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Master's degree in

Human Rights and Multi-level Governance

LOCALIZING THE ECOCENTRIC APPROACH TO HUMAN RIGHTS

Navigating new rights and responsibilities in the Colombian Atrato River

Supervisor: Prof. SARA PENNICINO

Candidate: LAURA ANDREA DUARTE REYES

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'(...) el respeto por la naturaleza debe partir de la reflexión sobre el sentido de la existencia, el proceso evolutivo, el universo y el cosmos'

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INTRODUCTION

The current human caused socio-ecological crisis is affecting all dimensions of human life, including the places where and the way human beings can or cannot live, the possibilities available for them to realize life goals, their land use, their access to fundamental goods such as water and fresh air.[1] However, the effects of these impacts are not evenly distributed, they become especially relevant in the case of communities living in territories where destructive settlement, extractive industries, illegal logging and agribusiness expansion have paved their way to *master* and destroy natural ecosystems including their human and non-human elements.

As a response to these challenges, human society seemed to have started to reconsider the human-centred worldview underpinning the modern socio-legal institutions used to regulate the human-environment interface, including human rights. Innovative court decisions and legislation embracing an ecological approach to rights, either in the form of environmental rights, Rights of Nature (RoN) or most recently, biocultural rights, have been increasingly adopted the world over. This is the case of the Whanganui river in New Zealand, the Ganges and Yamuna rivers in India, and the Atrato river in Colombia, which have been recognized as subject of rights through legislative or judicial decisions. Interestingly, these decisions have not been devised to merely uphold the environmentalists' claims of affording legal personality to nature. Instead, they have been primary conceived as a way to better uphold the human rights of the populations inhabiting these hydro-social territories, therefore linking the protection of riverine communities to the river, as a natural entity which preservation is essential for the communities' physical, cultural and economic life.

Against this background, the Colombian Constitutional Court Judgment T622/2016 (hereinafter the Atrato Ruling)[2] constitutes a unique example in which the ecocentric approach to rights was applied in a complex socio-political context, crossed by war, mining, structural discrimination and poverty. Significantly, the Court not only declared the Atrato river as a subject of rights, but also recognized the biocultural rights of the Afro-Colombian and Indigenous Peoples inhabiting the river's basin. This research provides an empirical bottom-up analysis of the impact, effectiveness, and on-the-ground challenges of this innovative

[1] Marcus Düwell & Gerhard Bos (2016) Human rights and future people — Possibilities of argumentation, Journal of Human Rights, 15:2, 231-250, available at https://doi.org/10.1080/14754835.2015.1118341

[2] Tierra Digna and others v Presidency and others [2016] Constitutional Court of Colombia T-622/16, M.P. Jorge Iván Palacio Palacio, Expediente T-5.016.242, 10 November 2016, (hereinafter Atrato-Ruling), at 6.

decision by giving voice to the Indigenous and Afro-Colombian communities affected by the degradation of the Atrato river. The study goes beyond practical implementation to embrace the non-material impacts of the ruling while trying to look at how the significance afforded by local communities to these new ecocentric rights, and the responsibilities attached to them, have influenced their daily lives and potentialized the socio-political projects supporting their long-standing struggle to have their fundamental rights and their environment protected.

This community-based approach provides valuable lessons for future implementations of similar ecocentric models in complex socio-political contexts. Moreover, it emphasizes the importance of listening and including the perspectives of affected communities in policy decision making processes, as it is them who in the end will bear the most significant part of the responsibility for the conservation and sustainability of the ecosystems they inhabit.

The research will be presented in three main chapters. The First Chapter provides a literature review on the discussion of the legitimacy of human rights in the face of the current socio-environmental crisis and how it has evolved into new alternative rights-based approaches. This is followed by a brief introduction to the development of the notions of 'biocultural rights' and the rights of nature, including a comparative overview of the Whanganui River case in New Zealand and the Ganges and Yamuna Rivers case in India.

The Second Chapter focuses on the Colombian Atrato River Case, by presenting an overview of the historical and socio- economic context in which the case was built and adjudicated, followed by a comprehensive analysis of the main legal elements used by the Colombian Constitutional Court to respond to the claims of the plaintiffs by making the Atrato river a subject of rights and assigning biocultural rights to local communities. This analysis will allow the reader to better understand the extent to which the progressivist legal narrative of the Court managed to apprehend the claims and expectation of the Atrato communities as portrayed in the Third Chapter.

The Third Chapter presents and analyses the may findings of the data collected through the interviews conducted during the field work. To this purpose, the way in which the ruling was welcomed by the Atrato People, the community processes activated to forward its implementation and the challenges faced by local communities for the effective protection of their biocultural rights and the rights of the river are addressed in this chapter. Finally, a structured presentation and discussion of the localized impacts of the Atrato Ruling by categorizing the opinions and perceptions of local community members in a tri-partite

taxonomy of impacts: material, instrumental, and non-material is provided. A final conclusion will summarize the main findings of this research.

a. Research Questions

The Atrato Ruling is not only the first world's Constitutional Court judgment declaring nature as a subject of rights, but it is also the first case law to explicitly recognise biocultural rights as a legal category encompassing the rights of local communities whose cosmovision is intrinsically linked to their natural environment. Thus, it has been internationally recognised as a cornerstone of the XXI century innovations on the nascent fields of Rights of Nature (RoN) and biocultural rights.

While the acknowledgement of the link between environmental protection and human rights is being increasingly recognized, its implementation has been hugely controversial and further analysis on the impact, effectiveness and on-the-ground challenges of these innovative approaches are still pending. Existing scholarship on the Atrato Ruling has mainly developed around the place and significance of the judgment within the 'Earth Jurisprudence' field, whether it is from the perspectives of ecosystems management, environmental justice, ecocentrism or legal personhood[3]. However, little attention has been given to the perspectives and expectations of the local communities that propelled the Court's decision in the first place and the impact of this verdict on their lives. This becomes particularly relevant in the Atrato Case, in which RoN laws circulating globally, have been institutionalized by the Court even when the country lacks laws specifically recognizing rights to nature[4], which might raise doubts on to which extent was the Atrato ruling an effective response to the needs of the claimants or an eccentric judgment of an activist judge[5].

It must be noted that despite the environmentalist approach of the Atrato Ruling, just as in the cases of the Whanganui river in New Zealand and the Yamuna and Ganges rivers in India, the protection of the Atrato river has been granted in connection to the safeguard of the human rights of the communities inhabiting a hydro-social territory. Hence, the argumentative efforts in this case, are not restricted to nature's intrinsic worth but are stretched to dialogue with the

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[3] United Nations, 'Earth Jurisprudence' <http://www.harmonywithnatureun.org/ejInputs/> accessed 18 May 2019.
[4] Kauffmann, C., and P. Martin. "When Rivers Have Rights: Case Comparisons of New Zealand, Colombia, and India." *International Studies Association Annual Conference*. 2017.
[5] Arenas Orbegozo, M. Who are we after worlds Collide? Explorations into the sources of sui generis legal persons in Colombia: the Atrato river (Master's thesis) Tilburg University 2019, [http://arno.uvt.nl/show.cgi?fid=149409] at 14

claims of indigenous and Afro-Colombian communities, who claim distinct relationships with water, as opposed to western utilitarianism[6]. Indeed, it is a ruling that not only touches upon the environmental but also the social and humanitarian spheres of the complex reality of Choc, thus the Atrato Ruling represents a unique case study that allows for a holistic assessment of the role of these innovate ecocentric legal institutions in addressing problems motivated by economic, cultural, and environmental factors.

Against this background, the objective of this research is to fill in these gaps by exploring and understanding the expectations and perspectives of local communities around the Atrato Ruling, its implementation and local impacts. Particular attention will be also given to the role played by the Colombian Constitutional Court in addressing the communities demands through the adjudication of rights in a complex socio-political context crossed by war.

To this purpose, this research seeks to answer the following questions:

> *Does the ecocentric approach adopted by the Court in the Atrato case reflect the claimants' understanding of their own world? or was it a merely rhetorical and highly academic interpretation of facts parroting trending global discourses on Rights of Nature?*
>
> *What has been the impact of the Atrato case's litigation process and the consequent Constitutional Court's judgment and orders on the lives of those who they are supposed to protect?*
>
> *What are the perceptions of local communities on the new rights and responsibilities established by the Constitutional Court through the Atrato Ruling?*
>
> *According to local communities, what are the main challenges and opportunities related to the implementation of the Atrato Ruling and the sustainability of the joint river management model created by the Court?*

Against the global increasing implementation of an ecocentric approach to rights discourses, particularly in the form of RoN, understanding the perceptions of local communities on these questions, as well as the opportunities and challenges they have encountered in the aftermath of the Atrato Ruling are essential to: i). provide a bottom-up analysis of how RoN norms might be implemented in different political contexts; ii). offer a basis for analysis of how future similar decisions can more effectively address the challenges created by the new

[6] Kauffman and Martin (n 4)

responsibilities inherent in joint river management models such as the Atrato one; iii). provide valuable lessons learned for civil society groups or strategic litigation organisations interested in pursuing an ecocentric approach to human rights as a way to protect the rights of both local communities and the ecosystems they inhabit; iv) for the Colombian context in particular, this assessment contributes to identifying the policy and social transformations that, according to the affected communities, need to be advanced for the Atrato ruling to be implemented, which, in turn, can foster national and international collaboration and advocacy towards this aim.

b. Methodology

The analysis of the local communities' role, perspectives, and expectations on both the litigation process and the aftermath of the Atrato Ruling, has been conducted through a case study research design. This research heavily draws on the 'Localizing human rights case study methodology' (LHR) proposed by Aguilar[7] and framed in the *localising human rights theory*, developed by De Feyter, which underlines the need "to make human rights more locally relevant, particularly in a context of economic globalisation."[8] Within this framework, this research follows the localizing strategy's objective to understand the relevance of the human rights framework and, in this case, the ecocentric approach to human rights, "for resolving the needs and problems of local people and, moreover, to understand whether the perspectives and expectations they express when framing their claims in human rights language differ from the normative contents of human rights law ."[9]

This research primarily relied on interviews as the main source of primary data. To conduct the interviews, I spent three weeks in Colombia, two of them in Bogotá and one in Quibdó (Chocó) and visited some municipalities located in the Atrato river Basin. Although the research is focused on the experience and perception of local communities, interviews were also conducted with relevant stakeholders that were closely involved in the case both from the practical or the academic realm. This afforded me with a holistic overview of the legal and political context in which the ruling was handed down, allowing me to critically identify the intersection points between the experience and perceptions of local communities, the litigation process and the

[7] Aguilar, Gaby Oré, and Gaby Ore Aguilar. The local relevance of human rights: a methodological approach. IOB, University of Antwerp, 2008, at 21.
[8] De Feyter, Koen. "Localizing human rights." Economic globalisation and human rights. -Cambridge, 2007. 2007. 67-92, at 4.
[9] Aguilar (n 7) at 14.

