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Restoring dignity by granting rights: IHL and peacebuilding empowerment for Magdalena River fishing communities in Colombia

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Abstract

This article examines the role of international humanitarian law (IHL) in safeguarding artisanal fishing communities residing along the banks of the Magdalena River in Colombia after the recognition of the river as a rights-bearing entity[1] and a victim of the armed conflict. The article also explores the potential of targeted peacebuilding interventions for achieving sustainable well-being, ecological restoration and enduring peace. Against the backdrop of historical conflict, the Magdalena River and its adjoining communities have suffered significant harm, requiring widespread reparations that go beyond immediate crisis management. The study proposes a comprehensive approach for achieving sustainable well-being, ecological restoration and enduring peace, acknowledging the complex connections

between legal frameworks, environmental considerations and the cultural heritage of the riverine community.

Keywords: Magdalena River, rights-bearing entity, international humanitarian law, biocultural rights, artisanal fishing communities, reparations, peacebuilding interventions, sustainable fishing practices.

> We live in the flicker – may it last as long as the old earth keeps rolling! But darkness was here yesterday.
>
> Joseph Conrad, *Heart of Darkness*

Introduction

On 24 October 2019, the First Criminal Circuit Court of Neiva, in the department of Huila, Colombia, recognized the Magdalena River as an entity subject to protection, conservation, maintenance and restoration by the State and the community.[2] In a thirty-four-page decision, the Court resolved, in the first instance, a *tutela* filed by environmentalists Andres Felipe Rojas, Óscar Páez and Daniel Leandro Sanz, who warned about the ecological damage that the river might suffer due to the construction of the El Quimbo hydroelectric project. The ruling requires the State to design and establish a commission of Guardians of the Magdalena River, composed of representatives of the Colombian government through the Ministry of Environment, the Regional Autonomous Corporation of the Rio Grande de la Magdalena (Corporación Autónoma Regional del Río Grande de la Magdalena, Cormagdalena),[3] the Huila Governor's Office and the Upper Magdalena Corporation (Corporación Autónoma Regional del Alto Magdalena),[4] to work for the protection of the river. It also orders the elimination of illegal mining, the conduct of epidemiological and toxicological studies, the decontamination of water sources affected by mercury (and other toxic substances), and the

1 As will be discussed, the recognition of the Magdalena River as a rights-bearing entity signifies the conceptualization of the river's independent and inalienable right to exist and flourish. This recognition grants the Magdalena River legal "personhood", extending its integrity to the understanding that it can be impacted independently of harm to human beings.

2 First Criminal Circuit Court of Neiva, Sentencia de Tutela de Primera Instancia No. 071, 24 October 2019.

3 Cormagdalena is a national entity with administrative, budgetary and financial autonomy. It is endowed with its own legal status and is tasked with promoting the recovery of navigation and port activity, land reclamation and conservation, and energy generation and distribution, as well as the sustainable use and preservation of the environment, fishing resources, and other renewable natural resources. See the Cormagdalena website, available at: https://cormagdalena.gov.co/ (all internet references were accessed in September 2024).

4 The Upper Magdalena Corporation's goal is to foster a harmonious relationship between society and nature, ensuring that present and future generations have access to the natural resources needed for regional development and the preservation of the planet. To achieve this, the organization implements an Environmental Policy based on sustainability, equity and citizen participation, enabling efficient environmental and renewable natural resource management. See the Upper Magdalena Corporation website, available at: https://sibcolombia.net/socios/cam/.

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development of a food security plan, among other measures, all in collaboration with the local communities.

This decision was followed by the Peace and Justice Chamber of the Superior Court of Bogotá's sentence against former paramilitary leader Ramón María Isaza Arango, alias "El Viejo", for his responsibility for several crimes during the armed conflict.[5] In the ruling, the Chamber declared the Magdalena River as a victim of the criminal actions of the paramilitaries under the command of Isaza, under Law 975 of 2005,[6] due to the serious environmental and cultural damage caused by their criminal activities.[7] The ruling finds its basis in the Colombian constitutional block, a legal notion that elevates international human rights law treaties[8] and international humanitarian law (IHL) treaties[9] to constitutional level, thereby extending the legal corpus of the Justice and Peace Law to include these two systems.[10]

In the wake of these two unprecedented decisions, the Colombian Intangible Cultural Heritage Committee declared the knowledge and techniques associated with artisanal fishing in the Magdalena River as part of the intangible cultural heritage of the nation.[11] This recognition of artisanal fishing in the Magdalena River involves acknowledging its practitioners as part of a specific social group that shares a history intertwined with water, fishing and the ecosystem. It is not merely a recognition of cultural and biological diversity, but also an acknowledgment of the ancestral knowledge and practices that have played a pivotal role in shaping the collective memory of the riverine community.[12] Furthermore, this recognition provides an opportunity to chart the roadmap for implementing the reparations mandated by both judicial decisions in Colombia, with a particular focus on addressing the fishing communities in the river's basin.

The first section of this article will describe the framework through which nature, and in this particular case the Magdalena River, can be considered as an

5 See Superior Court of Bogotá, Radicado 11001225200020160055 2 (Chamber of Justice and Peace), 8 April 2021, available at: https://verdadabierta.com/wp-content/uploads/2021/05/Descargar-Sentencia.pdf.

6 Law 975/2005, 25 July 2005. Also known as 25 or the Justice and Peace Law (Ley de Justicia y Paz), Law 975 is a legal framework enacted during the administration of Álvaro Uribe Vélez and approved by Congress to facilitate the demobilization of paramilitary groups in Colombia, potentially extending to guerrilla groups. Its primary objective is to disarm, demobilize and reintegrate irregular armed groups, particularly paramilitaries. The framework for this legislation is mainly determined by principles from international human rights law (Political Constitution of Colombia, 4 July 1991, Art. 93) and IHL (*ibid.*, Art. 214(2)), limiting its frame.

7 See Superior Court of Bogotá, above note 5.

8 Political Constitution of Colombia, above note 6, Art. 93.

9 *Ibid.*, Art. 214(1).

10 Constitutional Court of Colombia, Sentence No. C-225 (Full Chamber), 18 May 1995. See also José Ismael Villarroel Alarcón, "El tratamiento del derecho internacional en el sistema jurídico boliviano", in Juana Inés Acosta Lopez, Paola Andrea Acosta Alvarado and Daniel Rivas Ramirez (eds), *De anacronismos y vaticinios diagnóstico sobre las relaciones entre el derecho internacional y el derecho interno en Latinoamérica*, Universidad de la Sabana, Universidad Externado de Colombia and Sociedad Latinoamericana de Derecho Internacional, Bogotá, 2017.

11 Fundación ALMA, "Pesca Artesanal en el río Magdalena como patrimonio cultural inmaterial de Colombia", available at: www.fundacionalma.org/pesca-artesanal-en-el-rio-magdalena/.

12 *Ibid.*

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entity with rights. It will then explore the significance of such recognition and the emergence of biocultural rights as a new guideline for protecting the environment. The second section will outline the legal basis for declaring the Magdalena River a victim of the Colombian armed conflict, and will also delve into how fishing communities can benefit from the recognition of the river as a victim of the armed conflict. Finally, the third section will provide examples of potential peacebuilding interventions in the reparations of the Magdalena River. This section will explain that if the goal is to effectively repair the harm caused to the river, this should be done by restoring the livelihoods of the communities connected to the river, particularly the fishing communities. This restoration would subsequently become a peacebuilding opportunity through the development of sustainable fishing practices for these communities.

The Magdalena River as an entity subject to protection, conservation, maintenance and restoration

The process of granting rights to the Magdalena River began with the First Criminal Circuit Court of Neiva's decision to recognize the river as a rights-bearing entity. The Court's decision constitutes a reconceptualization of the complex interrelationship between ecosystems and cultures, but more importantly, a reconceptualization of humanity's relationship with nature from a legal perspective. Indeed, the recognition of ecological systems as subjects of rights is intended to attenuate the predominant anthropocentric approach to environmental rights[13] – that is, the need to establish a linkage between the diversity of the human species as part of nature and as a manifestation among multiple forms of life.[14]

Legal developments regarding the environment as a rights-bearing entity

The recognition of nature as a legal person or subject is a novel approach that may lead to confusion with similar concepts dealing with environmental protection. In this context, acknowledging certain ecosystems as subjects of rights differs from regarding them as objects of special protection. The distinction lies in the fact that recognizing legal personality represents a reconceptualization of nature as a subject. This endows entities like the Magdalena River with independence and the ability to hold rights, obligations or legal relationships. Conversely, designating a

13 See Eduardo Gudynas, *Derechos de la naturaleza: Ética biocéntrica y políticas ambientales*, 1st ed., Programa Democracia y Transformación Global, Lima, 2014; cited in Diana Carolina Sánchez Zapata, "El reconocimiento de la naturaleza como sujeto de derechos: una oportunidad para repensar la planeación del ordenamiento territorial como función administrativa", *Revista Derecho del Estado*, No. 54, 2022.

