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The Environment as a Victim: overcoming the human-centric Paradigm of Rights

El ambiente como víctima: superando el paradigma humanocentrista de los derechos

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Abstract: The present article evaluates the profound impact that recognizing the environment as a potential victim has for the enforceability of environmental rights and the particularities of the Latin American juridical systems that have been critical in this development affecting how environmental rights and protections are considered, in particular the understanding of the environment as a victim. In the 1990s, the In Dubio Pro Natura principle was developed via judicial decisions. This principle is understood as a separate principle of international law that requires authorities to interpret laws and regulations in the most favourable manner to the interests of nature. In the first decade of the 2000s, Ecuador and Bolivia constitutionalized environmental rights. This process embraced non-western legal approaches and traditions from indigenous peoples. More recently, Colombia's restorative justice system has acknowledged the environment as a direct victim of their internal armed conflict. The process that has taken place in the Latin-American region represents a case study on challenging the human-centred paradigm of rights. This article discusses the significance and potential of this recognition for the enforcea-

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bility of environmental rights.

Keywords: In Dubio Pro Natura; indigenous rights; restorative justice; transitional justice; environmental rights.

Resumen: El presente artículo evalúa el profundo impacto que el reconocimiento del ambiente como una potencial víctima tiene para la exigibilidad de los derechos ambientales y las particularidades de los sistemas jurídicos Latinoamericanos que han sido críticos para este desarrollo que afecta cómo los derechos ambientales y sus protecciones son evaluados, en particular la interpretación del ambiente como víctima. En la década de 1990, el principio In Dubio Pro Natura fue desarrollado por medio de decisiones judiciales. Este principio es entendido como un principio independiente de derecho internacional que exige a las autoridades interpretar las leyes y regulaciones de la forma más favorable a los intereses de la naturaleza. En la primera década del siglo XXI, Ecuador y Bolivia constitucionalizaron los derechos ambientales. Este proceso acogió enfoques y tradiciones no occidentales provenientes de los pueblos indígenas. Más recientemente, el sistema de justicia restaurativa de Colombia ha reconocido al ambiente como víctima directa de su conflicto interno armado. El proceso que ha tenido lugar en Latinoamérica representa un caso de estudio que cuestiona el paradigma humanocentrista de los derechos. Este artículo discute la importancia y potencial de este reconocimiento para la exigibilidad de los derechos ambientales.

Palabras clave: In Dubio Pro Natura; derechos indígenas; justicia restaurativa; justicia transicional; derechos ambientales.

I. Introduction

Conceptualizing the environment as a victim whose rights have been violated is a challenging and necessary discussion regarding the enforceability of environmental rights. If the environment could speak "what would nature say about its fate during the [Colombian] internal armed conflict?" asked rhetorically the Colombian Truth Commission in its report on the internal armed conflict.[1] Following this, the Commission exemplifies through different instances how the environment is the main target of violence in scenarios of internal armed conflicts, therefore making it one of the victims of these heinous acts that take place in these contexts. For instance, when territories become battlegrounds, local fauna, and flora suffer. Combatants have instrumentalized natural resources against their counterparts as weapons, often inflicting irreparable damage to the local ecosystem.

Humanitarian law has acknowledged the occurrence of these events and has addressed progressively what constitutes environmental war crimes. For instance, the Fourth Geneva Convention states in its definition of the prohibition of destruction of occupied territories that such actions should be limited to "the absolutely necessary" in times of war.[2] Furthermore, Additional Protocol I to the Geneva Conventions outlaws warfare methods intended or that may be expected to cause "widespread, long-term and severe"

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1 Colombian Truth Commission, *There is future if there is truth: Final Report of the Commission for the Clarification of Truth, Coexistence and Non-Repetition, vol. I. The Impacts of the Internal Armed Conflict in Colombia*, Bogota, 2022, p. 185.

2 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 1989, International Committee of the Red Cross (ICRC), 75 UNTS 287, 12 August 1949, Art. 53, <https://www.refworld.org/legal/agreements/icrc/1949/en/32227> [accessed 23 March 2024].

environmental damage.[3] The United Nations Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques prohibits using these techniques for military or hostile activities against a State party that have widespread, long-lasting, or several effects.[4] More recently, the Rome Statute codified as a war crime in the context of an international armed conflict causing "widespread, long-term and severe damage to the environment" when it is clear these actions are disproportionate to the concrete and direct military advantage that is pursued.[5]

Notwithstanding the increased recognition of the negative impact that human actions have on ecosystems in both international instruments and domestic legislation, the rationale behind the aforementioned provisions fell short of recognizing the environment as the victim of the said war crimes or violations of humanitarian law. Environmental damage caused by hostile acts in the context of armed conflicts is prohibited because of the aftermath effects of these acts on the civilian population and their subsistence. Irrespective of the values that have motivated the abovementioned process, the recognition of environmental rights in inter-

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3 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, International Committee of the Red Cross (ICRC), 1125 UNTS 3, 8 June 1977, Art. 35 (3), <https://www.refworld.org/legal/agreements/icrc/1977/en/104942>[accessed 22 March 2024]

4 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 1978, Treaty no. No. 17119, United Nations, Treaty Series, vol. 1108, p. 151, Arts. I-II, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-1&chapter=26&clang=_en> [accessed 19 March, 2024].

5 Rome Statute of the International Criminal Court (last amended 2010), 1998, UN General Assembly, Art. 8(2)(b)(iv), UN General Assembly, 17 July 1998, <https://www.refworld.org/legal/constinstr/unga/1998/en/64553> [accessed 24 March 2024].

national instruments and the progressive constitutionalization of these rights as urgent matters have increased. At the same time, there has been a shift in how these rights are defined and their scope as enshrined in constitutional provisions.[6] However, the dominant interpretation of environmental rights and protections has been insufficient as it limits their importance to their connection to human rights affected by environmental harm.[7]

Moreover, a human-centred conception of the environment is based on a hierarchical cosmovision that puts the human species on top and the environment and non-human species as resources and commodities. In contrast, a more environment-centred conception of these rights contrasts this logic with more extensive protections for environmental rights afforded under legal principles such as the *In Dubio Pro Natura*. The *In Dubio Pro Natura* principle states that in decisions affecting the environment, authorities should favour those decisions that grant the highest degree of protection or that cause less impact on the environment and biodiversity.[8] As opposed to a human-centred understanding of environmental rights, this approach puts environmental protection as an end in itself.