Court's opinion. In total I conducted 13 semi-structured interviews with five Guardians of the Atrato River and representatives of the Major Community Councils that acted as plaintiffs in the Tutela Writ, two community members of the Technical Secretariat of the Commission of Guardians of the Atrato River, one group interview in the locality of Tanguí (10 participants), one lawyer from the Center of Studies for Social Justice 'Tierra Digna' (hereinafter Tierra Digna) who represented the communities before the Court, a former law clerk of the Constitutional Court involved in the drafting of the decision, and two Colombian law professors. (See Appendix 1 for a complete list of the participants)

Special attention was drawn to the way in which the interviewees experienced the litigation journey and the meaning they afforded to the decision of the Court in relation to socio-political projects and the ethical frameworks that the judgement encompasses or challenges (i.e. biocultural rights, governance of natural resources, mining, the extractive economic model). Discussions with the participants also revolved around the changes they had perceived in the territory after the issuing of the judgment and the challenges they experience or envisage for the Court's orders to be materialized. The data collected from the interviews was analyzed through a coding method, using the software NVIVO, which allowed me to identify patterns and common ideas that were then summarized and structured in the findings of this research. Due to time and security restrictions, it was not possible to conduct a larger number of interviews that could have been more representative of local communities at large, therefore, this research represents mainly the views of local community leaders directly involved in the implementation process of the Atrato Ruling.

Concerning secondary data, literature review of academic, journalistic, and official institutional documents relating to the Atrato Ruling and worldwide alternative ecocentric approaches to human rights were the main sources of information. The research also involved the review of related international case-law and legal instruments.

CHAPTER I. THE ECOCENTRIC APPROACH TO HUMAN RIGHTS

The worldwide intensification of unprecedent ecological degradation represents one of the greatest contemporary challenges for humanity. Paradoxically, it has been humanity itself that over the last few decades has transformed the Earth's natural systems, exceeding their capacity and disrupting their self-regulatory mechanisms, with irreversible consequences for both

humans and other species.[10] It has been widely argued that at the roots of this human-driven ecological crisis -and its unevenly distributed impacts- lies the anthropocentric ethic that governs the human-environment interface in the 'modern' world. The belief that humans are the most important life form and the masters of a nature that exists to fulfill their infinite needs, has long obscured the human interdependence with 'the commonwealth of all forms of life'[11]. This has led to the legitimization of practices that seem to -willfully- ignore that the destruction of natural ecosystems would ultimately translate in the extermination of the human lives depending on them.

Admittedly, the effects of human-induced damages, including climate change, deforestation, desertification, loss of biodiversity, scarcity of natural resources and pollution, are often being borne by the poorest and most vulnerable in society, including indigenous and local communities, particularly in developing countries.[12] Several human rights, such as the right to health, life, a healthy environment, food, water and land, among others, are being seriously affected due to environment-related causes. As concluded by the Intergovernmental Panel on Climate Change in its 2018 special report, to address these accumulative and omnipresent challenges the world needs "rapid, far-reaching and unprecedented changes in all aspects of society".[13] Against this background, the socio-legal institutions used to regulate, or mediate the relationship between humans and the environment are being highly questioned. Human rights have certainly played, and continue to play, an important role in mediating the human - environment interface.[14] However, the challenges posed by the global ecological crisis 'deters thinking on the complexity of a human rights 'future', one in which we humans may no longer claim an exclusive (or even privileged) position in rights-based struggles.'[15]

The present chapter will provide a literature review on the discussion of the legitimacy of human rights discourse in the face of the current socio-environmental crisis and explore some alternative rights-based approaches aimed at advancing a holistic transformation of human

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[10] "Global Environment Outlook Geo-6 Healthy Planet, Healthy People." Ed. UN Environment. Cambridge: Cambridge UP, 2019. doi:10.1017/9781108627146.001, at 4.

[11] Tully, James. "Two Traditions of Human Rights." *Human Rights, Human Dignity and Cosmopolitan Ideals: Essays on Critical Theory and Human Rights* (2014): 139-157.

[12] Boyd, David R., Rights as a response to ecological apocalypse, Open Global Rights (20 March 2019), https://www.openglobalrights.org/rights-as-a-response-to-ecological-apocalypse/

[13] IPCC, Summary for Policymakers of IPCC Special Report on Global Warming of 1.5°C approved by governments, at https://www.ipcc.ch/2018/10/08/summary-for-policymakers-of-ipcc-special-report-on-global-warming-of-1-5c-approved-by-governments/

[14] Kotzé, Louis J. "Human rights and the environment in the Anthropocene." *The Anthropocene Review* 1.3 (2014): 252-275, at 253.

[15] Petrasek, David, Human and non-human rights – convergence or conflict? (10 December 2018), accessed at https://www.openglobalrights.org/human-and-non-human-rights-convergence-or-conflict/

rights. The first section will focus on some criticisms leveled against human rights generally which are relevant in the environmental context, followed by the exploration of possible ways forward for human rights to embrace their ecological embeddedness; this includes approaching issues such as the importance of multidisciplinarity, the notion of ecocentrism and the reorientation of equality and justice towards a comprehensive understanding of the Earth System and its vulnerabilities. The second section will provide a brief introduction to the development of the notions of 'biocultural rights' and the rights of nature as efforts to overcome the anthropocentric approach to rights. This introduction will be followed by a comparative overview of two cases – the case of the Whanganui River in New Zealand and the Ganges and Yamuna Rivers in India- in which the notions of biocultural rights and the rights of nature converge in an attempt to forge alternative ways of conceptualizing human-environment relationships. Finally, an interim conclusion will be provided, setting the framework against which the case of the Colombian Atrato River will be analyzed in the next chapter, as a break ground decision that moves into the direction of an ecological revamping of human rights.

1. From Anthropocentrism to Ecocentrism: the legitimacy of human rights in the Anthropocene

Environmental ethics, or the moral consideration afforded to nature, determines the ways in which the relationship between human beings and the environment is experienced and regulated. It defines, for instance, the status granted to nature within the traditional practices of a community, in international legal instruments, national constitutions, public policies and sustainable development plans.[16] To be sure, 'central to environmental ethics are the tasks of determining what things in the nonhuman environment are valuable; how and why they are valuable; and how we ought to consider these values in deliberations about principles, actions, practices, and laws.'[17]

Human-centered worldviews, such as the one underpinning western modernity[18], have been associated with an 'anthropocentric' approach to nature. The notion of 'anthropocentrism' is based on the idea that humans are considered to be the most important life form, and other forms of life to be important only to the extent that they affect humans or can be useful to

[16] For a review of the secular, western traditions in the field, see Palmer, Clare, Katie McShane, and Ronald Sandler. "Environmental ethics." Annual Review of Environment and Resources 39 (2014): 419-442 available on https://www.annualreviews.org/doi/10.1146/annurev-environ-121112-094434

[17] Ibid., at 421

[18] Bosselmann, Klaus. "A vulnerable environment: contextualising law with sustainability." *Journal of Human Rights and the Environment* 2.1 (2011): 45-63, at 47.

humans[19]. This conception of nature promotes the belief that humans are separated from nature and entitled to the appropriation of the natural environment, thus obscuring human interdependence with 'the commonwealth of all forms of life'.[20] In this sense, anthropocentrism deepens a utilitarian approach in which the environment and ecosystems goods and services are only considered for the benefit of human health and wellbeing.[21]

According to Speed, 'anthropocentrism has been posited as the primary (though frequently unstated) reason why humanity constantly attempts to dominate nature'[22], and even more, it is seen to be the philosophical driving force behind the current 'worldwide intensification of unprecedent, anthropogenic environmental degradation that constitutes a global ecological crisis (itself several interconnected ecological crises)'.[23] Based on the idea that human species is the masters of a nature which exists to serve its present needs, the impact of human actions on ecosystems and the resultant climate change, have heavily disrupted the Earth natural systems. This has caused irreversible consequences for human society and the natural systems that support its existence as well as the existence of other species on the planet. As scientists have recently argued, this devastating transformation is rapidly pushing the planet into a new period in geological time, unofficially known as the Anthropocene.[24]

The Anthropocene has revealed that the Earth System[25] comprises not only ecological aspects but also human-social elements. The stability of the former is required for the flourishment of the latter. However, the human-social element impacts the overall stability of the Earth system,

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[19] It is argued that the concept of anthropocentrism was first introduced in the 1860s, amidst the controversy over Darwin's theory of evolution, to represent the idea that humans are the center of the universe. Campbell, 1983 as in Van Kortenkamp, Katherine, and Coleen Moore. "M. (2001) Ecocentrism and anthropocentrism: Moral reasoning about ecological commons dilemma." Journal of Environmental Psychology 21: 261-272., at 262.

[20] Tully (n 11).

[21] Bosselmann (n 18) at 48.

[22] Speed Chris, Anthropocentrism and sustainable development: Oxymoron or symbiosis? June 2006 WIT Transactions on Ecology and the Environment 93:323-332 DOI: 10.2495/SC060311 Conference: Sustainable City 2006, at 323 available at https://pdfs.semanticscholar.org/4c1e/6b5d650202baa8deb6a30f0736e950bd85c7.pdf. See also De Lucia, Vito. "Beyond anthropocentrism and ecocentrism: a biopolitical reading of environmental law." Journal of Human Rights and the Environment 8.2 (2017): 181-202, at 185.

[23] Lundberg, Maria and Fisher, Aled Dilwyn. Human rights' legitimacy in the face of the global ecological crisis – indigenous peoples, ecological rights claims and the Inter-American human rights system Journal of Human Rights and the Environment 2015; Volume 6(2) s. 177-203.

[24] 'The term 'Anthropocene' suggests that the Earth has now left the Holocene epoch (a relatively harmonious interglacial state) as a result of human activities that have become so pervasive and profound that they rival the great forces of Nature and are pushing the Earth system into an unpredictable and unstable state.' Louis J. Kotzé "The Anthropocene, Earth system vulnerability and socio-ecological injustice in an age of human rights." Journal of Human Rights and the Environment 10.1 (2019): 62-85, at 62-63.

[25] The term "Earth system" refers to Earth´s interacting physical, chemical, and biological processes. The system consists of the land, oceans, atmosphere and poles as well as human society. Our social and economic systems are also embedded within the Earth system. See IGBP, Earth Systems Definitions, at http://www.igbp.net/globalchange/earthsystemdefinitions.4.d8b4c3c12bf3be638a80001040.html

including its ecological component. In the Anthropocene, 'climate events and associated suffering can no longer be cast as acts of God or nature. They are now at least partly linked to human agency and responsibility.'[26] According to Kotzé, the key drivers of the Anthropocene can be found in the 'deeply intertwined and mutually reinforcing practices of legally sanctioned extractivism, colonialism, imperialism, industrialization and slavery (all exemplars of modern progress)'.[27] As argued above, the legitimization of these practices, is deeply informed by the anthropocentric environmental reductionism and *othering* of nature, as well as of any other form of human life that is not considered 'human enough' to be deemed valuable[28].