14 Constitutional Court of Colombia, *Centro de Estudios para la Justicia Social "Tierra Digna" y Otros v. Presidente de la República y Otros*, Sentence No. T-622 (Sixth Chamber), 10 November 2016 (*Atrato River*), cited in D. C. Sánchez Zapata, above note 13.

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natural entity for protection merely shifts it from its typical interactive role to a safeguarded status, without necessarily assigning it rights or obligations.

The process by which nature was given rights-bearing status began to emerge from political and social processes in countries such as Ecuador and Bolivia. Both States drafted new constitutions which have reinterpreted the relationship between nature and humankind, by tackling environmental issues through the drafting of State principles such as plurinationality, interculturality and good living (*buen vivir*).[15] Both political charters grant legal status to Pacha Mama (Mother Earth) and incorporate ancestral indigenous philosophy principles such as *sumak kawsay* in the Ecuadorian case or *suma qamaña* in Bolivia (both meaning "good living").[16] In the Ecuadorian reform, the Constitution now states in Article 71 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".[17] This means that anyone, including individuals, communities and nations, can demand that Ecuadorian authorities enforce the rights of nature, including the right to be restored.[18] As a result, Ecuadorian courts have resolved at least twenty-five cases in which the main claim was the protection of the rights of nature.[19]

Another example of granting legal rights to rivers can be found in the struggle of the Whanganui people of New Zealand, who after more than a century have achieved some recognition of the Whanganui River as a subject of rights through a law passed by parliament. In this case, the Whanganui River has also been granted rights of personhood, meaning that the river itself can act as a person in a court of law; it has legal standing.[20] In practice, this recognition has translated into the appointment of two legal representatives of the river and monetary compensation to care for its health.[21] This approach differs from the Ecuadorian model by naming specific guardians and not granting positive rights.[22]

The Colombian interpretation of nature as rights-bearer

Colombia began to follow a similar trend in granting rights to ecological systems in 2016, when the Constitutional Court recognized the Atrato River as a rights-bearing entity in response to a *tutela* filed on behalf of the ethnic communities of Chocó

15 See D. C. Sánchez Zapata, above note 13, p. 99.
16 *Ibid.*
17 Political Constitution of Ecuador, 20 October 2008, Art. 71.
18 Mihnea Tanasescu, "When a River Is a Person: From Ecuador to New Zealand, Nature Gets Its Day in Court", *Open Rivers*, No. 8, Autumn 2017, available at: https://openrivers.lib.umn.edu/article/when-a-river-is-a-person-from-ecuador-to-new-zealand-nature-gets-its-day-in-court/.
19 Gabriela Eslava, "Naturaleza: ¿Víctima del conflicto?", Dejusticia, 8 February 2019, available at: www.dejusticia.org/naturaleza-victima-del-conflicto/.
20 M. Tanasescu, above note 18.
21 G. Eslava, above note 19.
22 M. Tanasescu, above note 18.

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department.[23] The purpose of the *tutela* was to halt the illegal extraction of minerals and illegal logging, arguing that the consequences on the river and the communities could be irreversible. In its ruling, the Court emphasized the need to establish a connection between the diversity of the human species as part of nature and as a manifestation of multiple forms of life.[24] In this sense, the conservation of biodiversity entails the preservation and protection of the ways of life and cultures that interact with it. Hence, the recognition of these rights for the communities settled in the Atrato basin can also be understood as a way of affirming their culture, traditions and way of life.[25]

The acknowledgment of the Magdalena's rights also encompasses an understanding of the intricate dynamics within this complex ecosystem and the profound interplay between biodiversity and the cultural identity of the surrounding population. This relationship has persisted for generations, particularly in the traditions associated with hunting, fishing, food-gathering, water consumption and ecosystem preservation, as well as the interactions among communities and the people who inhabit them. It also highlights the significant role of women, who play a cross-cultural and effective role in water management as a cultural asset.[26] Therefore, the approach that facilitates the advancement and analysis of the relationship connecting the environment with culture is the biocultural approach.[27] This approach recognizes the rights of ethnic communities to autonomously administer their territories according to their own laws and customs. These are not new rights, but rather the integration of the rights of ethnic communities to their culture and the protection of the environment they inhabit, based on the intrinsic relationship that exists between the two.[28]

In that sense, biocultural rights represent an alternative approach towards the collective rights of the ethnic communities in relation to their cultural and natural surroundings, which allows them to regulate nature based on indigenous ontologies.[29] As described by the Colombian Constitutional Court in the *Atrato River* case, biocultural rights connect the cultural rights of ethnic communities and their rights to natural resources, within the following parameters:

a. the multiple ways of life expressed as cultural diversity are inextricably linked to the diversity of ecosystems and territories;

23 The *tutela* is a subsidiary and autonomus judicial remedy designed to provide constitutional oversight of the actions or omissions of all public authorities and, in exceptional cases, of individuals. It can be filed by any person to ensure the prompt and effective protection of fundamental rights when urgency is required to prevent irreparable harm or when no other judicial remedy is available. See Constitutional Court of Colombia, *Atrato River*, above note 14.

24 *Ibid.*

25 *Ibid.*

26 Superior Court of Bogotá, above note 5.

27 Biocultural rights, as defined by Elizabeth Macpherson *et al.*, constitute an innovative approach towards combining conservation with respect for indigenous rights and community rights of stewardship for natural resources. See Elizabeth Macpherson, Julia Torres Ventura and Felipe Clavijo Ospina, "Constitutional Law, Ecosystems, and Indigenous Peoples in Colombia: Biocultural Rights and Legal Subjects", *Transnational Environmental Law*, Vol. 9, No. 3, 2020.

28 Constitutional Court of Colombia, *Atrato River*, above note 14, pp. 4–7.

29 *Ibid.*, p. 36.

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b. the richness expressed in the diversity of cultures, practices, beliefs, and languages is the product of the co-evolutionary interrelationship of human communities with their environments and constitutes an adaptive response to environmental changes;
c. the relationships of different ancestral cultures with plants, animals, micro-organisms, and the environment actively contribute to biodiversity;
d. the spiritual and cultural meanings of Indigenous peoples and local communities about nature are an integral part of biocultural diversity; and
e. the preservation of cultural diversity leads to the conservation of biological diversity, so that the design of policy, legislation and jurisprudence should be focused on the conservation of bioculturality.[30]

The significance of embracing the biocultural approach extends beyond recognizing collective rights within ethnic communities concerning their cultural and natural environments. It also addresses the issue of legal representation. Through the acknowledgment of rights, the needs and interests of nature can be addressed at the legal level, providing it with a direct voice.[31] Given that nature cannot act on its own, it requires a form of representation with the power and legitimacy to comprehend its interests and advocate for them. In a post-conflict context, acknowledging nature as a victim involves the question of its reparation and restoration, and to prevent these concepts from being buried in abstract notions, decisions regarding natural ecosystems must be made in dialogue with nature itself. In practice, this can be done through those who know it best: its communities. Only through this dialogue will it be possible to find ways to repair nature and, through justice, establish its truth as a victim of human actions.[32]

To identify the communities directly involved with a particular ecosystem, the Colombian Constitutional Court has emphasized the special relationship that any given community has with its lands and natural surroundings, characterizing this relationship as involving constitutionally protected historical, cultural and spiritual dimensions that differ from those of any other individual.[33] Furthermore, in 2011 Colombia introduced significant legal instruments addressing the harm suffered by different minorities during the armed conflict. In this regard, Congress passed Law 1448 of 2011,[34] which acknowledges the harm suffered by the non-ethnically differentiated peasant population, and the government introduced Decree-Laws 4633 for indigenous peoples,[35] 4634 for Roma peoples[36] and 4635 for Black communities,[37] each reflecting the different

30 *Ibid*., para. 5.17, cited in E. Macpherson, J. Torres Ventura and F. Clavijo Ospina, above note 27.
31 See Christopher D. Stone, "Should Trees Have Standing? Towards Legal Rights for Natural Objects", *Southern California Law Review*, Vol. 45, 1972.
32 G. Eslava, above note 19.
33 See Constitutional Court of Colombia, Sentence No. T-188 (Third Chamber), 12 May 1993.
34 Law 1448/2011, 10 June 2011.
35 Decree-Law 4633/2011, 9 December 2011.
36 Decree-Law 4634/2011, 9 December 2011.
37 Decree-Law 4635/2011, 9 December 2011.