In essence, the proponents of granting the status of victim to the environment support a more progressive interpretation of environmental rights. This contends a more restrictive interpre-

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6 See for instance: Ecuador Constitution (2008), Preamble which explicitly recognizes nature as a legal entity, subject of rights and the Bolivia Constitution (2009), Preamble which celebrates "nature, Pachamama (Mother Earth) of which we are part" marking a shift in the paradigm that subdues nature and natural resources for the use of society.

7 For instance, right to health, food, access to water and cultural rights are closely connected with environmental rights.

8 Bryner, N., *Aplicación del principio In Dubio Pro Natura para el cumplimiento de la legislación ambiental*, Congreso Interamericano de Derecho Ambiental, Washington, Organization of American States' General Secretary, 2015, pp. 166-168.

tation of environmental rights that considers that only human beings can be subjects of rights. The present article aims to analyse the significance of the paradigm shift caused by acknowledging the environment as a legal entity that could be deemed a victim of violations of their rights and how the Latin-American legal context allowed a more extensive protection to environmental rights that lead to their recognition as subject of rights and potentially a victim. The analysis will be conducted from different perspectives. Firstly, as a progressive interpretation of human rights and humanitarian law in the Americas, in particular in the constitutional processes that took place in Bolivia and Ecuador. The article will make reference to the international legal principle *In Dubio Pro Natura* developed via judicial decisions in different countries in the Americas, as a significant precedent for an expanding interpretation of environmental rights. Secondly, as an interpretation that builds upon indigenous rights and environmental advocacy. Thirdly, this article will focus on Colombia as a case study on the topic in the context of restorative justice, particularly related to Indigenous rights. Finally, this article will focus on the victimization of the environment, what are the distinctive factors of this type of victimization, and the analogies that could be made with human rights violations, in particular on the obligation of the states to prevent human rights violations and repair or compensate to the maximum extent possible in case a violation has already happened.

II. The need for an ontological shift i n the conceptualization of environmental rights

In June 2021 a panel of experts convened by the Stop Ecocide Foundation proposed an amendment to the Rome statute that would incorporate a definition for the crime of ecocide. According to the Independent Expert Panel's proposal, Article 8 ter

should be added to the list of war crimes contained in the Rome Statute adding the crime of ecocide.[9] On its proposed definition, ecocide is defined as the "unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts" and the concept of environment comprises "earth, its biosphere, cryosphere, lithosphere, hydrosphere, and atmosphere, as well as outer space".

This proposal would go beyond Art. 8 of the Rome Statute. As mentioned above, Art.8 is invoked in war when the actions that affect the environment are disproportionate to the sought military advantage. Notwithstanding the difference above, it has been pointed out that this definition of what the crime of ecocide would entail is rooted in a human-centred understanding of environmental rights. Namely, paragraph 2 definition of wanton considers whether damage inflicted to the environment would be excessive concerning "the social and economic benefits anticipated". According to this logic, environmental rights are conditioned to a cost-benefit examination guided by a human-centric rationale that sees environmental rights in certain scenarios as dispensable or as a bargaining chip to obtain advantages in other sectors. Following this line of argumentation, societal interests are perceived as conflicting with environmental protections. The human-centric paradigm alienates humans as individuals and members of their communities from their local environments putting individualistic interests on top. However, this division is artificial. Our planet's environmental degradation affects the sustainability of ecosystems and the future relationship of communities with their surrounding resources. It is therefore contradictory to envi-

[9] Independent Expert Panel for the Legal Definition of Ecocide, "Commentary and Core Text", 2021, <https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d7479cf8e7e5461534dd07/1624721314430/SE±Foundation±Commentary±and±core±text±revised±%281%29.pdf>, June 2021. [accessed 29 March 2024]

sage any benefits to society that could outweigh the consequences of ecocide.

This disjunctive was already present in the first instruments recognizing environmental rights. In particular, a human-centred conception and deontological approach to environmental rights permeates these instruments. We can take for instance principle 2 of the 1972 Stockholm Declaration on the human environment, which is a cornerstone declaration for the acknowledgment and development of the right to live in a healthy environment. Principle 2 bases the obligation to safeguard natural resources on the benefits they provide to present and future generations which would demand "careful planning or management, as appropriate".[10] Notwithstanding that environmental rights can be rationalized from a consequentialist ethical worldview, their development would be limited to the extent in which humans benefit from environmental protections. The following subchapter explores the limitations of conceptualizing environmental rights from a human-centred perspective. The subchapter will then, delve into *In Dubio Pro Natura,* a regional principle of International Law that originated in the Americas as an alternative compliment to this understanding of the said rights and well-established principles in environmental law such as the concept of sustainability.

A) Overcoming a 'human-centred' conception of environmental rights

Modernity, and in particular the Industrial Revolution created a paradigm of development that influenced the way societies see themselves in contrast to nature which in turn, is seen as a completely separated entity. Economic development is understood as

[10] UN General Assembly, United Nations Conference on the Human Environment, A/RES/2994, UN General Assembly, 15 December 1972, <https://www.refworld.org/legal/resolution/unga/1972/en/9934> [accessed 01 May 2024]

the result of human societies transforming nature and the environment for their progress. As a byproduct of this understanding of the relationship between human societies with non-human species and natural resources, men became "on top of nature and their owner".[11] This worldview naturally affects how legal frameworks have been built and their limitations. Defendants of a human-centred conception of environmental rights argue that law is a cultural product made by and for humans. Thus, the idea of other species being subject to rights would conflict with the origin of legal rights. Furthermore, they assert that creating new subjects of rights would render these rights ineffective. Alternatively, in a purely ethnocentric conception of environmental rights, environmental protection would be a human obligation.[12] Notwithstanding the latter, the prevalent conception of rights has not offered effective protection for environmental rights contrary to what the former authors stated. For instance, in matters related to the fight against climate change, framing this threat as "an obligation of all humanity" has led to the setting of goals that are not met and become more symbolic than actual obligations.[13]