The human caused ecological challenges, are already affecting all dimensions of human life, including the places where and the way human beings can or cannot live, the possibilities available for them to realize life goals, their land use, their access to fundamental goods such as water and fresh air.[29] Ultimately 'long-term ecological changes will affect basic interests of human beings and will influence the conditions under which human beings can enjoy rights in the first place.'[30] These impacts become plainly relevant in the case of indigenous and ethnic groups, given their *sui generis* connection to traditional lands and natural ecosystems, added to the increased vulnerability this bonding entails.[31] Activities related to extractive industries, in particular, can generate effects that often infringe upon these peoples' rights – such as the rights to life, health, property, culture, among others.

In the view of Kotzé, this scenario poses a straight forward practical question: *"in this time of aggressive global change, how and to what extent are humans able to respond adequately to this unbalance in the human-environment and human-human relationship through their socio-legal institutions, including human rights?"*[32] As Kotzé himself acknowledges, this question has far-reaching moral implications. Answering to it implies not only reflecting on the mediating role of human rights in the human–environment interface, but also on the

[26] J Ribot, 'Cause and Response: Vulnerability and Climate in the Anthropocene' (2014) 41(5) Journal of Peasant Studies 667–705 at 667.
[27] Kotzé (n 24) at 67
[28] 'It is also presumably the ability of law and rights to enable ownership, enable possession, and legitimize proprietary entitlements over non-humans and over certain humans, which reinforces its 'othering' and hierarchy-inducing qualities.' Kotzé, Louis J., and Villavicencio, Paola, "Somewhere between rhetoric and reality: Environmental constitutionalism and the rights of nature in Ecuador." Transnational Environmental Law 6.3 (2017): 401-433, at 414.
[29] Marcus Düwell & Gerhard Bos (2016) Human rights and future people — Possibilities of argumentation, Journal of Human Rights, 15:2, 231-250, available at https://doi.org/10.1080/14754835.2015.1118341
[30] Ibid., at 232
[31] Macpherson, E. J. (2019). Indigenous Water Rights in Law and Regulation. Cambridge University Press, at 177.
[32] Kotzé (n 14), at 256.

'reformative possibilities that other environmental ethics such as ecocentrism may hold'.[33] Similarly, it entails thinking of new avenues aimed at pushing the boundaries of the current human rights system by adopting a multidisciplinary approach that better reflects the relationship of interdependence between human beings and nature.

Human rights have certainly played, and continue to play, an important role in mediating the human - environment and the human - human interface in environmental contexts.[34] Yet, the existing environmental degradation, and its negative impact on a broad range of human rights, indicate that the current human rights regime, 'has proved insufficient to achieve the types of structural changes that are necessary to meaningfully address the myriad socio-political, legal and ecological challenges in the Anthropocene.'[35] According to some scholars, this ineffectiveness of the human rights system is due to the way in which human-nonhuman relations have been approached by modern discourses on human rights and the environment. The following section will point to some criticisms leveled against the application of rights discourses to ecological issues[36], to then explore possible avenues for human rights to remain a legitimate discourse in the face of the Anthropocene.

1.1.Rights Discourses and Ecology: critiques

To begin with, critics such as Kotzé, suggest that the discourse on human rights and the environment lacks multidisciplinary. As a result, engineering and natural sciences, which will play a key role in future efforts at institutional environmental regulation, are completely dissociated from the human rights system, weakening its potential to mediate human - environment relations both at practical and academic levels.[37] Second, as argued by Bosselmann, the creation and development of the human rights system has been grounded on the same anthropocentric idea that underlies at the very foundation of the current ecological crisis.[38] This is so because human rights, as a liberal normative project, entail the reflection of

[33] Ibid., at 258
[34] Ibid., at 253. Human rights mediate between the human - environment interface by: fostering stronger environmental laws; providing a safety net that closes gaps in environmental laws; providing non-derogable minimum standards for environmental governance; improving implementation and enforcement of environmental laws; promoting environmental justice; increasing public involvement; fostering government and private-sector accountability; improving environmental education; and providing a more just interplay between socio-economic demands on the one hand and environmental demands on the other. Boyd, 2012: 233-252, as cited in Kotzé (n 14), at 253.
[35] Ibid., at 270.
[36] For a number of arguments which may, to some extent, mitigate these critical concerns, see Bosselmann (n 48), at 14-16.
[37] Kotzé (n 14), at 258.
[38] K Bosselmann (n 18) at 61.

the primary individualistic ethics of modern society and its environmental reductionism.[39] Indeed, the idea of human rights prescribes only that we respect other human beings and says nothing directly about nonhuman nature,[40] thus, depriving the environment of direct and comprehensive protection. 'Environmental degradation as such is not sufficient cause for complaint, it must be linked to human-wellbeing.'[41] For her part, Anna Grear argues that the anthropocentricism of dominant rights approaches is not simply located in their application to humans alone, but at a deeper, systemic level reflects law's 'deep intimacy with capitalism' and increasingly-globalized modernist politico-legal market-state institutions that drive ecological crises.[42] These critiques, however, are usually accompanied by the articulation of a way forward. This way forward, as will be shown below, is 'ecocentrism'.

A third allegation against human rights as an effective means to deal with the challenges posed by the Anthropocene, is grounded on the disingenuously used of human rights in the sustainable development paradigm 'to advance socio-economic development at the cost of ecological concerns.'[43] In theory, sustainable development is accomplished when its trite construct - environmental protection, economic viability and social equity - is achieved.[44] However, this formulation, in which human rights play a key role, has been used as the ethical justification for the legal creation of deeply embedded anthropocentric human demands on dwindling resources.[45] In this regard, Bosselmann suggests that governments and corporations have favored a 'weak' approach to sustainable development, which holds economic, social and environmental concerns as equally important, instead of establishing the preservation of the planet's ecological integrity as the prerequisite for development.[46] This approach to development not only pushes vulnerable living beings' interests to the periphery of regulatory concerns, but also prioritizes the 'social and economic development for some humans at the

[39] *Ibidem.*
[40] Düwell & Bos (n 29) at 235.
[41] Bosselmann (n 48), at 14.
[42] A Grear, 'Towards "Climate Justice"? A Critical Reflection on Legal Subjectivity and Climate Injustice: Warning Signals, Patterned Hierarchies, Directions for Future Law and Policy' (2014) 2 Journal of Human Rights and the Environment 103, at 109.
[43] Kotzé (n 14), at 259.
[44] Bosselmann (n 18) at 51.
[45] 'This is evident in, for example, the United Nations Declaration on the Right to Development, 1986, which explicitly acknowledges that: 'the human person is the central subject of the development process and … development policy should therefore make the human being the main participant and beneficiary of development' Kotzé (n 14), at 267.
[46] Bosselmann (n 18) at 52.

expense of both global Earth system stability and of meaningful international solidarity between people'.[47]

In light of the above, one may ask, why insist on relying on a legal system that has failed to address the crisis? A practical answer to this question, would be that the popularity of human rights as a language within which to frame environment-related social justice claims is unprecedently increasing.[48] The recent proliferation of environmental rights,[49] including environmental-related procedural rights and other substantial socio-economic rights bearing on environmental interests, is testimony to their growing popularity.[50] Significantly, the right to a healthy environment has not only permeated regional human rights instruments[51] but also several domestic constitutions the world over.[52] Given this mushrooming of environmental rights and their potential influence on environmental outcomes (broadly speaking), it can be assumed that human rights will continue to remain essential constructs in the global environmental regulatory domain.[53]

A second answer, more philosophical in nature, would be that human rights embed 'ethical demands instead of legal commands or putative legal claims, providing a juridical expression of the underlying ethics and values of a society.'[54] These ethics are likely to remain in times of

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[47] Kotzé (n 24) at 66 and 67.

[48] Bosselmann, Klaus. "Human rights and the environment: Redefining fundamental principles?." Governing for the Environment. Palgrave Macmillan, London, 2001. 118-134.

[49] Environmental rights are composed of substantive rights (fundamental rights) and procedural rights (tools used to achieve substantial rights). UN Environment Program, What are environmental rights?, at https://www.unenvironment.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/what

[50] Kotzé (n 14), at 252.

[51] The African Charter of Human and Peoples' Rights (article 24), provides that 'all peoples shall have the right to a general satisfactory environment favorable to their development' and the Additional Protocol to the American Convention on Human Rights (article 11) provides that 'everyone shall have the right to live in a healthy environment and to have access to basic public services.' Furthermore, the Inter-American Court of Human Rights (IACHR), through its advisory opinion OC-23/17, has not only found that there is an autonomous right to a healthy environment, but also stated that any right can be affected by environmental harm (paras. 63, 64). Other regional treaties such as the European Convention on Human Rights (ECHR),for instance, 'does not provide for a right to a healthy environment and is thus dependent on the interpretation of other, explicitly enumerated, human rights, such as the right to private and family life, to include or to extend to environmental matters.' Voigt, C., & Grant, E. (Eds.). (2015). Editorial: The legitimacy of human rights courts in environmental disputes, Journal of Human Rights and the Environment, 6(2), 131-138. doi: https://doi.org/10.4337/jhre.2015.02.00; For a comprehensive journey through the international, regional and national developments on a human right to the environment see Borràs, Susana. "New transitions from human rights to the environment to the rights of nature." *Transnational Environmental Law* 5.1 (2016): 113-143 at 115 – 126.

[52] Approximately 147 countries have entrenched environment-related rights in their national constitutions to date. Specifically, the right to a healthy environment is enshrined in over 100 constitutions over the world, with a recent empirical study showing that on balance, environmental rights, despite their many shortcomings, observably improve the overall environmental governance effort. See UN Environment Program (n 49) and Boyd, 2012: 245–251 in Kotzé (n 14), at 253.

[53] Kotzé (n 14), at 253.

[54] Ibid., at 254.

increased uncertainty, in which humans tend to 'rely on background values to adopt rules of decision'.[55] Furthermore, when claimed by human rights, these values are automatically granted a constitutional normative superiority which translates in greater protection and greater justificatory basis to claim entitlements.[56] Thus, human rights discourse remain contested and counter-hegemonic responses to 'unjust structural arrangements – that is, the systemic processes – driving interlinked socio-ecological crises.'[57]

Against this background, insisting on the human rights regime as one of the socio-legal institutions that can contribute to address the challenges posed by the Anthropocene, appears not only reasonable but also tactical[58]. Nevertheless, for human rights– as background societal values- to maintain their legitimacy in discourses concerning socio-environmental justice, the recognition of their ecological embeddedness and a consequent shift on the environmental ethics underlying their foundational core are needed. Some of the possible options in which this transformation may be realized will be addressed as follows. The ways forward to be presented are heavily informed by the above-mentioned critiques to applying rights discourses to ecological issues.