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ways in which these minorities, along with their land and natural surroundings, were harmed by the armed conflict.[38]

As previously mentioned, the representation of the Magdalena River was entrusted to the Guardians of the Magdalena River commission. This commission comprises representatives from various entities, including the Ministry of Environment, Cormagdalena, the Huila Governor's Office, and the Upper Magdalena Corporation. The Magdalena basin spans an extensive region in which the river, its islands, ravines, beaches, dams, floodplains, marshes and canals interweave, creating a complex landscape characterized by distinct seasonal changes and fluctuations in matter and energy flow.

Among riverside communities, artisanal fishermen[39] stand out as key actors in the hydro-social relations that shape their territories.[40] These fishermen intricately weave their activities with the ecological cycles of the river, supported by a set of daily practices and local knowledge, leading to the existence of a true biocultural region with distinctive features and diverse manifestations. The work of these fishermen represents the primary vocation of the river's inhabitants, constituting one of the most important ancestral activities of the local and regional economy. The river serves as their main economic source and is the main contributor to the food security of their families.[41] As of 2015, the population dedicated to this trade in the floodplain of the Magdalena River was estimated at between 32,000 and 45,000 fishermen.[42]

Artisanal fishing communities define themselves as the caretakers of the river and their ecosystems, grounded in the concepts of ecosystem services and ecosystem compensations.[43] In this context, these communities have suffered harm during the Colombian armed conflict, and their intimate relationship with the Magdalena River makes them legitimate rights-holders.[44] However, the

38 Alexandra Huneeus and Pablo Rueda Sáiz, "Territory as a Victim of Armed Conflict", *International Journal of Transitional Justice*, Vol. 15, No. 1, 2021.

39 In Colombia, artisanal fishermen are defined as "any person who directly harvests fish from the natural environment and sells them at a local or regional level". See Autoridad Nacional de Agricultura y Pesca, Res. 1485, 8 July 2022, para. 3.15. See also Carolina Hernández-Rodríguez, Nubia Ruiz-Ruiz and Sébastien Velut, "Environmental Crisis, Food Crisis and Resisting Fisherpersons: The Case of the Magdalena River, Colombia", *Space Populations Societies*, Vol. 2022, No. 2–3, 2022.

40 Catalina Álvarez Burgos, "Pescadores en América Latina y el Caribe", *Cultura Hombre Sociedad*, Vol. 22, No. 1, 2012.

41 R. Delvalle Quevedo, above note 39.

42 The Nature Conservancy *et al.*, *Estado de las planicies inundables y el recurso pesquero en la macrocuenca Magdalena: Cauca y propuesta para su manejo integrado*, Bogotá, 2016.

43 C. Hernández-Rodríguez, N. Ruiz-Ruiz and S. Velut, above note 39.

44 According to Law 1448/2011, above note 34, the definition of victim in the Colombian armed conflict considers as victims "those persons who, individually or collectively, have suffered individual or collective harm as a result of events that occurred on or after 1 January 1985, concerning international humanitarian law or serious and manifest violations of international human rights standards that occurred on the occasion of the internal armed conflict". It is important to note that this definition is narrower compared to the protection provided by IHL, which applies across the entire territory of the State and extends to "all people" affected by an internal armed conflict; this goes beyond the temporal jurisdiction established by Law 1448. IHL ensures that there are no "unfavourable" distinctions that would limit or restrict the scope of protection. See Constitutional Court of Colombia, Sentence No. C-781 (Full Chamber), 12 October 2012.

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fishing communities living in the river's basin have experienced not only one but multiple situations of armed conflict, with interchanging actors. Throughout the 1,540 kilometres of the river's extension, FARC-EP and ELN guerrillas, different paramilitary organizations and the Colombian armed forces clashed with each other for decades, directly affecting these communities and their lifestyle. This broadens the conception of harm and reparations, demanding an acknowledgment that goes beyond physical damages to include the disruption of socio-ecological relations. This encompasses various aspects of subsistence farming and other cultural practices.[45]

The task at hand is to achieve the safeguarding and effective protection of the Magdalena River, along with the cultures and forms of life associated with it. This safeguarding includes the restoration of artisanal fishing practices, going beyond the need to provide food security and economic activity for the communities that practice them, and is also linked with local cultural characteristics such as music, cuisine and traditional medicine.[46]

In bridging the imperative to safeguard the Magdalena River and its associated cultures with the recognition of the river as a victim in the Colombian armed conflict, a critical nexus emerges. The restoration of artisanal fishing practices, integral to the holistic well-being of riverside communities, becomes intricately connected with the broader context of environmental protection during armed conflicts. The Magdalena River's status as a victim not only calls for reparations but also prompts a re-evaluation of the legal frameworks that safeguard nature, emphasizing the need for a cohesive and ecocentric approach in our collective pursuit of environmental justice.

The Magdalena River as a victim in the Colombian armed conflict

The decision by the Peace and Justice Chamber of the Superior Court of Bogotá declaring the Magdalena River as a victim during the Colombian armed conflict is primarily based on the definitions outlined in Law 1448 of 2011 and Decree-Law 4633 of 2011.[47] Decree-Law 4633 in particular establishes a differential treatment for indigenous communities and introduces the concept of territory as a victim. In that sense, the Magdalena River represents the living integrity and sustenance of identity, harmony and collective ties, which may have been desecrated during the armed conflict.[48]

The 2016 Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace (Final Agreement) says little about how to deal with the environmental degradation and destruction generated by the armed

45 A. Huneeus and P. Rueda Sáiz, above note 38.
46 Fundación ALMA, above note 11.
47 Law 1448/2011, above note 34; Decree-Law 4633/2011, above note 35.
48 Daniel Ruiz Serna, "El territorio como víctima: Ontología política y las leyes de víctimas para comunidades indígenas y negras en Colombia", *Revista Colombiana de Antropología*, Vol. 53, No. 2, 2017.

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conflict,[49] leaving particular issues up to interpretation, including the criminalization of crimes against the environment, the assessment of damages and the determination of the individual criminal responsibility of legal and illegal armed actors who directly or indirectly attacked nature in the framework of war activities.[50] Still, the protection of the environment has been recognized as an international obligation by different instruments such as the Montreal Protocol on Substances that Deplete the Ozone Layer,[51] the Rio Declaration on Environment and Development,[52] the United Nations (UN) Framework Convention on Climate Change,[53] the Kyoto Protocol.[54] The Rio Declaration on Environment and Development provides that "States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage".[55]

At the international level, the obligation to preserve the environment has been stated in international tribunals such as the International Court of Justice (ICJ), in its *Pulp Mills on the River Uruguay* case,[56] and the Inter-American Court of Human Rights (IACtHR), in the cases of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*,[57] *Claude-Reyes et al. v. Chile*,[58] *Sawhoyamaxa Indigenous Community v. Paraguay*,[59] *Saramaka People v. Suriname*[60] and *Kichwa Indigenous People of Sarayaku v. Ecuador*.[61]

In the case of the Magdalena River, recognition as a victim of the armed conflict was granted by the Superior Court's Peace and Justice Chamber, which considered biocultural rights as part of its victim status determination. The Chamber, in its deliberation, considered various positions from Colombian authorities, emphasizing the biocultural rights associated with the river, as well as

49 Luisa Gómez-Betancur, "The Rights of Nature in the Colombian Amazon: Examining Challenges and Opportunities in a Transitional Justice Setting", *UCLA Journal of International Law and Foreign Affairs*, Vol. 25 No. 1, 2020.

50 Hector Herrera and Juliana Galindo, "La naturaleza como víctima del conflicto armado: un análisis ecocéntrico de los ataques contra la infraestructura petrolera en el marco de la Jurisdicción Especial para la Paz", in Lily Andrea Rueda *et al.* (eds), *Reflexiones sobre el Enfoque Territorial y Ambiental en la Jurisdicción Especial para la Paz*, Special Jurisdiction for Peace, Bogotá, 2022.

51 Montreal Protocol on Substances that Deplete the Ozone Layer, Treaty Doc. 100-10, 16 September 1987, Preamble.

52 Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I, 12 August 1992 (Rio Declaration).

53 UN Framework Convention on Climate Change, Treaty Doc. No. 102-38, 9 May 1992.

54 Kyoto Protocol to the UN Framework Convention on Climate Change, 37 ILM 22, 11 December 1997 (Kyoto Protocol).

55 Rio Declaration, above note 52, Principle 13.

56 ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, April 2010, *ICJ Reports 2010*.

57 IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment (Merits, Reparations and Costs), Series C, No. 79, 31 August 2001.

58 IACtHR, *Claude-Reyes et al. v. Chile*, Judgment (Merits, Reparations and Costs), Series C, No. 151, 19 September 2006.

59 IACtHR, *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment (Merits, Reparations and Costs), Series C, No. 146, 29 March 2006.