Furthermore, the dominating conception of who is deemed a subject of rights in environmental law has additional limitations. As it was pointed out above, at the moment there is only one explicit war crime that revolves around the environment. Moreover, the threshold required to prove individual responsibility makes it

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[11] Belkis, Cartay A., "La naturaleza: objeto o sujeto de derechos", In: *Los derechos de la naturaleza (un mundo sin insectos)*, Chilpancingo, Universidad Autónoma de Guerrero/ H. Congreso del Estado de Guerrero. LIX Legislatura, Instituto de Estudios Parlamentarios "Eduardo Neri"/ Editora Laguna, 2012, p. 22, <https://biblio.juridicas.unam.mx/bjv/detalle-libro/3219-los-derechos-de-la-naturaleza> [accessed 04 May 2024]

[12] *Ibidem*, p. 35.

[13] Tschakert, P., 1.5C or 2C: A conduit's view from the science-policy interface at COP20 in Lima, Peru. Climate Change Responses, 2015, DOI: <https://doi.org/10.1186/s40665-015-0010-z> [accessed 11 May 2024]

inaccessible to respond to environmental destruction outside of the context of related human rights violations.[14] This limitation from criminal law to respond to crimes committed against the environment is linked to how victimhood is conceptualized in the dominating Western legal systems. It is argued that only humans can be acknowledged as victims of crimes because non-human species and the environment lack the mental capacity to comprehend that they have been victimized.[15] In this order of ideas, they fall under the category of disputed resources and not victims, in particular in the context of armed conflicts.[16] Furthermore, although transitional justice mechanisms have taken inspiration from multidisciplinary approaches, environmental law has often been excluded from the legal disciplines that contribute to the work of transitional justice bodies.[17] However, a broad definition of victimhood that includes the environment would contribute to establishing the truth in post-conflict scenarios while opening a new path for broadening environmental rights. An environmental chapter that focuses on the wrongdoings committed against the environment in the context of armed conflicts would offer a clearer picture of the heinous acts committed and the atrocities that took place by parties in a conflict. This consideration has influen-

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14 Killean, R., From ecocide to eco-sensitivity: 'greening' reparations at the International Criminal Court. The International Journal of Human Rights, 25(2), 2021, pp. 323–347. DOI: <https://doi.org/10.1080/13642987.2020.1783531> [accessed 09 May 2024]

15 White, R., *Environmental Harm: An Eco-justice Perspective*, Bristol, Policy Press, 2014.

16 Varona, G., *Restorative pathways after mass environmental victimisation: Walking in the landscapes of past ecocides*, Oñati Socio-Legal Series vol. 10, n. 3, pp. 664-685, 2014, p. 670.

17 Ong, D., "Prospects for Transitional Environmental Justice in the Socio-Economic Reconstruction of Kosovo", *Tulane Environmental Law Journal*, vol. 30 n. 2, pp. 217-272, 2017, p. 218.

ced the establishment of transitional justice mechanisms as it will be delved below concerning the case study of Colombia.

Transitional justice mechanisms, in particular Truth Commissions, have demonstrated in the past their capacity to address violations of environmental rights and environmental damage in a more effective way than traditional mechanisms which focus on individual violations of human rights. For instance, one of the features of Truth Commissions and other transitional justice mechanisms that could make them more effective in addressing environmental wrongdoings is that their focus goes beyond individual violations. In addition to this, the role of these mechanisms is to document and address a pattern of violations of collective human rights.[18] This feature allows transitional mechanisms to open a dialogue between the affected communities, the perpetrators of violations against the environment, and the state. Moreover, for a dialogue process in the framework of transitional justice mechanisms to be genuine, the parties involved should have meaningful forms to participate in and influence the built narrative. This offers a window of opportunity, in cases related to indigenous groups which in many cases can contribute to the process with their legal traditions. These traditions often distance themselves from the human-centred view of environmental rights.

In the case of Colombia, the recognition of the environment as a victim is considered a victory for indigenous rights. As part of the process that ended with creating a Special Jurisdiction for Peace (JEP, in its Spanish acronym), indigenous group representatives advocated for the explicit recognition of the environment as a victim of the internal armed conflict in the country. This position could be explained by the special connection that indigenous peoples have with their land which does not only have symbolic meaning but also is essential for their survival as a separate

[18] UN Office of the High Commissioner for Human Rights, Rule of law tools for post-conflict states. Truth Commissions, 2006, p. 11.

group.[19] Therefore, in their worldview recognizing the status of victim to the environment is an intrinsic part of protecting their cultural rights and other human rights that have been wronged to them as a community and individuals. Following this line of reasoning, the Colombian government integrated an environmental justice approach into their transitional system to have a dialogue process between one of the groups most affected by the internal armed conflict. This shift is significant because it would guide jurisdictional authorities to not only consider damages inflicted to individuals and communities by environmental damage alone but to recognize that natural resources as well as the fauna and flora that are affected or cease to exist are victims themselves. This approach although innovative is not unprecedented. There are successful cases in which rivers and trees have been represented in domestic environmental restorative justice conferences.[20]

Furthermore, the acknowledgment of the environment as a legal entity has been present in Latin American constitutionalism, particularly in Ecuador and Bolivia. As a consequence of this radical development, a concept such as sustainable development is seen as insufficient to protect environmental rights. Therefore, the recognition of the environment and non-human species as subjects of rights would require a harmonious interpretation of other rights that might be in conflict. In this order of ideas, the *In Dubio Pro Natura* has become an interpretative principle that meets this requirement as it will be explored in the following sub-chapter.

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19 Anaya, S. James, "The Human Rights of Indigenous Peoples", In: Krause, Catarina and Scheinin, Martin, *International protection of human rights: a textbook*, 2nd rev. ed., Turku/Åbo: Åbo Akademi University, Institute for Human Rights, 2012.

20 Hamilton, M., *Environmental Crime and Restorative Justice. Palgrave Studies in Green Criminology*, Basingstoke, Palgrave MacMillan, 2021.