1.2. Ways Forward for Human Rights in the Anthropocene

As already anticipated, despite (and in view of) the criticisms to human rights discourse, there are sound reasons to consider that only an ecologically revamped version of the mechanisms offered by human rights to establish duties, entitlements, moral boundaries and governance obligations, could create the foundation of a legal normativity responsive to the ecological crisis.[59] This would involve the development of all human rights in a manner 'which demonstrates that humanity is an integral part of the biosphere, that nature has an intrinsic value and that humanity has obligations toward nature.'[60]Along these lines, some considerations for advancing the ecological transformation of human rights will be explored below, drawing on existing literature on the subject.

For the purpose of this work we will briefly refer to three considerations that could affect the way we will have to re-imagine the relationship between human rights and the environment,

[55] Krakoff 2010 as in Kotzé (n 14) at 271.
[56] *Ibidem*.
[57]Lundberg and Fisher (n 9), at 180 -181.
[58] Human rights discourse may be use in tactical way in order to contribute to a broader global strategy aimed at stopping and reversing the effects of the ecological crisis.
[59] Kotzé (n 14), at 271.
[60] Bosselmann (n 48), at 16

which are closely related to the case study that will be analyzed in the next chapter, namely the Colombian Atrato River case. These three aspects are interrelated with each other and can be summarized as follows: (i) human rights should embrace multidisciplinarity (ii) an ecocentric approach to human rights and sustainable development is required and (iii) human rights should facilitate the reorientation of equality and justice towards a comprehensive understanding of the Earth System and its vulnerabilities in the Anthropocene.

Human rights should embrace multidisciplinarity

To begin with, for human rights to adequately meet the challenges of the ecological crisis, they will have to be both interrogated and reimagined from broader multidisciplinary and interdisciplinary frameworks.[61] Environmental human rights must be able to respond to a richer and more complex set of imperatives and concerns, that require the disruption of the traditional separation between social sciences and natural sciences.[62] Kotzé suggests that human rights discourse has the potential to translate the natural sciences' treatment of the 'Anthropocene', as a geological phenomenon, into the social sciences. [63] Not only because human rights has the potential to put a human face in the middle of the scientific debate that surrounds, for instance, climate change conversations, but also because it means imposing limits on actions that can harm nature. This approach emphasizes the interdependency between human and non-human life by nurturing the human rights regime with ecological scientific considerations. Accordingly, just as the limitation or restriction of human rights in legally prescribed circumstances, particularly in the common interest, is an accepted practice in international human rights theory[64], limits on individual human rights might be imposed based on ecological risks.

An ecocentric approach to human rights and sustainable development is required

Second, a new environmental ethic is evidently required in the Anthropocene. Authors such as Bosselmann and Kotzé, suggest that at the heart of the ecocentric ethic lies the realization that the future of life on Earth depends ecological integrity[65]. Unlike anthropocentric ethics, an ecocentric formulation simultaneously indicates: '(a) an ethical position where nature is recognized as having intrinsic value; and (b) an epistemological position reflecting ecology's

[61] Kotzé (n 14), at 262.
[62] *Ibidem.*
[63] *Ibidem*
[64] Bosselmann (n 48), at 6.
[65] Kotzé (n 18), at 263 and Bosselmann (n 18).

relational and holistic understanding of 'nature' and its ecosystems, of which humans are but a part.'[66]

Hence, a shift towards ecocentrism would require a deliberate effort to broaden the human-center worldview that human rights have held since Modernity, to embrace the fact that the individual not only operates in a social environment, but also in a natural environment.[67] As argued by Bosselmann, the respect for the intrinsic value of life is a common ground on both the environmental ethics and human rights literature.[68] Thus, 'just as much as the individual has to respect the intrinsic value of fellow human beings, the individual also has to respect the intrinsic value of other fellow beings (animals, plants, ecosystems)."[69] This ecocentric formulation of human rights will imply the introduction of ecological limitations on individual freedoms, particularly on human entitlements to 'resources',[70] as well as corollary obligations.[71] It might even lead to a complete transformation of the individual character of human rights into something more grounded in communal and group conceptions of rights that extend well beyond individual freedom.[72] It might include also granting new rights to nature, as has been already occurring in some exceptional cases.[73]

All things considered, a holistic ecocentric approach to human rights entails the acceptance of the interdependency of human life and the natural ecosystems of which we are just a part. In other words, it involves the recognition of the complex ecological systems and processes that support the common resources on which rights depend. Thus, 'existing human rights can be understood to demand that we protect these common resources and supportive systems, and to offer principles for how these might be protected.'[74]

For the foregoing considerations to be constructive they need to be extended to the 'Modern' concept of sustainable development. The Report of the UN Commission for Environment and Development (*Brundtland Report*)[75], describes the notion of sustainable development as "development which meets the needs of the present without compromising the ability of future

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[66] De Lucia (n 22), at 186.
[67] Bosselmann (n 18) at 20.
[68] *Ibidem*
[69] *Ibidem*
[70] Kotzé (n 18), at 259.
[71] Bosselmann (n 18) at 16.
[72] Kotzé (n 18), at 246.
[73] For the worldwide evolution toward recognition of the inherent rights of Nature see Harmony with Nature Knowledge Network, at http://www.harmonywithnatureun.org/rightsOfNature/
[74] Lundberg and Fisher (n 23), at 181.
[75] Our Common Future (Oxford University Press, Oxford 1987), at 8

generations to meet their own needs"[76]. By focusing exclusively on the needs and interests of humans, this definition reveals the anthropocentric economic and political environment in which the notion of sustainable development was conceived.[77] Consequently, the natural resources that are to be redistributed to meet present and future human needs, are governed under the logics of the 'mastery' and *othering* of nature. Adopting an ecocentric approach to human rights, would involve imposing limits on the governance of natural resources as well as on individual rights, thus challenging the sustainable development paradigm. The protection of Earth systems, including the life and culture of the communities affected by the deterioration of natural ecosystems, would now have be at the centre of sustainable development.

Along these lines, Bosselmann contends that, without the principle of ecological sustainability, there is no sustainable development. As proposed by Kotzé a new vision of sustainable development that can adequately respond to the ecological crisis is compellent.[78] In this sense, development should only be acceptable if it is ecologically justifiable. In a time of global ecological upheaval, the fallacy of unlimited natural 'resources' ought to be overcome. Moreover, in line with the first consideration addressed above, the determination of what the minimum requirements are that would be necessary to maintain ecological integrity must abide to the consideration of natural sciences. This implies the discard of the development versus environment idea. According to Rockström and Karlberg, the degrees of freedom for sustainable human exploitation of planet Earth in the Anthropocene are severely restrained.[79] Similarly, these restraints will have to be imposed on rights to ecological goods and services.

A 'strong' approach to sustainable development, in which the preservation of the Earth's ecological integrity is understood to be the prerequisite for development, setting a non-negotiable bottom-line against which to assess and temper economic prosperity and social

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[76] 'Some commentators have contended that the focus on development in the Brundtland definition is misleading because it gives the impression that environmental considerations are secondary to developmental goals and that the term 'needs' is difficult to define because individuals' needs are subject to social and cultural variations.' Leib, Linda Hajjar. Human rights and the environment: philosophical, theoretical and legal perspectives. Vol. 3. Martinus Nijhoff Publishers, 2011, at 111.

[77] Despite the omission of the environmental dimension in this definition, it has been argued that the Report's concept of 'sustainable development' assumed ecological sustainability as its core rather than at the periphery of development. HC Bugge, C Voigt (eds), as in Bosselmann (n 18) at 53. In this regards, Bosselmann also points out that, in its inaugural meeting in October 1984, the Brundtland Commission, set out the objective of building '*a future which is more prosperous, more just, and more secure because it rests on policies and practices that serve to expand and sustain the ecological basis of development*.' Our Common Future (n 75) at 356.

[78] Kotzé (n 14) at 265.

[79] Rockström J and Karlberg L (2010) The quadruple squeeze: Defining the safe operating space for freshwater use to achieve a triply green revolution in the Anthropocene. Ambio 39: 257–265, at 1. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2890077/pdf/13280_2010_Article_33.pdf, accessed 10 April 2020.

development, will be necessary. As an example of this 'strong' approach, Bosselmann refers to the first report of the UN Secretary-General, following a 2009 UN General Assembly Resolution (64/196) entitled 'Harmony with Nature'. The report proclaims sustainable development as 'a holistic concept in harmony of nature' and shows the way/s in which international law and legislation in many countries can promote greater harmony with nature.[80] All in all, from a sustainability perspective human rights need to incorporate a conception of duty related to the notion of 'ecological limitations.' 'Recasting human rights in this way will have to happen through a paradigm of strong sustainability that seeks to reconnect humans with the environment, as it were'.[81]

Human rights should facilitate the reorientation of equality and justice in the Anthropocene

Third, human rights should contribute to facilitate a reorientation for equality and justice that takes into consideration the unevenly distribution of anthropogenic change.[82] This will require embracing conceptions of justice that not only focus on humans but on the entire Earth System, including the achievement of justice for non-human life. Moreover, it will involve the apprehension of alternative worldviews that differ from the homogenous 'ways of life' underpinning Modernity. In this sense, Armesto et alt. propose that land policy decisions in the Anthropocene incorporate social values and ecological considerations in equal measure.[83] The same premise could be applied to human rights and their judicial interpretation. This would include the consideration of the intrinsic link between local cultures and biological diversity as well as ethical concerns on the social and environmental consequence of a free market economy.[84]

In it is academic article "Anthropocene, Earth System vulnerability and socio-ecological injustice in age of human rights", Kotzé proposes that the re-interrogation of human rights as key mechanisms in the state's regulatory mix to address socio-ecological injustices arising from the ecological crisis, can be accomplished by utilizing the vulnerability theory.[85] This theory results particularly relevant for the present work since it advocates for a notion of socio

[80] Bosselmann (n 18) at 58.
[81] Kotzé (n 14) at 267.
[82] Ibid., at 267
[83] Armesto et al. (2010) as in Kotzé (n 14) at 268.
[84] Armesto et al. (2010: 157-158) as in Kotzé (n 14) at 268.
[85]According to Kotzé, the vulnerability theory is an emerging epistemic framework (if not – as yet – a powerful normative construction). Despite its occurrence in international climate laws as well as its recurrent appearance in the case law of the European Court of Human Rights, it cannot be said that the concept has any binding normative properties (yet). See, Ippolito, Francesca, and Sara Iglesias Sanchez, eds. Protecting Vulnerable Groups: The European Human Rights Framework. Bloomsbury Publishing, 2015.

ecological justice that embraces the patterns of vulnerability that marginalized human and non-human beings and entities experience as a result of the current environmental crisis.[86]

According to Kotzé, a nuanced ecological conception of justice must consider that in the Anthropocene we are all vulnerable - that 'we' also includes the ecological element of the Earth System. Nevertheless, this vulnerability does not burden all equally. The anthropocentric understanding of the human-nature relationship captures a heterogenous worldview, mostly that of privileged politically dominant groups, which represent the humans -and corporations, triggering the global ecological crisis. To be sure, while the imaginary of the Anthropocene tends to be universalistic, it is not the unqualified and generalized 'human' that is responsible for the Earth system destruction and the multiple injustices and vulnerabilities that this entails, but a privileged subject enjoying a disproportionate share of socio-economic and environmental benefits.[87] Paradoxically, these dominant actors are those that are least affected by the earth system disruptions, they themselves have triggered [88].