60 IACtHR, *Saramaka People v. Suriname*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), Series C, No. 172, 28 November 2007.

61 IACtHR, *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment (Merits and Reparations), Series C, No. 245, 27 June 2012.

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its natural and cultural significance.[62] As previously mentioned, biocultural rights encompass the rights of ethnic communities to autonomously govern their territories according to their own laws and customs. Consequently, through the interpretation of Law 1448 and Decree-Law 4800, the Court concluded that communities residing in the river basin are eligible for collective reparations as part of the integration of their cultural rights and environmental protection. This decision is based on the intrinsic relationship between cultures and the environments they inhabit.[63] Therefore, the Chamber's reasoning in finding the Magdalena River as a victim of the armed conflict stems from the biocultural relationship between the communities living in its basin and the collective reparations to which they are entitled. The consideration of the river as a victim defines this ecosystem as a single entity subject to protection and reparations derived from its environmental significance and its cultural relationship with the communities that inhabit it.

Legal protection of the environment during armed conflicts

IHL primarily aims to minimize the impact of war on civilians. This objective can be broadened to encompass environmental protection, stemming from the detrimental effects of warfare on nature. The argument follows that since the environment sustains life, aligning with the humanitarian goal of ensuring people's survival during and after conflicts, it deserves comparable safeguarding by IHL.[64] Furthermore, the environment and its resources play a pivotal role in post-conflict peacebuilding efforts by offering opportunities for communities to reconstruct their lives. Destruction of the environment and its resources during armed conflicts significantly impedes the peacebuilding process, making it almost impossible.

IHL, along with customary IHL, encompasses treaty provisions aimed at safeguarding the environment during armed conflicts. In 1994, the International Committee of the Red Cross (ICRC) produced the *Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict* (ICRC Guidelines), following a resolution of the UN General Assembly in 1992 and an International Conference on the Protection of War Victims in 1993. The ICRC Guidelines were updated in 2020, resulting in thirty-two rules and recommendations that evidently reflect the developments that have been witnessed in international law since 1994.[65] For many years, however, the

62 Superior Court of Bogotá, above note 5, p. 4793.

63 See Constitutional Court of Colombia, *Atrato River*, above note 14, pp. 4–7.

64 See Kenneth Wyne Mutuma, "The Protection of the Environment during Armed Conflict", *Journal of Conflict Management and Sustainable Development*, Vol. 7, No. 1, 2021.

65 According to the ICRC Guidelines, IHL treaty and customary rules provide the natural environment with specific and general protection. The first type of protection consists of those rules that grant *specific* protection to the natural environment as such, in that they have that as their purpose. These protections are set out in Part I of the Guidelines and include rules on prohibitions and restrictions on methods and means of warfare that may cause widespread, long-term and severe damage to the natural environment; the prohibition on using the destruction of the natural environment as a weapon;

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protection afforded to the environment by IHL was largely incidental and indirect.[66] Such protection was mostly provided through provisions that regulate the means and methods of warfare and similarly those that have aimed to limit the impacts of warfare on civilians and their property.

The reality is that a comprehensive regulation is still pending, leaving the very limited applicable principles scattered around in different branches of international law. In the realm of international criminal law, for instance, Article 35(3) of Additional Protocol I to the Geneva Conventions (AP I) – applicable to international armed conflicts – prohibits the use of methods or means of warfare designed or intended to cause widespread, long-term and severe damage to the natural environment. Similarly, IHL includes provisions for the protection of nature as a civilian object during armed conflict.

As noted above, the purpose of IHL is to mitigate the effects of armed conflicts, ensuring the survival of people during and after such conflicts. Recognizing the vital role of the environment in sustaining life, its protection becomes imperative for securing people's survival amidst and following conflict. However, this interpretation is framed within an anthropocentric perspective. IHL provisions construct, categorize and order nature for the benefit of human beings, neglecting to consider nature itself. In essence, these legal frameworks are based on instrumentalist and property-based notions, and this emphasizes the need for a more holistic approach to addressing the protection of the environment in international law. Parallel to the updated ICRC Guidelines, the International Law Commission (ILC) prepared its own set of Draft Principles on Protection of the Environment in Relation to Armed Conflicts (Draft Principles), which in certain ways offer a broader scope when it comes to environmental protection during armed conflict situations.[67] These Draft Principles provide a set of measures that can be taken before, during and after armed conflict in order to safeguard the environment.[68] A combined reading of the updated ICRC Guidelines and the ILC Draft Guidelines can therefore provide a framework that enhances environmental protection during war. Such reading could also prove useful in informing and elaborating on our understanding of the constantly evolving manifestation of armed conflicts.[69]

If the environment and natural resources are destroyed because of armed conflicts, the peacebuilding process becomes almost impossible. This is because

and the prohibition on attacking the natural environment by way of reprisal. The second type of protection consists of general rules that protect, among other things, the natural environment, without this being their specific purpose. Part II of the Guidelines sets out general protections that, in the ICRC's view, are provided to all parts or elements of the natural environment as civilian objects by the principles of distinction, proportionality and precaution; protections provided by the rules on specially protected objects other than the natural environment; protections provided to parts of the natural environment as civilian objects by the rules on enemy property; and certain additional protections under other general rules of IHL. ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict: Rules and Recommendations*, Geneva, 1994, updated 2020 (ICRC Guidelines).

66 See K. Wyne Mutuma, above note 64.

67 ILC, *Draft Principles on Protection of the Environment in Relation to Armed Conflicts*, in *Report of the International Law Commission: Seventy-First Session*, UN Doc. A/74/10, 2019, Chap. VI.

68 See K. Wyne Mutuma, above note 64.

69 *Ibid.*

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people are put back into conflicts for reasons of competition over scarcely available resources.[70] Our immediate reality reveals how the destruction of natural resources has dramatically accelerated, foreshadowing a rise in future confrontations. Still, progress is being made towards an ecocentric application of international law; at the time of the drafting of this article, an independent expert panel has brought into discussion the possibility of including the crime of ecocide in the Rome Statute of the International Criminal Court.[71]

Moreover, as will be analyzed below, the interpretation of IHL principles provides an avenue towards the application of responsibility for criminal conduct committed against nature during armed conflict. In this regard, the ICRC has identified the protection of the environment as a rule of customary IHL that restricts the manner in which armed actors may conduct hostilities.[72] The 26th International Conference of the Red Cross and Red Crescent mandated the ICRC to prepare a report on the customary rules of IHL, which materialized in the 2005 ICRC Customary Law Study.[73] Part II of the study deals with specifically protected persons and objects, with three rules within Chapter 14 addressing environmental protection during armed conflicts. The first of these is Rule 43:

> The general principles on the conduct of hostilities apply to the natural environment:
>
> A. No part of the natural environment may be attacked, unless it is a military objective.
>
> B. Destruction of any part of the natural environment is prohibited, unless required by imperative military necessity.
>
> C. Launching an attack against a military objective which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited.

The ICRC has pointed out that the above rule is applicable in international armed conflicts and in non-international armed conflicts.[74] It aligns with fundamental principles such as the principle of distinction between military and civilian

70 *Ibid.*

71 The Independent Expert Panel for the Legal Definition of Ecocide defines ecocide as "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". See Rachel Killean, "From Ecocide to Eco-Sensitivity: 'Greening' Reparations at the International Criminal Court", *International Journal of Human Rights*, Vol. 25, No. 2, 2021.

72 It must be noted that the protection of the environment as customary law is contested, at the international level, by various States such as the United States. See Maria Clara Maffei, "Legal Personality for Nature: From National to International Law", in Maurizio Arcari, Irini Papanicolopulu and Laura Pineschi (eds), *Trends and Challenges in International Law*, Vol. 1, Springer Nature, Switzerland, 2022.

73 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), available at: https://ihl-databases.icrc.org/en/customary-ihl/rules.

74 Saeed Bagheri, "The Legal Limits to the Destruction of Natural Resources in Non-International Armed Conflicts: Applying International Humanitarian Law", *International Review of the Red Cross*, Vol. 105, No. 923, 2023.

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objects, the requirement of military necessity and the principle of proportionality. It is important to note that the general principles of IHL apply to the protection of the environment as a civilian object.[75] However, there remains ambiguity regarding the extent of protection offered by IHL rules, particularly in defining whether rules like Rule 43 of the ICRC Customary Law Study and Article 35(3) of AP I extend protection to the natural environment with or without human use.

The ICRC has also identified two additional rules applicable to the protection of the environment during armed conflicts, the first being Rule 44:

> Methods and means of warfare must be employed with due regard to the protection and preservation of the natural environment. In the conduct of military operations, all feasible precautions must be taken to avoid, and in any event to minimize, incidental damage to the environment. Lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions.