B) Sustainability and *In Dubio Pro Natura*

The recent constitutionalization process of environmental rights in Latin America has been described as the recognition of "constitutional interculturality".[21] Namely, the first constitutions in Latin America after becoming independent states in the XIX century, took inspiration from foreign judicial institutions, in particular from Europe and North America. In contrast, legal traditions from indigenous peoples were ignored in these foundational processes and even considered a threat to national unity.[22] In contrast, by the end of the XXth century and the first decade of the XXIst century new constitutional processes took place in Latin America which strived to reflect the existence of different cultural traditions that dated before the colonization processes by European powers in the Americas.

Consequently, indigenous perspectives of development and the relationship between human societies and the environment were part of the newly enacted constitutions.[23] This marked a significant shift in the interpretation of environmental rights as it welcomed a biocentric conception of these rights. For instance, Ecuadorian and Bolivian constitutions reference the "Pacha Mama" or Mother Earth, a subject of rights. This should not be interpreted as a merely symbolic reference but as clauses to seek

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21 Foroni, M., *Beni comuni e diritti di cittadinanza. Le nuove Costituzioni sudamericane*, Milan, Lampi di Stampa, 2014, p. 83.

22 Dantas de Carvalho, F. A., "Entre a Nação Imaginada e o Estado Plurinacional: o reconhecimento dos direitos indígenas nonovo constitucionalismo latino-americano", L. Avritzer, L. Bernardo, M. Corrêa, y F. de Carvalho (orgs.), *O ConstitucionalismoDemocrático Latino-Americano em debate*, Soberania, separação depoderes e sistema de direitos, Belo Horizonte, Autêntica Editora, 2017, p. 217.

23 Carducci, M, *Epistemologia del Sud e costituzionalismo dell'alterità*, Diritto Pubblico Comparato ed Europeo, 2012, p. 320.

to build a new institutional balance that includes environmental interests in their vision of development.[24]

The inclusion of biocentric provisions in their constitutions is not a rejection of the achievements of the anthropocentric vision of environmental rights but rather an expansion of principles derived from it such as sustainability. In the same spirit, the principle of *In Dubio Pro Natura* compliments the concept of sustainable development which would be insufficient in itself to protect environmental rights. Sustainable development implies that a balance between competing visions of society's future is reachable. Following this approach, there should be a negotiation between two interests that are in conflict: economic growth, particularly in developing regions, and the imperative to preserve natural resources for future generations.[25] In this order of ideas, defining what is sustainable is the subject of political negotiations. It is reasonable to expect that an extensive interpretation of environmental rights would impose limitations on human actions that affect the future preservation of local environments and their resources. Nevertheless, this definition implies that agreements between regulators, stakeholders, and policymakers determine the extent to which environmental rights and protections can be implemented in harmony with economic growth goals.

Accordingly, there are two possible interpretations of what sustainability may entail: an economic-driven interpretation of sustainability and a version of sustainable development that puts the focus on the protection of biodiversity and the possibility for

[24] For instance, Art. 10 of the 2008 Ecuador Constitution states that "nature will be subject of the rights granted by the Constitution". Art. 71 further declares that "nature or Pacha Mama where it reproduces and develops its life has the right that its existence be respected entirely, the maintenance and regeneration of its vital cycles, structure, functions and evolving processes".

[25] Kulik, Rebecca M, Sustainable development, Britannica, 2024, <https://www.britannica.com/topic/sustainable-development>, [accessed 06 July 2024].

future generations to effectively enjoy all human rights.[26] Sustainability questions operate under a human-centric conception of environmental rights in this order of ideas. However, the introduction of sustainability requires a broader analysis of the impact of human action in the future and taking those measures that would protect nature from the adverse effects of activities that affect the environment. The protection of indigenous communities and their ancestral ways of living are also mentioned as part of what sustainability should strive for. As such, sustainability is a political concept that seeks to find a common ground between conflicts that may arise from environmental and indigenous rights on one hand and economic interests on the other.[27] The concept of "sustainable development" indeed refers to two forces that seem contradictory: the desire for change and the preservation of natural resources. As part of this political discussion over what development models suppose an improvement of living conditions for societies, policymakers and project executors have to decide which visions of development are included and prioritized over others.[28]

What could this principle say to non-Western legal systems whose visions of development differ from the dominant ones? Sustainable development offers an incomplete answer to pressing issues. In contrast, the *In Dubio Pro Natura* principle in the Americas has intended to represent a more complete picture which would require elevating environmental rights. *In Dubio Pro Natura* is a regional principle of international law that developed in the

[26] UN Secretary General, Our Common Agenda: policy brief: to think and act for future generations, 2023, <https://digitallibrary.un.org/record/4005638?v=pdf>, [accessed 07 July 2024].

[27] Gad, Ulrik et al., "Introduction: Sustainability as a Political Concept in the Arctic", In: *The Politics of Sustainability in the Arctic Reconfiguring Identity*, Space, and Time, Taylor & Francis, 2018, pp. 1-3.

[28] Nightingale, A. *et al.*, *Environment and Sustainability in a Globalizing World*, Routledge, New York, 2019.

jurisprudence of different countries in the Americas. The principle was first invoked by the Costa Rican Constitutional Chamber in 1995 as analogous to the obligation of the state to act with precaution if there is a risk of environmental harm. Following this landmark decision, the principle was later invoked by the Federal Supreme Court of Brazil which expanded its scope as an interpretative principle that has allowed tribunals to interpret norms in the most favourable way possible for the environment.[29] Following this development the *In Dubio Pro Natura* has been recognized by other judicial tribunals as an environmental principle to interpret the law in Latin-American countries such as Argentina, Bolivia, Colombia, Chile, Ecuador and Mexico.[30]

The principle mentioned above is comparable to the *In Dubio Pro Reo* principle in criminal law. The *In Dubio Pro Natura* principle mandates that applicable laws are to be interpreted in case of a lack of clarity or ambiguity, in a way that is most favourable to environmental preservation.[31] In this order of ideas, policymakers, judicial bodies, and authorities should interpret existing laws and regulations to guarantee the highest level of environmental protection. According to Bryner, when the *In Dubio Pro Natura* principle is invoked decision-makers should prefer the outcome that grants the highest degree of protection or the one that causes the least impact to biodiversity, habitat, ecosystem processes, and the quality of the air and water among other environmental interests.[32] The pursuit of sustainability already embraces similar goals.