This consideration becomes significantly relevant for the present work, given the condition of vulnerability of ethnic communities who have sui generis -cultural, spiritual and economic- relations with their land. It must be noted, that these people's vulnerability is generally translated into -or accompanied by- the susceptibility of the natural ecosystems they inhabit, due to exploitative practices in their territories and lack of sustainable economic alternatives - or a proper state and societal support of their own 'ways of living'.

As per the vulnerability theory, human rights law should not only remain a tool to resist or upset the structural causes of the aforementioned asymmetries but it should also embrace a more explicitly – and perhaps more adequately – focus 'on protecting the entire vulnerable living order – rights that richly celebrate and facilitate new modes of sharing, mutual respect, and reciprocal obligations of care that work to promote the collective interests of an interdependent community of human-non-human life.'[89] Furthermore, it must be noted that the foregoing considerations involve also the question of intra- and intergenerational equity. Based

[86] Kotzé (n 24) at 64.
[87] Kotzé (n 24) at 68.
[88] 'In this sense De Lucia points out that anthropocentrism does not benefit all people equally, but only certain privileged categories of people – namely 'those best approximating to the abstract model of the possessive, rational subject [qualify] as the beneficiaries of current regimes of ecological accumulation, [which exclude] those not conforming to such a model'. De Lucia at 95 as in Kotzé, Louis J., and Villavicencio, Paola, "Somewhere between rhetoric and reality: Environmental constitutionalism and the rights of nature in Ecuador." Transnational Environmental Law 6.3 (2017): 401-433, at 413.
[89] Kotzé (n 24) at 80.

on the premise that vulnerability is constant, not yet born generations will be also vulnerable to the ecological crisis and thus dependent on our present actions to protect the Earth Systems of which they will be a part. It is important to concede that significant moves towards the recognition of the rights and interests of future human generations in ecological terms are already taking place. This is the case of the Colombian Amazon Forest, which has been recently recognized by the Colombian Supreme Court as a subject of rights to be protected in order to safeguard the rights of present and future generations.[90]

The foregoing paragraphs have shown some of the ways in which the transformation of the human rights discourse may progressively come to life. Embracing multidisciplinarity, adopting an ecocentric approach that will impact both the human rights regime and the sustainable development paradigm, as well as taking into consideration the heterogeneous conditions of vulnerability underlying the unevenly distribution of anthropogenic change, are some of the recommended ways forward.

Attempts to overcome the anthropocentric approach are plentiful. They range from the recognition of environmental rights, to the recognition of rights to nature and most recently, the development of the notion of biocultural rights both at academic and jurisprudential levels. The last two will be briefly explored in the next section of this chapter.

2. Efforts Towards an Ecocentric Approach to Rights

The increasing worldwide recognition of substantial and environmental-related procedural rights along with international initiatives such as the 2017 Global Pact for the Environment[91], are significant evidence of the central role awarded to the protection of the environment in recent legislative, judicial and policy efforts[92]. Moreover, alternative rights-based approaches as well as human rights' interpretation based on the recognition of the mutual respect underpinning the collective interests of an interdependent community of human-non-human life are emerging.[93]

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[90] See, Dejusticia y otros v Presidencia de la República y otros, Colombian Supreme Court, ruling STC4360 of 4 May 2018. Full text in Spanish, available at https://cdn.dejusticia.org/wp-content/uploads/2018/01/Fallo-Corte-Suprema-de-Justicia-Litigio-Cambio-Clim%C3%A1tico.pdf?x54537

[91] World Commission on Environmental Law at https://www.iucn.org/commissions/world-commission-environmental-law/events-wcel/past-events/global-pact-environment-june-2017

[92] 'The formal recognition of a universal right to an adequate environment, however, has faced a number of obstacles. The notion of state sovereignty, the lack of legally binding instruments, and problems of enforceability have impeded implementation of its protection.' Borràs (n 51) at 115.

[93] Kotzé (n 24) at 75.

While the limited scope of this work does not accommodate a detailed exploration of the ideological and scholarly development of the ecocentric rights paradigm, it will offer a brief synopsis of some of the views that relate the most to the Colombian Atrato River case, as the main object of study in this thesis. Some of these approaches, include the recognition of the rights of nature, 'both practically (in some legal systems, such as in India, Bolivia, Ecuador, Columbia, New Zealand and some states in the United States) and as a discursive theme'[94], as well as the progressive development of more eco-friendly rights approaches such as the notion of 'biocultural rights'. Furthermore, as suggested by Kotzé, some indigenous approaches to justice more fully embrace non-human concerns[95] and the international legal system, like municipal systems, is becoming increasingly cognizant of these indigenous cultures' wisdom.[96] This has set the foundations for a bold new departure in human rights law that recognizes the importance of a community's stewardship over lands and waters for the sustainable conservation of biodiversity, namely the 'biocultural rights'.[97] Significantly, this novel category of group rights, although not free from tensions and criticisms[98], has been recently recognized by the Constitutional Court of Colombia as rights of the ethnic communities inhabiting the river basin of the Atrato River.

A brief introduction to these two alternative approaches will be provided bellow, followed by a comparative overview of two cases – the case of the Whanganui River in New Zealand and the Ganges and Yamuna Rivers in India- in which the notions of biocultural rights and the rights of nature converge, in the attempt to forge alternative ways of conceptualizing the human-environment relationship. This comparative review will pave the way for the next chapter, in which the case of the Colombian Atrato River case will be analyzed, as a break ground decision that moves into the direction of an ecological revamping of human rights that

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[94] Ibid., at 71.

[95] *Ibidem.* For instance, Principle 1 of the Principles of Environmental Justice declared by delegates to the First National People of Color Environmental Leadership Summit held in 1991, in Washington DC, affirms 'the sacredness of Mother Earth, ecological unity and the interdependence of all species, and the right to be free from ecological destruction'.

[96] Bosselmann (n 48) at 18.

[97] Bollier David, 'The Rise of Biocultural Rights', P2P Foundation Blog (2015), at https://blog.p2pfoundation.net/the-rise-of-biocultural-rights/2015/04/25; According to Kotzé, the recent process of the Global Pact for the Environment of 2017 muted the voices of indigenous peoples by excluding their participation and worldviews from the drafting process and the final draft, that has now made its way to the United Nations General Assembly. Kotzé (n 24) at 71

[98] Sajeva, Giulia. *When Rights Embrace Responsibilities: Biocultural Rights and the Conservation of Environment*. E-book, Oxford University Press, 2018, at 105.

can structurally respond to the socio-ecological crisis of the Colombian Pacific's Anthropocene.

2.1. Biocultural Rights: the stewardship *'basket'* of rights

Although not explicitly framed within the ecocentric discourse, the emerging notion of biocultural rights, represents a singular attempt to recognize the mutual respect underpinning the collective interests of an interdependent community of human-non-human life. It is grounded on the evidence of effective conservation practices of indigenous peoples and local communities (IPLCs) with strong cultural and spiritual ties to the territories they inhabit. The concept of 'biocultural rights' is of singular relevance for this work as it: (i) refuses to conceive of Nature as a commodity with exchange value[99] (thereby, questioning the anthropocentric ethics underpinning the human rights discourse); (ii) focuses on the rights of IPLCs to stewardship of their lands and waters (claiming the rights of one of the most vulnerable populations in the face of the ecological crisis that confronts the planet); and (iii) aims at biodiversity conservation by prioritizing community-based development models (thus, providing a 'people-led alternative to state-led technocratic solutions to the environmental crisis'[100]).

According to Kabir Bavikatte, biocultural rights are a new set of third generation rights in the process of being recognized. He traces their origin back to the convergence of the post-development movement, the commons movement and the movement for indigenous peoples' and local communities' rights.[101] Despite their differences, these movements shared the common goal of protecting local ecosystems by securing the rights of communities who live in them.[102] Bavikatte charts the development of biocultural rights in international environmental agreements[103], domestic legislation and international case law[104], that increasingly recognize the rights of communities to fulfil their role as trustees of their cultures,

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[99] Bavikatte, Sanjay Kabir. *Stewarding the earth: rethinking property and the emergence of biocultural rights*. Oxford University Press, 2014.
[100] Ibid., at 17.
[101] Bavikatte (n 99), at 1, 16, 17, 113 -116.
[102] Ibid., at 16
[103] Chiefly the Convention on Biological Diversity (CBD), the Nagoya Protocol on Access and Benefit Sharing, and other environment-related United Nations (UN) treaties and declarations, among which: the UN Convention to Combat Desertification, the UN Framework on Convention on Climate Change, the UN Forum on Forests, Food and Agriculture Organization and the International Union for Conservation of Nature. Ibid., at 18-19.
[104] Bavikatte maps emerging biocultural rights jurisprudence by examining the decisions of regional tribunals such as the Inter-American Court of Human Rights and the African Commission for Human and Peoples' Rights, and domestic courts like the Hight Court of Australia, Supreme Court of Canada, and the Constitutional Court of South Africa. Ibid., at 145 – 208.

lands, waters and resources.[105] In order for such rights to be fulfilled, states[106], private companies, and international institutions[107] need to abide by corresponding duties and respect the rights of IPLCs to participate in the management of their territories - seeking their prior free and informed consent- and preserve and promote their traditional knowledge.'[108]

Sajeva asserts that the notion of biocultural rights seems to be grounded on the following understandings: (i) some indigenous and local communities, who rely directly on local ecosystems for their survival, have maintained sustainable ways of living that are beneficial for the conservation of the environment; (ii) these ways of life can survive and flourish only if such peoples and communities are secured certain group rights over lands, resources, self-determination, cultural identity and procedural rights[109]; (iii) the recognition of this set of group rights can thus enable and enhance the conservation of ecosystems and the sustainable use of biological diversity.[110]