Rule 44 focuses on the potential prevention of environmental damage and the necessity of precaution. The rule incorporates the precautionary principle into the analysis to be conducted before carrying out a military operation that may cause harm to the environment. It also allows for the examination of the damage from an ecocentric approach.[76]

Rule 45, on the other hand, seems to reiterate the sentiments expressed in Article 35(3) and 55(1) of AP I. It states:

> The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited. Destruction of the natural environment may not be used as a weapon.[77]

This rule provides an unequivocal and absolute prohibition on means or methods of warfare that are either intended to cause damage to the natural environment or may have such an effect. However, this prohibition is regarded as inapplicable to "battlefield damage incidental to conventional warfare".[78]

75 There is ambiguity concerning the extent of protection provided by IHL rules, especially in defining whether rules like Rule 43 of the ICRC Customary Law Study and Article 35(3) of AP I offer protection to the natural environment with or without human use. Some scholars argue that this protection only encompasses ecosystems without human use, while others argue that this provision protects elements of the natural environment as civilian objects if civilians use or rely on them, or if their destruction may impact civilians. For a more thorough discussion on the matter, see Jeanique Pretorius, "Environmental Protection in Non-International Armed Conflicts: Finding the Way Forward", Conflict and Environment Observatory, 15 March 2019, available at: https://ceobs.org/environmental-protection-in-non-international-armed-conflicts-finding-the-way-forward/.

76 S. Bagheri, above note 74.

77 State practice establishes Rule 45 as a norm of customary international law applicable in international, and arguably also in non-international, armed conflicts. However, France, the United Kingdom and the United States are persistent objectors with regard to the application of the first part of this rule to the use of nuclear weapons. Arguably, the drafting of Rule 45 is not sufficiently clear to be categorically considered as a customary law.

78 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, Art. 35, available at: https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-35/commentary/1987.

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Additional support for this trend is found in various events and resolutions. For instance, UN General Assembly Resolution 47/37 acknowledges that the use of certain means and methods of warfare may have direct effects on the environment,[79] and Resolution 2/15 of the UN Environment Programme's Environment Assembly emphasizes the "critical importance of protecting the environment at all times, especially during armed conflict, and of its restoration in the post-conflict period, including from the unintended collateral impacts of human displacement resulting from armed conflict".[80]

Additionally, the ILC's second report on the protection of the environment in relation to armed conflicts recognizes the serious environmental damage caused by non-international armed conflicts. This damage includes issues such as the extraction of minerals and other valuable natural resources, deforestation, and massive population displacements due to hostilities.[81] Moreover, in 2022 the ILC Draft Principles were updated and adopted by the UN General Assembly as the Principles on Protection of the Environment in Relation to Armed Conflicts (PERAC Principles).[82] These principles include, *inter alia*, measures to enhance the protection of the environment, designation of protected zones, protection of the environment of indigenous people, sustainable use of natural resources, and a special section dedicated to those principles that are applicable after armed conflict.[83] The PERAC Principles are thus applicable before, during and after armed conflicts, both in conflicts between States and in civil wars.

The Colombian interpretation of legal protection of the environment during armed conflicts

In a similar case dealing with the victim status of the Cauca River,[84] the analysis conducted by the Chamber for Acknowledgment of Truth, Responsibility, and Determination of Facts and Conduct, within the Special Jurisdiction for Peace (Jurisdicción Especial para la Paz, JEP), considered that the ICRC's stance on the applicability of these rules to internal conflicts is robustly affirmed in Colombia.[85] While the Chamber's analysis represents an interesting approach on conferring victim status to a river, the transitional justice nature of this particular chamber must be taken into consideration. In this context, the criminal regulations

79 UNGA Res. 47/37, 25 November 1992.

80 UNEA Res. 2/15, 27 May 2016, available at: https://wedocs.unep.org/20.500.11822/11189.

81 The ILC's second report is the culmination of several years of work that resulted in the adoption of principles identifying environmental protection standards applicable in both international and non-international conflicts. See Marja Lehto, *Second Report of Special Rapporteur on the Protection of the Environment in Relation to Armed Conflicts*, UN Doc. A/CN.7/728, 27 March 2019.

82 The PERAC Principles are a set of twenty-seven principles outlining how the environment should be protected before, during and after armed conflicts, and in situations of occupation. They vary in strength from non-binding guidance to reflecting binding international law. See ILC, *Protection of the Environment in Relation to Armed Conflicts*, UN Doc. A/CN.4/L.968, 20 May 2022 (PERAC Principles).

83 *Ibid.*

84 JEP, Auto No. 226 (Chamber for Acknowledgment of Truth, Responsibility and Determination of Facts and Conduct), 11 July 2023 (*Cauca River*).

85 *Ibid.*

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pertaining to environmental destruction are more expansive than those in IHL and international criminal law.

The Colombian Penal Code encompasses multiple provisions that are potentially relevant to prosecuting environmental damage. However, these provisions differ significantly from the relevant crimes outlined in the Rome Statute. Given that the law relevant to the JEP includes (1) the Colombian Penal Code, (2) international human rights law, (3) IHL and (4) international criminal law, it is crucial to attempt a harmonious interpretation of the law in light of both the domestic and international orders. Simultaneously, it is important that the crimes prosecuted adhere to the principle of the legality of human rights, encompassing the requirements of foreseeability and accessibility of criminal prohibitions. The Colombian Penal Code establishes as a war crime the stipulations of Articles 154 and 164 of Law 599/2000. Article 154 states:

> The person who, in the course and conduct of armed conflict and outside the primarily criminal cases which provide a more substantial penalty, destroys or appropriates protected objects under international humanitarian law by illegal or excessive means to the actual military advantage expected, shall be liable to a term of imprisonment ….
>
> … To the effects of this and the other articles of this title, the following shall be understood as protected objects under international humanitarian law:
>
> 1. Civilian objects which are not military objectives.
> 2. Cultural objects and places destined for purposes of worship.
> 3. Objects indispensable to the survival of the civil population.
> 4. The elements that make up the natural environment.
> 5. Works and installations containing dangerous forces.[86]

On the other hand, Article 164 describes the crime of environmental destruction as follows:

> Anyone who, in the course and conduct of an armed conflict, uses methods or means of warfare conceived to cause widespread, long-term and severe damage to the natural environment, shall be liable to a term of imprisonment.[87]

Article 164 establishes the crime of environmental destruction. For this article to be applicable, (1) the method or means employed must be designed to cause damage to the natural environment, and (2) the nature of that intended damage must be widespread, long-term and severe. The crucial consideration for this provision to apply is whether there were less environmentally damaging means available to achieve the military objective.[88]

86 Law 599/2000, 24 July 2000, Art. 154.
87 *Ibid.*, Art. 164.
88 Matthew Gillet and Marina Lostal, *Informe sobre imputación de daños medioambientales ante la Jurisdicción Especial para la Paz*, JEP, Bogotá, 2023.

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The Colombian provision is less stringent than the Rome Statute; for instance, Article 164 lacks the proportionality test requiring a demonstration that the anticipated environmental damage was clearly excessive in relation to the concrete and direct overall military advantage anticipated. Additionally, it applies to all forms of armed conflict without any express limitation to international armed conflicts. Nevertheless, Article 164 stands as a promising provision for addressing military operations that cause environmental damage.[89] Notably, although Law 599/200 includes several crimes through which environmental damage can be encompassed, the one that most comprehensively covers the destruction of nature as a violation of IHL in armed conflict is Article 164.

Building upon the legal framework addressing environmental destruction, the focus now turns to the specific case of the Magdalena River and its status as a victim in the armed conflict. Examining the previously detailed legal provisions in the context of the Magdalena River's declaration as a victim offers a nuanced perspective on the intersection of environmental law and armed conflict.

The declaration of the Magdalena River as a victim of the armed conflict

The Peace and Justice Chamber declared the Magdalena River a victim of the crimes committed by Ramón María Isaza Arango and another fifty-nine former members of the Peasant Paramilitary Forces of Magdalena Medio (Autodefensas Campesinas del Magdalena Medio).[90] The Chamber established that the group utilized the river as a tool for acts of forced disappearance, along with the harm caused to the river itself and to the biocultural rights of the communities living in its basin.[91] However, the Chamber did not elaborate on the criteria necessary to establish the river's status as a victim. To address these criteria, we must resort to Colombian legislation to determine the process for establishing victim status during the armed conflict. The first relevant provision to consider is Law 1448 of 2011, known as the Victims' Law, which defines "victims" in the following terms in its Article 3:

> For the purposes of this Act, victims are considered to be those persons who, individually or collectively, have suffered damage as a result of violations of the law, as a result of events that occurred on or after 1 January 1985.[92]

The Victims' Law defines a victim as any person who has suffered grave violations of human rights or IHL as a result of the conflict since 1985. The Constitutional Court, in Sentence C-253A of 2012, further explained that the notion of "victim" in Article 3 of Law 1448 delimits the universe of victims who are beneficiaries of the law, as a transitional justice measure.[93] This notion of "victim" is limited to persons who suffered the victimizing event since 1 January 1985 onwards, which leaves out victims of the armed conflict for unlawful acts that occurred outside

89 *Ibid.*
90 Superior Court of Bogotá, above note 5.
91 *Ibid.*
92 Law 1448/2011, above note 34, Art. 3.
93 See Constitutional Court of Colombia, Sentence No. C-253A (Full Chamber), 29 March 2012.