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[29] Olivares, Alberto *et al*, "Contents and development of the In Dubio Pro Natura Principle. Towards the integral protection of the environment", *Ius et Praxis*, 24, n. 3, 2018, pp. 619-650, University of Talca, 2018, pp 629-641.

[30] Baldin, Serena *et al*, "The In Dubio Pro Natura Principle: An Attempt of a Comprehensive Legal Reconstruction", *Revista General de Derecho Público Comparado*, n. 32, 2022, pp. 168-199.

[31] Robinson, N, Fundamental Principles of Law for the Anthropocene? in Environmental. Policy & Law, 44, 2014.

[32] Bryner, N., *op. cit.*, pp. 166-168.

However, what makes the *In Dubio Pro Natura* principle a more rigorous protection of the interests of the environment is precisely that it affects the interpretation of laws, policies, and norms as well as how state actors should behave and base their decisions. The focus is no longer on how can humanity protect the environment to guarantee their subsistence as a species but on the protection of environmental diversity as a value in itself.

The development of the *In Dubio Principle* to further develop environmental rights and open the possibility to acknowledge the environment as a victim in its own right in the Americas is, of course, not the only attempt within the legal doctrine to find an alternative to effectively protect the rights in the face of the challenges posed by the global environmental crisis. However, I particularly highlight the contributions in this regard in the Global South as it is the region that will be most affected by the impact of this crisis. Nevertheless, it is worth mentioning that legislation has been approved in Australia and New Zealand recognizing rivers and mountains as legal entities.[33] It is also worth mentioning a judicial decision by the Supreme Court of Bangladesh reaffirming a 2019 decision that declared that the Turag River and all rivers in the country were "living entities" with rights as legal persons.[34]

Furthermore, there is a movement led by NGOs, associations, and individuals that seeks to create groundbreaking interpretations of human rights, that pretend to broaden the interpretation of environmental rights and protections notwithstanding that they operate in an anthropocentric legal system. The *State of the Netherlands v Urgenda Foundation* is a landmark case in this respect. In this judgment upheld by the Supreme Court of the Netherlands, the plaintiffs, an NGO that works against clima-

[33] See the Australian Yarra River Protection Act, 01 December, 2017 and New Zeland Te Urewera Act, 27 July, 2014.

[34] Margil, Mari, *Bangladesh Supreme Court Upholds Rights of Rivers*, Medium, 2020. <https://mari-margil.medium.com/bangladesh-supreme-court-upholds-rights-of-rivers-ede78568d8aa>, [accessed 23 July 2024].

te change demanded the Court to hold the state and its institutions responsible for breaching their constitutional and international obligations to fight climate change. The basis of the claims was that the Netherlands has a constitutional duty of care regarding the living and environmental conditions in the light of the overwhelming scientific evidence on the effects of climate change caused by human actions. Furthermore, the inaction of the state represented a violation of international commitments in the fight against climate change and violated the rights to personal integrity as well as private and family life.[35] The Supreme Court of the Netherlands confirmed in this decision, that the state had to reduce its emissions in line with the state's human rights obligations and commitments to fight climate change.

Moreover, this decision is relevant in this discussion as it sets a precedent on how environmental rights can be enforced through a judicial interpretation that intertwines these rights with the fulfilment of human rights. According to the Supreme Court, it was not possible to respect the aforementioned human rights contained in Articles 2 and 8 of the European Convention of Human Rights without the state "doing its part" and complying with its international commitments in the fight against climate change according to its possibilities and degree of responsibility.[36] This precedent further demonstrate a growing movement towards innovative interpretations of rights to further protect the environment and enforce state obligations. However, it could be more arduous

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[35] The State of the Netherlands v Urgenda Foundation, The Supreme Court of the Netherlands, case 19/00135 (English translation), 2019, <https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf>, [accessed 13 July 2024].

[36] Wewerinke-Singh, Margaretha *et al*, "The State of the Netherlands v Urgenda Foundation: Distilling best practice and lessons learnt for future rights-based climate litigation", *Review of European, Comparative & International Environmental Law*, 30(2), 275-283, 2021, pp. 276-277. <https://doi.org/10.1111/reel.12388> [accessed 13 July 2024].

to reach to the conclusion that states are obliged to interpret laws and regulations in a manner that grants the furthest degree of protection to the environment within a system holding a strict human-centred understanding of rights.

III. Nature as a subject of rights

In the introduction of this article, I raised a rhetorical question brought up by the Colombian Truth Commission. What would nature say if it could speak about the atrocities and heinous acts that are often committed in connection with other serious human rights violations? And by the same token, who "speaks for the environment" as a victim? In the recent American constitutionalization processes that welcomed non-Western traditions into their juridical systems, the environment has been recognized as a subject of rights. Indigenous rights and traditions become the driving force for this legal development. Similarly, transitional justice mechanisms have opened a dialogue with indigenous peoples that have been victimized several times, by the dominant post-colonial forces and as victims of an internal armed conflict. The transitional justice system in Colombia is an example of that. For Indigenous peoples, the recognition of the environment's victimhood according to their cosmovision was critical for them to be fully repaired. However, seeing Indigenous people as the "guardians or representatives" of the environment could be problematic if it is used without having a meaningful conversation with the communities. Namely, treating Indigenous institutions and beliefs as a monolith erases the diversity among the many communities and their history. At the same time, non-meaningful participation leads to the tokenization of these communities and stereotypical representations of their institutions.

Environmental leaders as part of civil society are also on countless occasions "the voice" of the environment. They are the first group that alerts about environmental threats including in many

places in which human rights and environmental defenders put their lives at risk.