Along these lines, biocultural rights entail the 'recognition of human rights to indigenous peoples and local communities not only to promote their interests and needs but also in order to promote conservation of the environment.'[111] In the words of Sajeva, biocultural rights build on two foundations: one related to the self-determination and cultural diversity of IPLCs, and the other to what can be considered to be a more general interest of humankind in the conservation of the environment.[112] In this sense, Bavikatte holds that 'biocultural rights begin from the perspective that human flourishing cannot be disassociated from the flourishing of ecosystems'.[113] However, he adds, 'the legitimacy of biocultural rights does not take at is point

[105] Ibid., at 21
[106] Sajeva, Giulia. "Rights with limits: biocultural rights–between self-determination and conservation of the environment." *Journal of Human Rights and the Environment* 6.1 (2015): 30-54, at 32.
[107] Sajeva (n 98) at 181.
[108] Sajeva (n 108) at 32.
[109] Ibid., at 39. These rights are proposed by Sajeva as a translation into human rights terms of the indispensable conditions for a free community to maintain its traditional way of life (these rights will vary according to the context and their intrinsic relation to the prevention of environmental destruction). Drawing on existing literature, Sajeva argues that these three are: (i) traditional institutions (formal and informal) need to be recognized as legitimate by the members of the community in which they exist; (ii) it should be understood that a strong cultural identity confers a 'sense of pride' through the identification with a certain heritage; (iii) the 'recognition and preservation of cultural identity, lifestyles, and livelihoods' is also contingent 'on the protection and control of traditional land bases and associated natural resources'. The latter implies that self-determination is critical for biodiversity conservation. Ibid., at 35 – 36.
[110] Ibid., at 39.
[111] Sajeva (n 98) at 13.
[112] Sajeva (n 108) at 38.
[113] Bavikatte (n 99) at 142.

of departure the inherent right of a group or community to flourish, but rather from the ethic of stewardship: it is the ethic of stewardship and not the group per se that justifies a right.'[114]

As a result, biocultural rights appear to be a *sui generis* type of rights within the human rights discourse.[115] One that places the stewardship of ecosystems at their very core, as their *raison d'être*.[116] Against this background, the *basket* of biocultural rights, would be composed of rights 'that protect the interests of indigenous and local communities but only in so far they are relevant for the conservation of the environment.'[117] Within this framework, the lifestyles and practices of IPLCs would be bound by a duty of sustainability, which according to Sajeva poses very challenging implications.[118] One of them being the risk of falling into the ideological trap of the *noble savage* myth by subordinating the rights of indigenous peoples and local communities to a role as environmental stewards. [119] In addition, this raises questions concerning whether it is fair to entrust IPLCs with the protection of an interest that actually is held by all humankind'.[120]

Despite these valid considerations, at the heart of the notion of biocultural rights, lies the recognition of the interdependency of human and non-human life. Therefore, they should be understood, explicitly to operate as 'a *sui generis* legal concept attempting to create a bridge between human rights as commonly understood in western legal systems and IPLC legal (and more broadly, normative) practices.'[121] These IPCL practices reflect a profound ethic of care

[114] Ibid., at 142- 143.
[115] Sajeva (n 98) at 13.
[116] Bavikatte (n 99) at 141.
[117] Sajeva (n 108) at 40.
[118] In the view of Sajeva, the logic of biocultural rights suggests that failure to observe a duty of sustainability might undermine, or even justify the withdrawal of, the right itself. For a complete analysis of the challenges posed by the notion of biocultural rights see Sajeva, *When Rights Embrace Responsibilities* (n 98) at 130-179.
[119] Biocultural rights discourse is grounded on the assumption, that there exist Indigenous Peoples and Local Communities that have maintained environmentally sustainable ways of life. This assumption is highly questioned on the grounds that it is misguidedly based on the *noble savage* myth. According to Giulia Sajeva, 'the [*noble savage*] myth assumes that all indigenous peoples have had - and have preserved - sustainable lifestyles, just as if such peoples had some inherent features that define their sustainable relationship with the environment and that run so deeply as to be independent from external conditions'. In this sense, the assumption upholding the notion of biocultural rights entails a too simplistic representation of reality. Being aware of the dangers of the noble savage myth, does not preclude 'that IPLCs have truly cultural, spiritual and legal systems that guide their relationships with the environment towards sustainable paths. It is simply to acknowledge that IPLCs can and do - and sometimes for sustainability-inspired reasons - change their practices and/or find that their practices become unsustainable because external conditions have changed.' Sajeva (n 108) at 45 - 46.
[120] Sajeva, (n 98) at 182. According to Sajeva, this question needs to be answered differently for indigenous peoples and local communities, due to the recognition of indigenous peoples as subjects in international law and the existing body of recognized indigenous rights on the one hand and the lack of these conditions in the case of local communities on the other.
[121] Sajeva (n 106) at 47 – 48.

for nature, according to which the wellbeing of the community depends on the wellbeing of the environment.[122]

In this regard, Sajeva suggests that the development of the concept of biocultural rights could contribute to face the difficult equilibrium between human rights and protection of the environment in the Anthropocene.[123] She asserts, that rather that pushing for strict changes in ethic paradigms, biocultural rights allow us to play with the anthropocentric/non-anthropocentric reading of the interest in conservation of the environment -which can framed as an interest of humankind or as a value per se- depending on the one we see more applicable, useful or effective as per the targeted audience.[124] Bavikatte, takes a more political stand, by arguing that biocultural rights are meant to be a call for reclaiming social values that have been eclipsed by the values of the market, which have triggered the global environmental crisis – and the immense loss of global biodiversity- in the first place.[125]

In any case, regardless of the perspective one looks at them, biocultural rights are, by definition, a combination of human interests and environmental values. Thus, a step further in the ecological reconfiguration of human rights. One that recognizes the interests of indigenous peoples and local communities as inextricably linked with the conservation of their land and natural resources and vice versa.

The room for further research on the development of the notion of biocultural rights and the challenges attached to it, is still vast[126]. However, cases such as the recognition of rights to the Whanganui River in New Zealand and the Atrato River in Colombia, result particularly relevant for the debate on biocultural rights. Within the framework of the latter, in 2016 the Colombian Constitutional Court recognized the ethnic communities inhabiting the Atrato River's basin as biocultural rights-holders, following a judicious analysis of the international and national development on such rights[127]. In line with Sajeva's reasoning, it might be still

[122] Ibid., at 48.
[123] Sajeva, (n 98) at 184.
[124] Ibid., at 187.
[125] Bavikatte (n 99) at 52. Bavikatte affirms, that 'perhaps the greatest challenge for biocultural rights is what Gramsci refers to as a 'passive revolution', which is a top -down restructuring that occurs once the powerful market interests are widely threatened.'
[126] According to Bavikatte, the reasons behind this research gap involve a dominant political, economic, and social imagination which is unable to reconfigure itself to embrace the notion of stewardship ethics. 'This inability has much to do with the very foundations of market economy, dominant discourses on private property and the assumptions about the nature and role of human beings in this context.' Bavikatte (n 99) at 29.
[127] Tierra Digna and others v Presidency and others [2016] Constitutional Court of Colombia T-622/16, M.P. Jorge Iván Palacio Palacio, Expediente T-5.016.242, 10 November 2016, (hereinafter Atrato-Ruling). See p. 68 of this work for an analysis of the Col. Constitutional Court's deliberations on the notion of biocultural rights as an alternative vision of the collective rights of indigenous and Afro-Colombian peoples in Colombia.

too early to judge whether these decisions 'truly foster a combination of indigenous peoples and environmental interests without neglecting one of the two' - especially as the role and decision making-power of the involved ethnic communities in both cases is shared with the government. In any case, both decisions move in the direction invoked by biocultural rights.[128]

2.2. Rights of Nature

As discussed above, legal systems have traditionally considered nature as 'property'. As a result, 'environmental laws and regulations, despite their preventive approach, have developed so as to legalize and legitimate environmental harm.'[129]Against this background, the emerging recognition and protection of 'rights of nature' represents a new holistic view of all life and all ecosystems. According to Borràs, from this perspective two parallel recognitions appear. First, that nature becomes a legal subject with the right to exist, persist, maintain and regenerate their vital cycles, and second, that humans have the legal authority and responsibility to enforce these rights on behalf of nature.[130]

Despite the recent developments on the rights of nature, their origins are generally traced back to 1972 when Professor Christopher Stone published his iconic article 'Should Trees have Standing?[131]. Following the legal historical trend of expansion that stretched to new rights-holders such as blacks, women, children, minorities and corporations, Stone proposed that the American legal system should give legal rights to the so called 'natural objects'.[132] The essence of Stone's proposal was to create the possibility for nature to take action in court to protect its own interests.[133] Anticipating the counterargument that nature cannot have itself legal standing as it is not a being, some academics have supported Stone's idea by drawing on the widely accepted legal mechanism of 'legal fictions'. They argue that just as nonhuman entities such as businesses, not-for-profit charities, and religious organizations are recognized legal personality, nature could be recognized certain rights and be represented in court.[134]

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[128] Sajeva, (n 98) at 121.
[129] Borràs (n 92) at 113-114.
[130] Ibid., at 129.
[131] C. Stone, 'Should Trees Have Standing? Towards Legal Rights for Natural Objects' (1972) 45 California Law Review, at 450–501.
[132] Ibid., at 456-459.
[133] O'Donnell, E. L., and J. Talbot-Jones. 2018. Creating legal rights for rivers: lessons from Australia, New Zealand, and India. Ecology and Society 23(1):7. https://doi.org/10.5751/ES-09854-230107
[134] Ibid., at 7

This radical idea has certainly not been without critics[135]. Especially in relation to the attribution of legal personhood to nature, which has been considered to be a source of legal uncertainty when it comes to defining when nature holds locus standi and on what basis.[136] Over the last twenty years, this and other concerns on the concept of rights of nature have been widely debated topics, engaging a growing number of scholars as well as national and international institutions.[137] Nevertheless, in exceptional cases –which are becoming increasingly common- the rights of nature have recently found more concrete expression. As argued by Pecharroman, an increasing number of court rulings and legislation worldwide are challenging the current paradigm and granting certain rights to nature.[138]

Already in 2006, the Community Environmental Legal Defense Fund in the United States began to include local ecosystems as legal subjects within municipal ordinances.[139] The first country recognizing rights of nature as constitutional rights was Ecuador in 2008, followed by Bolivia in 2009.[140] Most recent legislative examples on the rights of nature can be found in local and national regulations in New Zealand[141], Brazil[142], Colombia[143] and Uganda[144]. Initiatives to recognize Rights of Nature also exist at the international level, 'including the UN Harmony with Nature Initiative[145], the proposed UN Declaration of the Rights of Mother Earth, and the proposed International Environment Court.'[146] Most of these legislative and policy efforts came to life after the issuing of emblematic court decisions granting rights to nature around the world. In Ecuador, the Vilcabamba River became the world's first ecosystem to