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the regulatory parameters of the law. In that sense, there may be victims who are not beneficiaries of Law 1448 but are still victims of other situations of non-international armed conflict outside of Law 1448's scope. In such cases the Court must make a consideration vis-à-vis the applicability of such victim status.

Human rights and IHL norms applicable to the Colombian case are defined as the standards elaborated in all international conventions signed by Colombia, particularly the Geneva Conventions of 1949. The definition of "victim" under these standards includes spouses, permanent partners, and first-degree family members of disappeared or murdered persons. Additionally in the Colombian case, individuals who have suffered injuries before 1985 may be considered victims for the purposes of seeking rights to truth and justice but are not entitled to damages or restitution.[94]

Under the Victims' Law, victims only need to submit a written declaration, along with supporting evidence of the events that occurred and the damages suffered, to obtain legal status.[95] The Special Administrative Unit for Comprehensive Care and Reparation for Victims reviews the declaration, verifies the stated facts, and then makes a final decision on whether to grant victimhood status, independent of any proceedings related to the perpetrator.[96]

However, with the establishment of the JEP, a more robust legislative framework emerged in the process of recognizing victims of the armed conflict. Indeed, the Final Agreement, Legislative Act 01 of 2017, the Statutory Law of the Administration of Justice in the JEP (Law 1957 of 2019), and Law 1922 of 2018 are constructed with the guiding principle of the JEP: the "centrality of the victims".[97]

In this regard, using the parameters established by the JEP Rules of Procedure as a subsidiary reference, there are three requirements for any entity to be considered a victim. First, the entity must express its willingness to be regarded as a victim and show a desire to participate in the proceedings before the JEP; second, the potential victim must provide preliminary evidence to demonstrate its standing; and third, the individual or entity should provide an account of the reasons for considering themselves a victim, specifying at least the time and place of the victimizing acts.[98]

Manifestation of willingness to be regarded as victim

Concerning the first criterion, the Chamber for Acknowledgment of Truth, Responsibility and Determination of Facts and Conduct within the JEP, in the case dealing with the victim status of the Cauca River, explained how the first requirement could be fulfilled when the victim is a natural entity like a river.[99]

94 *Ibid.*
95 *Ibid.*, Arts 154–156.
96 *Ibid.*, Art. 156.
97 Heyder Alfonso Camelo, "El fortalecimiento de la participación de las víctimas ante la Jurisdicción Especial para la Paz – JEP – en Colombia", Universidad Santo Tomás, 2019, available at: https://repository.usta.edu.co/handle/11634/20553.
98 Law 1922/2018, 18 July 2018, Art. 3.
99 See JEP, *Cauca River*, above note 84.

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The Chamber concluded that, through the principle and right of participation in environmental matters exercised by the community councils seeking recognition of the Cauca River as a victim, these councils have standing to express the violation of the environment and environmental assets, both natural and cultural.[100] According to the Chamber, there is no formality needed for the expression of intent to be considered as a victim, and such acknowledgement will be considered by the Chamber in a case-by-case manner.[101]

In order to establish the victim condition, the Colombian Constitutional Court has determined that the proof of victim status is governed by evidentiary freedom and therefore the inclusion of events in databases, and that the granting of asylum or refuge by a foreign nation for reasons directly related to the armed conflict is merely illustrative of possible summary evidence.[102]

Principle 10 of the Rio Declaration on Environment and Development states that "[e]nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level".[103] This, in accordance with Article 79 of the Colombian Constitution, allows communities to participate in "decisions that may affect [the environment]".[104] Additionally, Law 70/1993[105] contains a set of provisions that enshrine the legitimacy of communities in the protection of the environment. Article 19, for example, establishes that "the traditional practices that are exercised on the waters, beaches or shores" are destined for the use of the members of the respective communities of these areas.[106] Moreover, Article 20 states that holders of collective property "must comply with the obligations to protect the environment and renewable natural resources and contribute to the authorities in the defense of this heritage".[107] Finally, Article 59 states that the hydrographic basins in which communities benefiting from collective titling are settled will be constituted as units for the purposes of planning the use and exploitation of natural resources in accordance with regulations issued by the government.[108]

Given the insights presented earlier, the recognition of the Magdalena River as a victim extends beyond its environmental status to encompass the broader social fabric that is intricately connected to its waters. Artisanal fishing communities, with their special connection to the river, must be equally acknowledged as victims in the aftermath of the Colombian armed conflict. The participation rights exercised by these communities, as enshrined in both national and international legal frameworks, emphasize their role as stakeholders in environmental decisions affecting them. This approach aligns with the overarching goal of fostering

100 *Ibid.*
101 JEP, Auto No. SRVBIT – 035 (Chamber for Acknowledgment of Truth, Responsibility and Determination of Facts and Conduct), 12 August 2019.
102 Constitutional Court of Colombia, Sentence No. C-080/18, 15 August 2018.
103 See Rio Declaration, above note 52, Principle 10.
104 Political Constitution of Colombia, above note 6, Art. 3.
105 Law 70/1993, 27 August 1993.
106 *Ibid.*, Art. 19.
107 *Ibid.*, Art. 20.
108 *Ibid.*, Art. 59.

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enduring peace by recognizing and rectifying the multifaceted dimensions of harm caused during the conflict.

Statement of facts and preliminary evidence

The other two requirements necessary to confer victim status consist of accounts of the events that occurred and the presentation of preliminary evidence of victim status. As mentioned earlier, the Peace and Justice Chamber of the Superior Court of Bogotá concluded that paramilitary forces, commanded by Ramón María Isaza Arango, systematically used the river for forced disappearances.[109] In this context, the Chamber has established as a proven fact that the paramilitaries instrumentalized the river, with the belief that the horrors of war could be cleansed through it and that their acts could be purified.[110] Various sections of the region became off-limits for fishermen, who could not carry out their daily tasks, such as fishing or transporting products or people through the river, under penalty of death or forced disappearance.[111] The Chamber provided a detailed narrative outlining how paramilitary groups utilized the Magdalena River for their criminal endeavours, illustrating several key aspects.

To begin with, the river became a tool for concealing evidence and perpetrating acts of cruelty. Paramilitaries utilized its waters to hide incriminating evidence and obscure the truth of their violent actions, even developing specific techniques and training for carrying out forced disappearances on the river. The river also served as a conduit for retaliatory actions against perceived enemies and the establishment of alliances with neighbouring paramilitary groups. It became a pathway for enacting vengeance and fostering collaborations in subversive activities.

The Magdalena River played a central role in the execution of "social cleansing", wherein individuals deemed undesirable or threatening were eliminated. This highlights the river's function in the paramilitaries' efforts to eradicate perceived threats to their power. The river was also used for paramilitary bases strategically positioned along the riverbanks, enabling control over the waterway and contributing to the paramilitaries' territorial dominance and operational capabilities. Paramilitary groups then exercised control over mobility throughout the river, extending their influence over inhabitants and territories by regulating the movement of goods and people. These bases, along with many other locations, were turned into centres of confinement, torture, execution, sexual violence and forced labour, illustrating the grim realities faced by the inhabitants.

Furthermore, the exploitation of the river and its associated ecosystems for forced disappearances had profound impacts on the environment, emphasizing the interconnectedness of human conflict and ecological degradation.[112]

109 See Superior Court of Bogotá, above note 5.
110 *Ibid.*, p. 4860.
111 *Ibid.*
112 *Ibid.*, pp. 4861–4868.

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Concerning the harm caused to the river and its fishing communities, the Chamber established the direct violation of the local community's biocultural rights by the paramilitaries' systematic practice of throwing dead bodies into the stream.[113] This practice severed the connection between humans and nature, stripping the river of its intrinsic beauty, life and secret harmony. The damage is also evident in the basin's inhabitants' conception of a poisoned river, a space of dispute and death, leading to a rupture of identity[114] that affected their customs, ways of life and traditional practices.