In environmental philosophy, Deep Ecology points out the recognition of nature as a subject of rights as the crucial difference between the deep ecology movement and what they call the "shallow ecology movement". According to Arne Næss, operating under the anthropocentric legal framework would make other forms of environmentalism shallow because all they could accomplish would be technological fixes within the system to decrease contamination and pollution but not fully reversing the damage inflicted on the planet derived from the way humans interact with non-human life and ecological diversity.[37] This perspective is shared to a certain extent by Indigenous Epistemologies who conceive environmental rights as intrinsic to the realization of the rights of their communities and even by some international instruments.[38] Furthermore, Stone's "Should Trees Have Standing?" became a benchmark reference in favour of finding juridical mechanisms to grant rights to the environment and to act on behalf of the environment to demand the enforcement of said rights.[39]

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[37] Naess, A., "The shallow and the deep, long-range ecology movement: A summary" In A. Drengson & H. Glasser (Eds.), Selected Works of Arne Naess, X, Dordrecht, The Netherlands: Springer, 2005, pp. 7–12, <https://openairphilosophy.org/wp-content/uploads/2018/11/OAP_Naess_Shallow_and_the_Deep.pdf> [accessed 17 July 2024].

[38] For instance, on its preamble the UN World Charter for Nature affirms that "Mankind is part of nature and life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrients" and that "every form of life is unique, warranting respect regardless of its worth to man". UN General Assembly (37th sess.: 1982-1983), World Charter for Nature., A/RES/37/7, UN General Assembly, 28 October 1982, https://www.refworld.org/legal/resolution/unga/1982/en/10627 [accessed 18 July 2024]

[39] Stone, Ch, Should Trees have Standing? Toward Legal Rights for Natural Objects, 1974.

Legal systems of countries including their constitutions, if interpreted as living documents could abandon the traditional definition of nature as an object or quantifiable asset granting subjective rights to the environment as a means to respond to environmental challenges.[40] For instance, Article 34 of the Bolivia Constitution recognizes the right of any person on their behalf or representing a collective group to take legal action in defence of the environment without prejudice to the authorities' obligation to act on their motion in case of environmental damage.[41] Similarly, Article 71 of the Ecuador Constitution on its definition of Pacha Mama confers a right to "all persons, communities, peoples and nations" to "call upon public authorities to enforce the rights of nature".[42] These provisions illustrate the intent of the Constitutional legislators of both countries to go beyond a rhetorical discourse in defence of their environment. They do not only acknowledge nature as a subject of rights but also foresee mechanisms to denounce a violation of environmental rights and stop their victimization by administrative and judicial means. Since the environment cannot take legal action against its victimizers, it must be humans who are required to represent the interests of the environment. This solution resembles the legal representation parents or tutors exercise to protect minors or individuals who are unable to represent themselves.[43] From this follows another question: who speaks for the environment? As mentioned above, two actors emerge as the most legitimate voices of the environment: on one hand, Indigenous, leaders, members, and the Indigenous

[40] Iacovino, Angela, "Constitucionalismo ecológico en América Latina: de los derechos ambientales a los derechos de la naturaleza" *Cultura Latinoamericana*, vol 31, n. 1, 2020, pp. 306, <http://dx.doi.org/10.14718/CulturaLatinoam.2020.31.1.1> [accessed 18 July 2024].

[41] Plurinational State of Bolivia, Constitution of 2009, Art. 34.

[42] Republic of Ecuador, Constitution of 2008, Art. 71.

[43] Iacovino, Angela, *op. cit.,* pp. 302-302.

rights movement as a whole, and environmental leaders in the broadest sense of their definition.

A) The environment and Indigenous rights

The Indigenous movement, their cosmovision, and unique juridical institutions in the Americas played a significant role in the constitutionalization of environmental rights and the recognition of the condition of the environment as a subject of rights and a victim when their rights are violated. Furthermore, the Inter-American system of Human Rights has acknowledged, as part of the characteristics that make Indigenous peoples a distinctive group from those of the dominant societies in which they live, their link with the territory and by extension, with natural resources and the environment. Namely, that Indigenous people's relationship with land goes beyond the concept of property as it is fundamental to their cultures, spiritual life, integrity, and survival of the community for current and future generations[44] and also, that Indigenous Peoples have a right to be consulted not only in matters related to their ancestral lands and natural resources, but in all actions from the state, regardless of their nature, that have an impact over their rights and interests.[45]

The role of consultations with Indigenous communities had a consequential role in the Colombian case in the context of an armed conflict. Firstly, the Colombian government issued a series of decrees that recognized different groups as victims of the internal

[44] Yakye Axa v. Paraguay, Inter-American Commission on Human Rights, 17 June 2005, para 131.

[45] Inter-American Commission on Human Rights, Derechos de los Pueblos Indígenas y Tribales sobre sus Tierras Ancestrales y Recursos Naturales Normas y jurisprudencia del Sistema Interamericano de Derechos Humanos, Organization of American States, 30 December 2009, para. 273, <https://www.oas.org/es/cidh/indigenas/docs/pdf/Tierras-Ancestrales.ESP.pdf> [accessed 27 July 2024].

armed conflict and provided reparations for these groups. Article 3 of the Decree related to Indigenous Peoples, victims of the armed conflict noted that "for Indigenous peoples, the territory is a victim, considering their cosmovision and the special and collective link that binds them with mother earth"[46]. Similarly, the government issued a Decree related to black, afro-Colombian, Palenquera, and Raizal communities which stressed that "restoring the natural environment and adopting measures for their protection are basic conditions to safeguard the inextricable relation between territory, nature, and cultural identity".[47] These achievements were the result of the dialogue between the government (which at the time was initiating peace negotiations to end the internal armed conflict that the South American country suffered) and Indigenous communities, and culminate in the creation of transitional justice mechanisms which required to have a dialogue between all parties affected by this armed conflict. Therefore, it was fundamental to recognize that the harm inflicted on the Indigenous communities went beyond the individual harm caused to them but also to the historical, cultural, and spiritual ties they had with the environment. This harm affected non-human members of Indigenous communities and must be acknowledged and repaired.[48]

It has been pointed out that restorative justice is more adaptable as it puts the focus on the victims and their worldviews.[49] In the case of Colombia, the establishment of transitional justice mechanisms included a chapter for environmental restorative jus-

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46 Decree-Law 4633 of 2011, Republic of Colombia, December 09, 2011.