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[135] For an overview of the main critiques to the rights of nature theory see Hajjar (n 76) at 137-138.
[136] Cano Pecharroman, Lidia. "Rights of nature: Rivers that can stand in court." *Resources* 7.1 (2018): 13., at 2-3.
[137] In Bosselmann (n 48) at 16-19, the author summarizes some of the most relevant debates around the concept of rights to nature.
[138] Pecharroman (n136) at 3.
[139] Clark, C, Emmanouil, N, Page, J & Pelizzon, A, 'Can you hear the rivers sing? Legal personhood, ontology, and the nitty-gritty', *Ecology Law Quarterly*, vol. 45, no. 4 (2019)., pp. 787-844 at 813., at 790.
[140] *Ibidem.*
[141] In March 2017, the Whanganui River was granted legal status as a person. Te Urewera Act 2014, s 4 (N.Z.); Te Awa Tupua (Whanganui Claims Settlement) Act 2017, s 10 (N.Z.).
[142] In 2019, the Municipal Chamber of Florianopolis voted to adopt Organic Law 133 of the Municipality of Florianopolis granting rights of Nature. The Organic Law will be signed next by the Major of Florianopolis, at Harmony with Nature Knowledge Network (n 73).
[143] In 2019 the Colombian Department of Nariño became the first in the country to recognize Nature as a subject of rights by signing the Decree 348. https://www.rcnradio.com/colombia/sur/narino-primer-departamento-que-reconoce-los-derechos-de-la-naturaleza.
[144] In February 2019, the Parliament of Uganda recognized Nature's fundamental rights to be, evolve and regenerate in the National Environment Act 2019, at Harmony with Nature Knowledge Network (n 73).
[145] *Ibidem.*
[146] Kauffmann, C., and P. Martin. "When Rivers Have Rights: Case Comparisons of New Zealand, Colombia, and India." *International Studies Association Annual Conference*. 2017, at 1.

have its rights defended and recognized by a court[147]. More recently, in 2016 the Colombian Constitutional Court recognized the Atrato river as a subject of rights[148] and in 2017 the High Court of Uttarakhand, India, declared the rivers Ganga and Yamuna as 'juristic/legal persons/living entities having the status of a legal person with all corresponding rights, duties and liabilities of a living person.'[149]

Despite the increasing recognition of rights to natural ecosystems, the 'practical difficulty in creating enforceable legal rights for nature that improve environmental outcomes remains a limitation'.[150] It must be born in mind that granting rights to nature imply the recognition that humans have responsibility to enforce these rights on its behalf. As a result, the appointment of guardians or stewards of the new 'natural' right-holders becomes a prerequisite for the effectiveness of nature's rights. This premise appears to be a bridging point between the concept of biocultural rights and the rights of nature that can plausibly lead to their enforceability.

All things considered, the rights of nature are an evolving and growing legal concept that may lead to the protection of natural ecosystems if they are seen within an appropriate context.[151] This can be achieved by adopting a holistic approach, aimed at balancing what is good for human beings against what is good for other species and for the planet as a whole.[152] There are still challenges and unresolved questions around the rights of nature, such as the need to clarify the legal implications of providing legal personhood to nature and, most importantly, what is the added value of providing rights to nature to achieve an actual sustainable future.[153] In any case, as the cultural shift towards an ecocentric approach to nature takes place, and 'our planet strives to achieve a more sustainable way of living, the rights of nature will offer a legal tool to regulate our relationship with nature from a different and more harmonious perspective.'[154]

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[147] Wheeler et al. v. Director de la Procuraduría General del Estado en Loja, Corte Provincial de Justicia de Loja, 31 marzo 2011, Judgment 11121-2011-0010.
[148] Atrato Ruling (n 127).
[149] Uttarakhand High Court (2016). Judgment by High Court of Uttarakhand at Naintal regarding Salim v. State of Uttarakhand, Writ Petition (PIL) No.126 of 2014, at 11.
[150] O'Donnell and Talbot suggest that for legal rights of rivers to be enforceable three practical conditions must be met. First, an individual or organization must be appointed to act on a river's behalf, to uphold the rights of, and speak for nature. Second, capacity in the forms of time, money, and expertise may need to be made available so that the rights of the river can be upheld in court. And third, river representatives and funding sources are likely to need some form of independence from state and national governments, as well as sufficient real-world power to take action, particularly if such action is politically controversial. O'Donnell and Talbot (n 133) at 6-7.
[151] Bosselmann (n 48) at 19.
[152] Global Alliance for the Rights of Nature GARN, https://therightsofnature.org/what-is-rights-of-nature/
[153] Pecharroman (n 138) at 13.
[154] Ibid., at 14.

2.2.1. A Comparative Overview - Legal and Judicial Precedents on Granting Rights to Rivers

The recognition of rights to nature has been more prevalent regarding the protection of specific natural features, namely rivers. Some authors such as Pecharroman argue that there is no explanation about this fact.[155] However, I consider that the examples of the Whanganui, Yamuna, Ganges and Atrato Rivers may provide us with valuable hints towards a justification for the predominant recognition of rivers as subjects of rights. Rivers are seen as the planet's lifeblood, and water is often not considered merely as biologically necessary, but also as a sacred natural entity [156]. Rivers are often intrinsically related to the communities inhabiting their basins and tributaries, to the point of becoming not only their territory, but the space to reproduce life and recreate culture.[157] Thus, it can be inferred that argumentative efforts in these cases, are not restricted to nature's intrinsic worth but are stretched to dialogue with the holistic recognition that all life, and all ecosystems are deeply intertwined. In this regard, Macpherson asserts that the recognition of rights to rivers has been largely driven 'by indigenous and tribal communities, who claim distinct relationships with water based on their cosmovision of guardianship, symbiosis and respect, as opposed to western utilitarianism.'[158]

The present section aims at providing an overview of the legislative and judicial processes that led to the recognition as right holders of the Whanganui River in New Zealand and the Ganges and Yamuna Rivers in India. Far from being a complete comparative exercise[159], the following paragraphs attempt at sharing with the reader the main features of the decisions and the challenges attached to them. This will contextualize the brief introduction on the rights of nature presented above and set the basis for a deeper analysis of the case of the Colombian Atrato River in the next chapter.

Despite their contextual and legal differences these cases share notable characteristics that are worth examining and learning from. As suggested by Kaufmann and Martin, these cases are

[155] Ibid., at 6.
[156] Kauffman and Martin (n 4) at 1.
[157] Atrato Ruling (n 127) at 10.
[158] Regulatory model that protect the rights of rivers -as in the case of the Whanganui and Atrato Rivers in New Zealand and Colombia respectively, 'have been largely driven, not by environmentalists, but by indigenous and tribal communities, who claim distinct relationships with water based on their cosmovision of guardianship, symbiosis and respect, as opposed to western utilitarianism.' Macpherson (n 31) at 40.
[159] For a comprehensive comparative analysis of these decisions see Clark et alt. (n 139193), O'Donnell and Talbot (n 133), Kauffman and Martin (n 4) and Pecharroman (n 138).

part of a global movement to institutionalize rights of nature norms as a means for achieving truly sustainable development.[160] They emanated from local communities' struggles to protect their ethnic and cultural identities, the places they hold sacred, and the water on which they depend for life.[161] The main threats for these communities are deeply related to the logics of extractive industries. Within this context, these decisions move in the direction of biocultural rights as they challenge the external imposition of a way of living that is alien to local worldviews, while recognising the deep human - non-human relationships in each cultural setting.Moreover, as argued by O'Donnell and Talbot, they demonstrate that rights of nature can be used to address problems motivated by economic, cultural, or environmental factors[162].

Lastly, the solutions provided in these cases show how rights of nature are being combined with new governance structures designed to implement strong, representative, collaborative and Indigenous-led eco-centric approaches to implement and defend the rights of the rivers. This design involves the appointment of specific guardians charged with representing the rivers' and promoting their rights.[163] More research is needed to track the work of these institutions as they begin the task of implementing the necessary legal and policy frameworks that could materialize the goal of protecting our planet's ecosystems, including the humans populations inhabiting them.

i. The Whanganui River - New Zealand

On March 20th, 2017, the New Zealand government passed the 'Te Awa Tupua (Whanganui River Claims Settlement) Act 2017' recognizing the Whanganui River as holding rights and responsibilities equivalent to a person. This break ground legislation was the first one in the world to grant rights to a river and all its tributaries. This is certainly one of the most innovative examples of using existing legal structures and concepts to protect nature, nevertheless, the story behind this government decision is closely linked to the Whanganui Iwi Māori tribe and its historical fight to assert their rights in relation to the river and their territory. It was not born as an environmentalist enterprise aimed at the recognition of rights to nature, but as the fight for having the Māori tribe's worldview and rights legally recognised. A world view that is in

[160] Kauffman and Martin (n 4) at 2.
[161] *Ibidem.*
[162] O'Donnell and Talbot (n 133) at 7.
[163] Kauffman and Martin (n 4) at 2.

evident contradiction with the -until now- common anthropocentric understanding of the relation between human beings and nature. The 'Te Awa Tupua' is an Act aimed at protecting both the Whanganui river, as an alive ecosystem, and the human rights of the community that has historically inhabited its basin.

(a) Context and background

The Whanganui River - the New Zealand's longest navigable river, stretching for 290km from the slopes of Mount Tongariro to the Tasman Sea - is central to the existence of Whanganui Iwi Māori and their health and wellbeing. It has provided both physical and spiritual sustenance to Whanganui Iwi from time immemorial[164]. The Whanganui Iwi recognise the Whanganui River as their ancestor, as a treasured thing (taonga), and as a living being, Te Awa Tupua (Hsiao,2012). Yet, they had to fight to assert their rights in relation to the river, since colonisation in 1840.[165]

Historically, since the early days of settlement, the British progressively engineered the various rapids, twists and turns of the river to make steamboat traffic possible.[166] The river degraded ecologically due to the extraction of minerals, the release of invasive species (e.g., salmon and trout) and the exploitation for hydroelectric power without any concern for the cultural ties of the Whanganui iwi. [167] Tribal groups up and down the river who had long depended on its eels as a source of food and trade, lost control over their natural environment. 'Land was sold or abandoned along the banks and a significant amount of territory became incorporated into what became the Whanganui National Park.'[168]

In order to protect the river that had historically belong to them and to assert their rights to the "ownership, management, and control" of the Whanganui, the Māori started the country's longest running legal battle, from 1938 to 1962. 'The customary rights of the Whanganui Iwi were repeatedly whittled away through government legislation (e.g., the Coal Mines Act of

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[164] Whanganui River Deed Of Settlement between the Crown and Whanganui Iwi, 2014 https://www.govt.nz/treaty-settlement-documents/whanganui-iwi/whanganui-iwi-whanganui-river-deed-of-settlement-summary-5-aug-2014/

[165] Charpleix, Liz. "The Whanganui River as Te Awa Tupua: Place-based law in a legally pluralistic society." The Geographical Journal 184.1 (2018): 19-30.