Based on the accounts of crimes and the manner in which different crimes were committed, the Chamber determined that the peasant production systems which the inhabitants could have developed around fishing were disrupted.[115] The harm inflicted on the river also impacted other socio-ecosystemic services such as mobility and community organization. The paramilitaries seized control of the living body of water, regulating the movement of goods and people through the establishment of paramilitary bases, checkpoints and detention centres. This restriction on transit directly affected the cohesion of fishing communities, not only by limiting their economic activities but also by fragmenting their social organization and weakening their social ties.

Dealing with the issue of reparations for the harms described above, specifically regarding artisanal fishing communities, the Chamber carried out an expansive process of interpretation of Article 8 of Law 975/2005. This provision establishes that one of the objectives of collective reparation is "the psycho-social reconstruction of the populations affected by [systematic] violence".[116] The Chamber broadened this conceptualization so that collective damage also considers harm suffered by a community due to the impairment of legal powers to enjoy interests or goods of a community nature (right to peace, health, education, biodiversity, cultural heritage, autonomy and self-determination of peoples), among others.[117]

The Chamber's decision further explains that in order to establish reparation measures, a socio-ecological approach should be adopted that allows for the broad participation of the communities along the river's basin.[118] However, while the Chamber mentions the importance of reparation measures being mainly oriented towards the development of "participatory socio-ecological restoration"[119] that contemplates the characterization of the victims and the

113 *Ibid.*, p. 4871.

114 The Colombian National Centre for Historical Memory explains the notion of rupture of identity (*ruptura identitaria*) as a deliberate separation from a specific territory and the alteration of social relations within that physical space in response to violence administered by illegal armed groups. This separation does not necessarily involve the *de facto* loss of territory but signifies the disruption of the economic, social and cultural dynamics that traditionally unfolded there. See *ibid.*, p. 4872.

115 *Ibid.*, p. 4873.

116 Law 975/2005, 25 July 2005, Art. 8.

117 Superior Court of Bogotá, above note 5, p. 4779.

118 *Ibid.*, p. 4875.

119 Participatory socio-ecological restoration can be understood as a set of coordinated activities among communities, public authorities and companies developed to recover, to the extent possible, the

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damages associated with collective rights and interests as a basis for the reparation actions, these reparations still need to be applied to artisanal fishing communities.

Indeed, socio-ecological restoration is typically part of a healing (recovery) process. However, this restoration should not be narrowly focused on "returning" to the original states of ecosystems. Instead, it should aim to address various social and ecological objectives. Reparations should be developed in such a way that the recovery of ecological conditions becomes a source for people's livelihoods. Moreover, true recovery must consider environmental and natural resource issues as being integrated across a range of peacebuilding activities. This entails promoting socio-economic development, fostering good governance, reforming justice and security institutions, and cultivating a culture of justice, trust and reconciliation.[120]

Having examined the historical context and the diverse criminal activities perpetrated along the Magdalena River, it becomes imperative to explore comprehensive peacebuilding interventions for the affected artisanal fishing communities. The recognition of the Magdalena River as a victim of the Colombian armed conflict is a milestone as it provides new guidelines for post-conflict transitions involving the environment. To elevate elements of the environment to such a status under IHL not only enriches the protection of nature during and after armed conflict but also provides guidelines on post-conflict restoration processes, with the environment as an unavoidable entity in peacebuilding interventions.

The following section delves into some potential strategic peacebuilding initiatives tailored to address the multifaceted impacts on fishing communities in the Magdalena River basin. This exploration aims to provide a nuanced understanding of how participatory socio-ecological restoration can be effectively implemented to restore both the ecological integrity of the river and the well-being of the communities depending on it.

Peacebuilding interventions in the reparations for the Magdalena River basin

Within the context of reparations for the Magdalena River basin, a focused examination of peacebuilding interventions reveals the necessity for tailored and strategic initiatives to address the specific challenges faced by fishing communities. The critical need for substantive conflict resolution and the establishment of institutional capacity becomes evident, particularly when considering the participatory socio-ecological restoration initiatives discussed above. The task of this section is to present some potential peacebuilding initiatives aimed at achieving the safeguarding and effective protection of the

relationships between communities and the territories that support their livelihoods and cultural identity. See *ibid.*

120 See UN Environment Programme, *From Conflict to Peacebuilding: The Role of Natural Resources and the Environment*, 2009, p. 31.

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Magdalena River, recognizing the river as a living entity composed of various forms of life and cultural representations. Interventions designed to contribute to the sustainable well-being of the Magdalena River must consider the affected communities, including the fishing communities, while also aiming to restore the ecological integrity of the river. Through the implementation of a comprehensive approach, efforts can be made to address the multifaceted impacts of conflict and pave the way for enduring peace in this unique post-conflict setting.[121]

Since the introduction of the notion of peacebuilding in 1992, subsequent UN policy statements have underlined that successful transitions to peace require a comprehensive approach and that development assistance should play a key role in peacebuilding.[122] As noted by then president of the UN Security Council Ben Mustapha (Tunisia) on 20 February 2001, peace-making, peacekeeping and peacebuilding are closely interrelated interventions. Therefore, the call is for increased attention to the broader process of building peace through social and economic development.

As discussed previously, the Colombian armed conflict caused significant harm to the Magdalena River, demanding immediate attention to protect both the health and livelihoods of communities in the area. Therefore, any peacebuilding initiative concerning the river must aim to manage the environmental drivers and impacts of the conflict, defuse tensions, and ensure that natural assets are used sustainably to support stability and development in the longer term.[123]

While there is a general consensus on the need to conceptualize transitions to peace in a broad manner and to utilize development initiatives to support peace, making the notion of peacebuilding operational is far from straightforward. Dan Smith suggests a policy toolbox for peacebuilding consisting of four broad groups of strategic interventions, aiming to (1) provide security, (2) establish the socio-economic foundations of long-term peace, (3) establish the political framework of long-term peace, and (4) generate reconciliation and justice.[124] These categories do not imply any prioritization between them, which should depend on the context and be determined by national and local actors.[125]

In the case of the Magdalena River, it is important to address the effects of the armed conflict on the basin as part of the harm caused to the local population.

121 Peter Wallensteen, *Understanding Conflict Resolution: War, Peace and the Global System*, 3rd ed., Sage, London, 2011.

122 Augustine Soosai Siluvaithasan and Kristian Stokke, "Fisheries under Fire: Impacts of War and Challenges of Reconstruction and Development in Jaffna Fisheries, Sri Lanka", *Norwegian Journal of Geography*, Vol. 60, No. 3, 2006.

123 Kaysie Brown, "War Economies and Post-Conflict Peacebuilding: Identifying a Weak Link", *Journal of Peacebuilding and Development*, Vol. 3, No. 1, 2006.

124 Dan Smith, *Norwegian Peacebuilding Policies: Lessons Learnt and Challenges Ahead: Contribution to the Joint Utstein Study of Peacebuilding*, Royal Norwegian Ministry of Foreign Affairs, Oslo, 2004.

125 Ayham Al Maleh, Etizaz Shah, Henk-Jan Brinkman and Viktoria von Knobloch, "Peacebuilding, Official Development Assistance, and the Sustainable Development Goals: The United Nations Peacebuilding Funding Dashboard", *Journal of Peacebuilding and Development*, Vol. 16, No. 1, 2021.

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These effects should be addressed as complex alterations in the socio-ecological dynamics of the region, where systematic criminal patterns have been deployed by illegal armed organizations. In other words, environment and natural resource considerations must be integrated into peacebuilding interventions. This integration should be considered a security imperative, as deferred action or poor choices made early on often establish unsustainable trajectories of recovery that may undermine long-term peace and stability. The following sections provide three compelling strategies to facilitate peacebuilding by empowering fishing communities in the Magdalena River.

Supporting economic recovery for fishing communities

An effective approach to the rehabilitation of fishing communities affected by the armed conflict involves the establishment of systems for the management of public finances. For communities dependent on the river, the mismanagement of resources and the inequitable distribution of benefits can have severe consequences, potentially reigniting conflict dynamics if local communities are excluded or if environmental degradation occurs as a consequence of exploitation. In this context, the Guardians of the Magdalena River could play a pivotal role in establishing an office for management and training. This office would provide fishing communities with essential training on fund management and financial matters. Furthermore, it could offer training in sustainable fishing practices and act as the primary institution for resolving controversies. Careful governance and consideration are therefore imperative to ensure sustainable development and prevent the resurgence of conflict among the fishing communities of the Magdalena River basin.

Developing sustainable livelihoods and sustainable fishing practices

Durable peace fundamentally hinges on the development of sustainable livelihoods, the provision of basic services, and the recovery and sound management of the natural resource base.[126] In the specific context of the Magdalena River and its post-conflict recovery, addressing environmental damage resulting from conflict, developing coping strategies and addressing chronic environmental issues undermining the livelihoods of fishing communities is imperative from the outset.