47 Decree-Law 4635 of 2011, Republic of Colombia, December 09, 2011.

48 Eichler, Lauren J, Ecocide is Genocide: Decolonizing the Definition of Genocide, Genocide Studies and Prevention: An International Journal 14(2), 2020, p. 104.

49 Matsunaga, Jennifer, "Two Faces of Transitional Justice: Theorizing the Incommensurability of Transitional Justice and Decolonization in Canada", *Decolonization: Indigeneity, Education and Society*, vol. 5, n. 1, 2016, pp. 24-44.

tice which culminated with a report of the Truth Commission and the ongoing judicial decisions taken by the Special Jurisdiction for Peace (JEP). As a Transitional Justice Tribunal, JEP pursues the clarification of the truth, recognition of the victims of the armed conflict by all parties involved, and granting reparations and guarantees of no repetition. In their decisions, the JEP Tribunal has recognized the local environments of Indigenous communities as a victim in their own right of the internal armed conflict. In their reasoning, the JEP Tribunal expressed that for these communities the experience of war is not exhausted with the pain inflicted on their people. Instead, the consequences affect the living species that lived in their territories, and the environment itself. Accordingly, environmental damage, caused as part of the conflict, inflicted irreparable damage to their spiritual cosmovision (with the disappearance of "protecting spirits"), and their effects went beyond the human sphere. Therefore, environmental damage also affected the relationship between Indigenous people's rights as well as the network of relationships that people had with their local environments and non-human entities.[50] These findings are further supported by the Colombian Truth Commission for Truth Clarification, Cohabitation, and Non-Repetition. For instance, the Commission documented the testimonies of ethnic communities who were forcibly displaced from their ancestral territories. In one of the testimonies, a member of these communities expressed how the different armed forces in conflict forbid them from living in their territories and from their traditional fishing activities. Furthermore, in his testimony, the community leader expressed that a consequence of the internal armed conflict is living with fear of returning to the land of their ancestors.[51]

Notwithstanding the above, it must be stressed the risk of tokenism when Indigenous rights are used as the basis to broaden

[50] Special Jurisdiction for Peace (JEP), Judicial Writ SRVBIT- Case 002-079, 12 November 2019.

[51] Colombian Truth Commission, *op. cit*, p. 216.

environmental rights and the recognition of the environment as a direct victim in the context of an armed conflict. In processes involving Indigenous communities, particularly in restorative justice frameworks, and when their rights are involved, there should be meaningful channels for Indigenous communities, their authorities, and members to express their views. It must be remembered that Indigenous groups are not a monolith and their cultural, and spiritual beliefs and institutions vary.[52] Otherwise, we would be participating in a "top-down" tokenization of Indigenous peoples in case their participation is only symbolic or in the worst-case scenario, in a caricature of this process. If the interpretation of their system of beliefs and practices related to the realization of environmental rights is informed by the preconceptions of the dominant society it would be an imposition from the authorities and could not be seen as a form of participation or reparation.

B) Environmental defenders

Environmental defenders are a group that often becomes the voice of the environment, in conflicts involving the use of non-renewable resources, damage to the environment, and the defence of the environment in general. Environmental defenders, human rights defenders, and community and social leaders are often interrelated terms as the defence of the rights they advocate intersect. The defence of social leaders right to participate in issues that affect them directly often interrelate with environmental conflicts. For instance, the right of communities to live in a healthy environment links human rights including ethnic minority rights with environmental rights. According to some of the provisions mentioned above, all citizens are called upon to be environmental defenders as they could demand the authorities to protect environmental rights. This definition of environmental human rights defender

[52] White, Rob, "The Four Ways of Eco-global Criminology. International Journal for Crime", *Justice and Social Democracy*, vol. 6, n. 1, 2017, pp. 8–22.

aligns with the UN Environment Programme which includes in the scope of the definition "anyone who defends environmental rights whether they identify themselves as human rights defenders or not".[53]

Environmental rights defenders in particular and human rights defenders, in general, could play an important role in advocating on behalf of the environment and non-human species. Environmental defenders, in particular, those whose work as rights advocates in cases related to land rights, especially in the context of conflicts over resources could be instrumental as environmentalists and experts. Their expert voices are valuable as they intervene in judicial processes including in the context of armed conflicts.[54] Their contribution could help judicial institutions to give proper consideration to the harm caused to the environment and the relationship communities build with their local environments.

Environmental defenders play a fundamental role not only as experts and advocates in contentious cases but, often raise arguments on behalf of sectors of societies that are regularly underrepresented. In decisions related to sustainable development, environmental defenders are the voice of local organizations, social movements, vulnerable sectors of society at risk by development projects which on many occasions are also victims of intersectional discrimination. This would include Indigenous peoples, farmers, and women collectives among other groups.[55] Furthermore, environmental and human rights defenders face serious risks to their lives and physical safety, particularly in places with ongoing conflicts about natural resources. For instance, in one of the most

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53 UNEP, Promoting Greater Protection for Environmental Defenders Policy, 2018.

54 Forsyth, Miranda *et al*, "A future agenda for environmental restorative justice?", *The International Journal of Restorative Justice*, vol. 4, n. 1, 2021, pp. 17-40.

55 Scheidel, Arnim *et al*, "Environmental conflicts and defenders: A global overview", *Global Environmental Change*, vol. 63, July 2020, pp. 5-7.

tragic examples in the Latin American region, indigenous leaders in Colombia were among the at least 33 environmental and land defenders who were assassinated, according to Global Witness' 2021 report on environmental defenders globally.[56]

IV. The victimization of the environment

The victimization of the environment in its diverse forms could be explained by the instrumentalization of biodiversity and environmental resources. According to the human-centric conception of rights that has influenced and limited who is deemed a subject of rights, the environment and its biodiversity are conceived as a mere resource, an object that human societies could use for their benefit and development. In this order of ideas, a new perspective that considers the environment as a subject of rights and potentially a victim invites us to re-think the relationship between societies and their surrounding environment. One of Kant's most famous principles of the categorical imperative, the "formula of humanity" states that humanity should not be treated as a means but rather as an end. Similarly, recognizing how human actions have victimized the environment would lead us to a need to expand the ethical formula of humanity to include non-human beings which should also be seen not as a means but an end on themselves.

