep

180 Estrellita Monkey Case, n. 86 above, p. 20, para. 62.

181 UNGA, *Report of the World Commission on Environment and Development: Our Common Future* [Brundtland Report], UN Doc A/42/427 (August 4, 1987); *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Judgement, 1997 *ICJ Rep* 7, 88 (Sep. 25) (separate opinion by Weeramantry, J.).

182 Estrellita Monkey Case, n. 86 above, p. 20, para. 62.

183 Id.

184 U.R. Sumaila et al., "To engage in deep-sea mining or not to engage: What do full net cost analyses tell us?," *Npj Ocean Sustainability* 2 (December 22, 2023): Article 19, available online: <https://doi.org/10.1038/s44183-023-00030-w>.

seabed would undermine legal obligations and ocean ambition undertaken by States through UNCLOS and other means, including the recently adopted BBNJ Agreement that focuses on the conservation and sustainable use of marine biodiversity beyond national jurisdiction, and the Kunming-Montreal Global Biodiversity Framework that seeks to reverse biodiversity loss, including in the marine space, through protection and conservation.[185]

In recent times, the discussions on DSM have also touched on the cultural and human rights aspect, which are mutually reinforcing with rights of nature, as discussed above. Some Indigenous communities have stressed their cultural connection with the ocean and raised their concerns that DSM would be an affront to their beliefs and existence.[186] Potential human rights infringements, including the right to a healthy and productive ocean to sustain human life, have also been raised in the context of DSM.[187] Here, the rights and interests of youth and future generations, which are the ones that have to deal with the unprecedented levels of threat that the ocean is already facing (and stand to come under further threat from DSM), must also be recognized and safeguarded.[188] Rights of nature interpretations already show precedent in determining that the economic interest of an individual cannot be placed above that of nature,[189] thus lending further support and strength to enforcing the common heritage of humankind principle and the rights of future generations.

Finally, worth noting are the compelling arguments for the strong application of precaution and *in dubio pro natura* under an ocean rights framework. The best available science is intended to facilitate the adoption of the precautionary approach in the context of uncertainty or likelihood of serious, widespread and irreversible harm.[190] However, despite the current state of

185 Singh and Jaeckel, n. 167 above.

186 L. Lixinski, "Integrating culture, heritage, and identity in deep seabed mining regulation," *AJIL Unbound* 118 (January 2024): 78–82, available online: <https://doi.org/10.1017/aju.2024.7>.

187 UN Office of the High Commissioner on Human Rights, Key Human Rights Considerations on the Impact of Seabed Mining, July 2024, available online: <https://www.ohchr.org/sites/default/files/documents/issues/climatechange/information-materials/ohchr-seabed-mining-10-july.pdf>.

188 P. Singh, "Deep Seabed Mining: 'For the Benefit of Humankind as a Whole'?," Research Institute for Sustainability Potsdam, May 8, 2024, available online: <https://www.rifs-potsdam.de/en/blog/2024/05/deep-seabed-mining-benefit-humankind-whole>.

189 *Sentencia No. 166-15-SEP-CC*, Caso No. 0507-12-EP, Corte Constitucional del Ecuador (May 20, 2015), p. 4.

190 J. Wakefield, "Chapter 10: The ecosystem approach and the Common Fisheries Policy," in: *The Ecosystem Approach in Ocean Planning and Governance*, eds., D. Langlet and

science for DSM, some actors are eager to proceed with the activity in the absence of proper rules, regulations and procedures in place in order to ensure DSM is for the benefit of all humankind, provides for the effective protection and preservation of the marine environment, and delivers equity and respects human rights. As noted above, in order to prevent harm to the rights of the ocean, in case of doubt, uncertainty, contradictions or legal loopholes, the legal recognition of ocean rights may require preference be given to alternatives less harmful to the ocean in light of the perceived risk of serious or irreversible damage to the marine environment. Thus, ocean rights provides an additional basis from which a precautionary pause or moratorium on deep-sea mining would be a legal duty, not an option.[191] It is important to remember here that States can be held accountable for decisions that they take, such as to allow deep-sea mining to commence despite current scientific knowledge, without sufficient safeguards as well as not being in the best interest of humankind, which could happen through potential litigation,[192] as well as face political and reputational repercussions.

Conclusion

The concept of rights of nature represents a paradigm shift in environmental governance, increasingly embraced as a supportive counterpoint to the traditional sustainable development framework, by creating a framework for safeguards, standards and principles to ensure that "sustainable" development is in fact ecologically sustainable. As global ocean health faces increasing threats from climate change, habitat destruction, overfishing and pollution, rights of nature offers an opportunity to better balance economic and social demands with ecological needs to foster an ethical relationship with the ocean based on principles of interconnectedness, intrinsic values and reciprocity. International ocean governance could benefit from alternatives that prioritize

R. Rayfuse (Leiden: Brill, 2018), 287–316, available online: <https://doi.org/10.1163/9789004389984_011>; Regulation No. 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, 2013 O.J. (L 354) 22, Art. 2(2).

191 Pew, *In the Matter of a Proposed Moratorium or Precautionary Pause on Deep-Sea Mining Beyond National Jurisdiction*, Legal Opinion, September 2023, available online: <https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2023/06/seabed-mining-moratorium-is-legally-required-by-un-treaty-legal-experts-find>.

192 C.R. Payne, "State responsibility for deep seabed mining obligations," in: *Routledge Handbook of Seabed Mining and the Law of the Sea*, ed., V.T. Campanella (Abingdon, UK: Routledge, 2023).

holistic and rights-based approaches. Though only in its infancy, an initiative towards a Universal Declaration of Ocean Rights offers a lens in which to view how rights of nature, or ocean rights, may contribute to ecologically sustainable economic activity and policy decisions in areas within and beyond national jurisdiction.

Embracing a rights of nature framework for the ocean will not be without challenges, but much can be learned from mistakes as well as successes on land, for rivers and regarding specific species. Ocean rights will only be successful in mitigating severe harm to the natural world if they are legally recognized, implemented and enforced.[193] As noted above, this will require first and foremost the development of "implementation structures to advance and track the law's success."[194] These include regulatory and institutional frameworks, designation of custodians with rights to represent nature's interests and pursue legal remedies combined with more traditional compliance and enforcement mechanisms, adequate resources and capacity-building, baseline knowledge and monitoring, and education. The three principles of appropriateness, necessity and proportionality can aid in ensuring that use of nature is justified, harm is minimized, and intrinsic values are honored when addressing compelling human interests and needs.

Though challenges lie ahead, the recognition of substantive rights and procedural safeguards, respect for intrinsic values and implementation and enforcement mechanisms that give effect to ocean rights (such as legal standing and governance reform), States may be incentivized to accelerate creating marine protected areas in areas beyond national jurisdiction; the interests of the MPA may be represented and defended by designated custodians; MPA objectives may be better adhered to; and higher standards of protection may be supported via strict adherence to scientific advice and the representation of the marine ecosystems' interests in decisions affecting its health. Individuals and species populations of marine migratory species would have rights as wild animals, such as the right to free development of behavior, which may require legislative measures to prevent harm to this right, as well as the application of consistent standards across jurisdictional waters. Ocean rights may also help prevent serious and irreversible harm to the ocean, such as through deep-seabed mining, by requiring strict adherence to the precautionary principle and shift economic focus away from short-term profit for a few to long-term good living for all.

193 Chapron et al., n. 107 above.

194 Kauffman and Sheehan, n. 111 above, p. 362.