Moreover, sustainable livelihoods for fishing communities must be pursued through the implementation of key fisheries policies aimed at maintaining robust fish populations and a resilient river ecosystem. These policies can support thriving fishing businesses, offer ample fishing opportunities, and provide communities with a steady and sustainable income. Conversely, unsustainable fishing practices pose a significant threat by depleting fish stocks and disrupting water ecosystems. Over-exploitation remains a primary concern, hindering stock

126 See UN Environment Programme, above note 120.

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recovery.[127] As a result, fishing communities are confronted with additional threats related to unsustainable fishing, such as illegal, unreported and unregulated (IUU) fishing,[128] which can compromise the sustainability of the River's resources.[129] Finally, the unintentional catching of non-targeted species, known as bycatch, poses a substantial anthropogenic threat to marine megafauna globally.[130]

These threats call not only for the implementation of harvest regulations already in place, but also for fishing policies that prohibit or reduce over-exploitation, IUU fishing and bycatch. Achieving sustainable fishing practices involves the implementation of key policy instruments based on concepts such as maximum sustainable yield (MSY), total allowable catch (TAC) and individual quotas. MSY is a scientific approach used to determine the maximum amount of fish that can be caught while still maintaining sustainable fish stocks, ensuring that enough fish remain for reproduction. Establishing a TAC model is crucial in pursuing a sustainable fishing agenda – an example of successful implementation of this can be observed in the reforms introduced by the European Commission in its Common Fisheries Policy in 2013, which shifted towards MSY-based stock management. This initiative led to an increase in the number of species fished at sustainable levels from five to twenty-seven.

Another important measure is the establishment of a sustainable fishing standard. The Marine Stewardship Council (MSC) fisheries standard provides guidelines for fishing communities to develop their own management criteria. While initially designed for marine environments, the principles of the MSC standard can be adapted for fishing communities, such as those along the Magdalena River.[131] This standard comprises three principles, which serve as a general roadmap for achieving sustainable fishing practices.

127 Fernando González Laxe, Federico Martín Bermúdez, Federico Martín Palmero and Isabel Novo-Corti, "Governance of the Fishery Industry: A New Global Context", *Ocean and Coastal Management*, Vol. 153, 2018.

128 *Illegal* fishing is conducted by vessels without the permission of the State, and/or by breaking its laws and regulations. *Unreported* fishing is fishing without reporting, or misreporting, details of the catch. *Unregulated* fishing is fishing conducted by vessels without nationality and/or fishing where no conservation or management measures exist. See Toya Hirokawa and Benjamin S. Thompson, "The Influence of New Sustainable Fisheries Policies on Seafood Company Practices and Consumer Awareness in Japan", *Marine Policy*, Vol. 157, 2023.

129 Murat Dağtekin, Ali Cemal Gücü and Yaşar Genç, "Concerns about Illegal, Unreported and Unregulated Fishing, Carbon Footprint, and the Impact Of Fuel Subsidy: An Economic Analysis of the Black Sea Anchovy Fishery", *Marine Policy*, Vol. 140, 2022.

130 Cian Luck *et al.*, "Estimating Protected Species Bycatch from Limited Observer Coverage: A Case Study of Seal Bycatch in Static Net Fisheries", *Global Ecology and Conservation*, Vol. 24, 2020.

131 This standard comprises three principles which serve as a general roadmap for achieving sustainable fishing practices. The first is that a fishery must be run in a manner that does not lead to overfishing or depletion of the exploited populations, and for those populations that are depleted, the fishery must be run in a manner that demonstrably leads to their recovery. The second principle establishes that fishing operations should allow for the maintenance of the structure, productivity, function and diversity of the ecosystem (including habitat and associated dependent and ecologically related species) on which the fishery depends. Finally, the standard establishes that the fishery must implement an effective management system that respects local, national and international laws and standards and incorporates institutional and operational frameworks that require the use of the resource to be responsible and sustainable.

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Additionally, for communities relying on the river for their livelihoods, the central focus should be on minimizing vulnerability to natural hazards and climate change through the management of key natural resources and the introduction of appropriate technologies. To provide effective protection for the river from climate change, management must be place-based, concentrating on local watershed scales that are most relevant to the area's management scales. Proactively implementing restoration projects can protect existing resources, thereby minimizing the need for expensive reactive restoration to repair damage associated with a changing climate. Special attention should be given to diversifying and replicating habitats of special importance, along with monitoring populations at high risk or of special value. This approach ensures that management interventions can occur if the risks to habitats or species increase significantly over time.[132]

Contributing to dialogue, cooperation and confidence-building

The environment can serve as an effective platform or catalyst for enhancing dialogue, building confidence, exploiting shared interests, and broadening cooperation between divided groups, as well as within and between States. Although they are not opposing sides in a conflict, the repair of the Magdalena River still requires a fluid dialogue between the Guardians of the Magdalena River, the Colombian government through the Ministry of Environment, and the fishing communities of the river. This dialogue should focus on solving problems such as territorial imbalances and inequalities still present in the post-conflict context. Similarly, dialogue between the parties is necessary to achieve the autonomy of the fishing communities or to respond to environmental conflicts that may arise.[133]

While the shared management of water, land, forests, wildlife and protected areas is the most frequently cited example of environmental cooperation for peacebuilding,[134] this cooperation should be extended to achieve sustainable fishing practices in the Magdalena River. Dialogue and cooperation should always remain as the main route to achieving a sustainable reparation of the river. Even when disputes may arise, Colombia is party to the previously described multilateral agreements that may be used in such events. Additionally, the previously mentioned office for river management could serve as a mediating institution for non-criminal controversies with the community. This tailored approach acknowledges the unique role of the environment, especially the Magdalena River, in fostering dialogue and cooperation specific to the needs and challenges faced by fishing communities in the pursuit of lasting peace.

132 Margaret A. Palmer *et al.*, "Climate Change and River Ecosystems: Protection and Adaptation Options", *Environmental Management*, Vol. 44, No. 6, 2009.
133 D. C. Sánchez Zapata, above note 13.
134 UN Environment Programme, above note 120.

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Conclusions

The recognition of the Magdalena River as a rights-bearing entity and later as a victim of the Colombian armed conflict marks a significant stride towards environmental protection. The decisions made by the First Criminal Circuit Court of Neiva and the Peace and Justice Chamber of the Superior Court of Bogotá offer an opportunity to transition toward an ecocentric approach. This approach acknowledges the inherent connection between humans and nature, advocating for an environmental ethic that comes from a democratic perspective and is rooted in the concept of biocultural rights.

However, the protection of specific environmental entities (such as the Magdalena River) under IHL becomes significantly challenging due to the limited regulations addressing the matter. Environmental law is currently undergoing a shift from an anthropocentric to an ecocentric approach, necessitating the modification or even introduction of new international law regulations concerning the environment. This situation has also spurred calls for a "Fifth Geneva Convention" that would include a comprehensive definition of "environment", encompassing marine environments, atmospheric pollution, and terrestrial fauna and flora, and imposing particularly strict protections for vulnerable ecosystems.[135] Increased awareness of existing IHL rules would yield tremendous preventive power. In particular, the introduction of the PERAC Principles presents a significant opportunity to bolster awareness and facilitate comprehensive regulation during and after armed conflicts. While the environment as a whole requires and deserves protection from the effects of hostilities, the case of the Magdalena River highlights the need for specific attention to vulnerable environments. From individual environmental entities to the environment as a whole, there is a pressing need for novel and clear regulations to propel international law towards an ecocentric approach.

Moreover, the selection of artisanal fishing communities in this article serves as an ideal model for providing effective reparations under the notion of biocultural rights. The aim is to achieve full reparation for the harm inflicted on the victim – that is, to repair the Magdalena River as a biocultural region with distinctive features and diverse manifestations. Thus, the concept of reparation extends beyond physical damages to incorporate the disruption of socio-ecological relations, encompassing various aspects such as subsistence farming and other cultural practices.

Introducing sustainable fishing practices into the fishing process becomes a tangible and effective form of reparation. Addressing the harm inflicted by the armed conflict on the Magdalena River basin requires acknowledging the complex alterations in the socio-ecological dynamics of the region, where

135 Glen Plant, "Elements of a 'Fifth Geneva' Convention on the Protection of the Environment in Time of Armed Conflict", in Glen Plant, *Environmental Protection and the Law of War: A "Fifth" Geneva Convention on the Protection of the Environment in Time of Armed Conflict*, Belhaven Press, London, 1992, pp. 37–38.

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systematic criminal patterns have been deployed by illegal armed organizations. This acknowledgment emphasizes the integration of environmental and natural resource considerations into peacebuilding interventions. The outcome of such integration should be viewed as a security imperative, as delaying action or making poor choices early on can establish unsustainable trajectories of recovery, potentially undermining long-term peace and stability.

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