Armed conflicts are one of the most extreme scenarios in which the environment is victimized as it is used as an instrument to inflict damage and suffering on enemies or civilians. Armed forces transformed the environment tearing down and devastating the existing species in some cases beyond repair in the areas they fight. In some other cases, animals are sacrificed as part of war tactics treating them as weapons, resources to experiment, or to deprive the enemy combatant or civilians of useful resources.

[56] Global Witness, Decade of defiance. Ten years of reporting land and environmental activism worldwide, September 2022, p. 13.

In the most heinous cases, animals have been instrumentalized in armed conflicts to torture, murder, and disappear people.[57] Notwithstanding that the examples mentioned above are some of the most extreme cases in which the environment has been victimized, it is not unreasonable to argue that the same logic operates in other cases. For instance, one of the reasons behind environmental conflicts is the exploitation of natural resources depriving communities of basic needs such as access to safe drinking water to maximize the profit of activities such as mining. Environmental defenders and social leaders have opposed mining projects in the past citing as one of the reasons that they transformed the local environment, displacing people and making traditional agricultural activities unfeasible.[58]

It is also relevant to mention the UN Draft principles on the protection of the environment in relation to armed conflicts. These principles reiterate the obligation to prevent, mitigate, and remediate harm to the environment and should apply to analogous situations in which the environment has been affected. In cases where the environment has been victimized an obligation to the states to mitigate and remediate follows. What amounts to an effective mitigation and remedy of the damage inflicted depends on the seriousness of the violation and how the environment has been affected. However, access to environmental justice is an element to guarantee effective remedies for a violation of the rights of the environment, recognize the environment as a victim, and determine which reparation measures should take place. Principles 9 on State responsibility for environmental damage and Principle

[57] Colombian Truth Commission, *op. cit*, pp. 192-195.

[58] Sanabria-Rangel, Álvaro, 'Environmental Justice and Globalization: Putting a Focus on Indigenous Peoples and Local Community Rights and Perspectives' in Hasrat Arjjumend (ed), *Advances in Environmental Law (TGI Books/ The Grassroots Institute*, Montreal/Vancouver, Canada, 2024, 2024, pp. 71-96, <https://doi.org/10.33002/enrlaw-333/c3> [accessed 02 August 2024]

11 on the liability of business enterprises for the harm they cause to the environment could not be fulfilled without the existence of effective access to environmental justice.[59] Furthermore, in the cases of environmental damage caused in Indigenous territories, the Draft principles on the protection of the environment foresee that what constitutes a remedy to the damages caused to the environment would require that the state authorities undertake effective consultations and cooperation with the Indigenous people affected as they should have a saying in the determination of what should be the appropriate remedy measures to repair the affected environment.[60] A similar formula should be considered in contexts of a violation of the rights of the environment. In addition to Indigenous peoples and environmental defenders, civil society and the local community who have a closer relationship with the affected environment should have the right to participate and be included when deciding how the victimized environment ought to be protected and repaired.

Notwithstanding that the notion of the environment as a subject of rights and how its status as a victim is interpreted will evolve via judicial and legislative decisions, environmental rights could take inspiration from human rights and international humanitarian law in this matter. For instance, an element of effective reparation for environmental rights violations could be the inclusion of environmental chapters in truth commissions to document the historical roots of environmental crimes.[61] Particular forms of damage targeting the environment and non-human beings could be highlighted in memorials built as a form of repa-

[59] United Nations, Protection of the environment in relation to armed conflicts: draft resolution, 11 November 2022.

[60] *Ibidem*, Principle 5.

[61] Cusato, Eliana, "Back to the Future? Confronting the Role(s) of Natural Resources in Armed Conflict Through the Lenses of Truth and Reconciliation Commissions", *International Community Law Review,* vol. 19, n. 4-5, 2017, pp. 373-400.

rations for human rights violations. In addition to these examples of potential forms of addressing reparations for the environment, a fundamental contribution to reparations and non-repetition would address the intersectionality of environmental, Indigenous, ethnic, and cultural minority rights violations as well as historical patterns of violations of the said rights.

V. Concluding remarks

Recognition of the environment as a subject of rights and potentially a victim of a violation of their rights departs from the dominant, human-centred conception of rights that places the status of victim solely on humans and does not allow to consider the environment and living species different than humans as subjects of rights. Although there is a process of widening the interpretation of environmental rights to increase their protections, this process has been significant in the Americas. One of the reasons behind the increased recognition of environmental rights is explained by a movement toward accepting other legal approaches that differ from the Western tradition that inspired the main juridical systems including those in Latin America. This process permeated some of the most recent constitutional processes in the region in particular in Bolivia and Ecuador. The acceptance of plurinational traditions and institutions from Indigenous peoples which dated back to the pre-colonization period, allowed the recognition of the environment as a subject of rights, in connection with their legal traditions and cosmovisions. Furthermore, Indigenous peoples, through their participation in restorative and transitional justice mechanisms in Colombia have been consequential in the recognition of the environment as an individualized victim in the context of human rights and humanitarian law violations that took place in the internal armed conflict of this country. Furthermore, in the framework of restorative justice processes, the role of environmental defenders has been fundamental to "give a voice"

to the environment, their rights that have been endangered, and their interests.

In addition to this, the In *Dubio Pro Natura* principle goes beyond the scope of application of sustainable development. According to this regional principle of international law, the highest standard of environmental protection should be preferred by policymakers, judicial bodies, and authorities interpreting current laws and regulations. This principle, although not in contradiction with sustainable development would go beyond the balance between two interests that are perceived to be conflicting: the need for economic growth and development and the need to preserve the environment for current and future generations. The intersectionality between Indigenous, participation rights, and environmental rights requires us to see the environment and non-human beings as more than resources at the service of societal interests and to re-think the relationship between humanity and the ecosystem.