[166] Hal Levine, « Personifying the Whanganui River. Ecological Solution or Political Stratagem? », Books and Ideas, 21 December 2017. ISSN: 2105-3030 [http://www.booksandideas.net/Personifying-the-Whanganui-River.html.] accessed 03 June 2019

[167] Blankestijn, Wouter, and Anna Martin. "Testing the (legal) waters: interpreting the political representation of a river with rights in New Zealand." (2018), at https://pdfs.semanticscholar.org/efe5/2495593f9a6d12b1e147c5ced5040d37644b.pdf

[168] Levine (n 166)

1903), vesting different river interests in the Crown and then relying on those laws to argue against the Māori in various government-instituted tribunals (e.g., Native Land Court)'[169]. The Māori argued that regardless of land sales they still owned the river and deserved compensation for its use, 'the river was never freely and knowingly surrendered by them, but contrary to the Treaty of Waitangi, and to their prejudice, Crown acts, policies, practices and omissions combined over the years to relieved them of it'.[170] Their case was lost after a series of appeals before national courts. It was not until the establishment of the Waitangi Tribunal in 1975 that the Māori's Whanganui claim was heard and ruled in consideration of the inextricable link between the river and the community.

Public concern over the application of the Waitangi Treaty,[171] signed in 1840 between the British crown and Māori chiefs to formalize the European settlement in New Zealand, led to the 1975 establishment of a tribunal to resolve Māori grievances regarding application of the principles of the Treaty. 'While its powers are advisory, not legal, all legislation and government policy are required to conform with Treaty principles'.[172]

The Tribunal's 1999 assessment of Claim 167 (known as Wai 167, after the Tribunal) recognised the Whanganui River iwi's ownership of the river, after a biocultural process, 'that involved site visits and extensive public hearings by members of the Tribunal with Whanganui Iwi and other stakeholders'.[173] The Tribunal produced a comprehensive report stating that although some parts of the river passed from Māori ownership with the sale of adjacent land it was necessary to see the river as Māori saw it when determining the effect of alienations. Therefore, 'the river was a single and indivisible entity (…) in which individuals had particular use rights of parts but where the underlying title remained with the descent group as a whole, or conceptually, with their ancestors'[174]. The Tribunal further emphasised the need of previous informed consent form the Māori Tribe in relation to any decision regarding the disposition of

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[169] Hsiao, Elaine C. "Whanganui River Agreement–Indigenous Rights and Rights of Nature' (2012)." Environmental Policy and Law 42: 371-375, at 372.

[170] Waitangi Tribunal. "The Whanganui River Report." (1999), at 1; accessed on 17 April 2020 at https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_93959583/Wai%20167,%20A049.pdf, at 1.

[171] The Treaty of Waitangi, was signed on February 6, 1840, between representatives of the British Crown and Māori chiefs, who acted on behalf of their sub-tribes, confirming the formal European settlement in New Zealand (Morrison and Huygens, 2019). The treaty documents were drawn up adopting the terms of British law and then translated into Māori by British colonists. The two versions of the treaty were legally recognised, but different descriptions of legal rights and obligations were provided, thereby compounding the inherent differences between British and Māori law.[171]

[172] Derby, 2012 as in Charpleix (n 165) at 20.

[173] Hsiao (n 169) at 372.

[174] The Whanganui River Report (n 170) at viii.

their natural resources, stating that some government Acts effecting the confiscation of the river from the Māoris, had been inconsistent with the principles of the founding Treaty [175].

The Tribunal was of the view that The Whanganui River case is unique for the close physical and spiritual association of the people to the river and the history of their assertion of river ownership. 'It is only when we appreciate that it is not possessions that most count but how we relate to, and respect the mana [sovereignty] of, each other and the environment that we will understand the contribution that Māori thinking can make to a better society, and can develop a philosophy of law that is more in tune with the Pacific way'[176].

(b) The 'Te Awa Tupua (Whanganui River Claims Settlement) Act 2017

Since the Waitangi Tribunal's faculties are limited to the extent of issuing of recommendations, it made some proposals for institutional and legal arrangements that were further settled in August 30, 2012, when an agreement between the Whanganui Iwi and the Crown was reached. The terms of the treaty settlement were given the force of national law through the 2017 Te Awa Tupua Act.

The Te Awa Tupua Act enshrines the declaration of the river as a living being and entity in its own right[177], with shared guardianship by the government and the river's Māori community. The agreement was based, among others, in the *Ko au te awa, ko te awa ko au* principle 'the health and wellbeing of the Whanganui River is intrinsically interconnected with the health and wellbeing of the people'[178]. This principle entails the strong biocultural component of the Whanganui case, in which not only the environmental health and wellbeing of the river but also the cultural, social, and economic development of Whanganui Iwi are considered together in order to find an agreement that would guarantee the realization of both ends.

To implement the Māori's perspective on the status of the river, the settlement recognizes the river as a legal person, Te Awa Tupua, with "all the rights, powers, duties, and liabilities of a

[175] The Treaty contemplated that Maori might freely and willingly dispose of their possessions, but in construing the terms, a free and knowing consent was required. It could not be taken on a sidewind, as, for example, through the operation of some aspect of English law of which Maori were unaware.
[176] The Whanganui River Report (n 170) at xiii.
[177] It is important to highlight that despite the Tribunal's recognition of the Whanganui's ownership in the head of the Maori, the riverbed was returned to the River itself, not to the Whanganui Iwi, thereby reinforcing the idea of the river as an independent legal entity.
[178] Hsiao (n 169) at 373.

legal person"[179]. However, it does not identify any specific right held by the river[180]. The emphasis is instead placed on the Māori's responsibility of guardianship for the river, which is to be exercised by a guardian body (Te Pou Tupua), the human face of the river, authorised to speak on its behalf and in charge of protecting its interests and dealing with everyday governance[181]. The guardian body is comprised of one Whanganui iwi representative and one Crown representative. Importantly, guardians must secure Te Awa Tupua's spiritual and cultural rights, not simply its physical and ecological rights.[182]

The Act also established a hierarchy of consultative bodies: an advisory group, *Te Karewao*[183], an advisory group, *Te Kōpuka*[184]- a collaborative and integrated watershed management strategy group comprised of representatives of iwi, relevant local authorities, departments of State, commercial and recreational users, and environmental groups with interests in the River- and finally, the *Te Heke Ngahuru*[185]- a looser "collaboration of persons with interests"-. This structure is financed by a separate fund, *Te Korotete*, initially established with thirty million New Zealand dollars from the Crown, which purpose is to "support the health and well-being of Te Awa Tupua." [186]

(c) Challenges

The Act is celebrated for the comprehensive model of guardianship and institutional arrangement it establishes, which suggest that the framework will allow for the river's rights to be given force and effect. However, one of the limits of the Act is that it does not create, limit, transfer, extinguishe, or otherwise affect any rights to, or interests in the river.[187] Thus, the Te Pou Tupua is bound by the matter of fact rights of others, including existing resource consents and other statutory authorisations. As a result, the longterm role of Te Pou Tupua in water use decisions remains unclear at this early stage.[188]

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[179] Te Awa Tupua (Whanganui Claims Settlement) Act 2017, s 10 (N.Z.), at Clause 14.
[180] Kauffman and Martin (n 4) at 6. 'New Zealand's Whanganui treaty settlement was pioneering in part because it differed greatly from previous RoN laws established in Ecuador, Bolivia, and the U.S. RoN laws in these latter countries recognized numerous rights held by all natural ecosystems, including the rights to exist, to maintain their integrity, to regenerate their life cycles and functions, and to be restored when damaged (e.g., Republic of Ecuador 2008). By contrast, the Whanganui treaty settlement and Te Awa Tupua Act do not delineate specific RoN, but merely recognize the Whanganui River as a legal person'.
[181] Te Awa Tupua (Whanganui Claims Settlement) Act 2017, s 10 (N.Z.), Subpart 3(18)
[182] Kauffman and Martin (n 4) at 7.
[183] Te Awa Tupua (Whanganui Claims Settlement) Act 2017, s 10 (N.Z.), Subpart 3 (27-28)
[184] Ibid., Subpart 4 (29-34)
[185] Ibid., Subpart 4 (35-38)
[186] Ibid., Subpart 6 (57-59)
[187] Ibid., Subpart 2 (16)
[188] O'Donnell and Talbot (n 133) at 7.

According to Kauffman and Martin, 'For Whanganui negotiators, the idea of granting their river a legal personality was an imperfect approximation (but likely the best that could be done within a European legal framework) of treating the river as a whole, living, spiritual being'[189]. It demonstrates that environmental interests are also strongly in the interest of human beings and arguably could stand alone and be considered to be purely in the interests of nature itself [190].

ii. The Ganges and Yamuna Rivers - India

Following the New Zealand example, on March 20, 2017, the High Court in Uttarakhand State in India declared the Rivers Ganga and Yamuna and all their tributaries as *'juristic/legal persons/living entities having the status of a legal person with all corresponding rights, duties and liabilities of a living person'.*[191] In this case, the judicial outcome was the result of a public interest litigation[192] initiated by Mohammed Salim, a resident of the Hindu holy town of Hardwar who, after decades of failed government programs designed to clean up the Gangariver, sought the court's intervention 'to protect the rivers from further illegal encroachment and to compel the State of Uttarakhand to take positive action to reduce pollution and restore the health of the rivers'.[193]

Despite the controversial religious approach adopted by the Court to justify its decision[194], according to Kauffman and Martin, as in the Whanganui case, the Uttarakhand ruling 'emanated from local communities' struggles to protect their ethnic and cultural identities, the places they hold sacred, and the water on which they depend for life'.[195] Nevertheless, the legal

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[189] Kauffman and Martin (n 4) at 7.
[190] Hsiao (n 169) at 373
[191] Salim v. State of Uttarakhand, Uttarakhand High Court. 2016 (n 149) at 11.
[192] 'The Indian state court's ability to issue such orders stems from India's constitutional provision allowing Public Interest Litigation. Public interest litigation was introduced in 1986, justified under Article 32 of India's constitution, as a way to give marginalized groups in society access to justice when the state failed to take action to address problems of public interest' Kauffman and Martin (n 4) at 13.
[193]Clark et alt. (n 139193) at 813.
[194] According to professor Vrinda Narain, 'notwithstanding the obvious environmental implications, the centrality of Hindu religious faith to the directions issued is worrying. In the context of rising Hindu right wing rhetoric, the Court's linking of the Hindu faith with national identity and the corresponding casting out of religious minorities implied by this method of argumentation by the court is cause for concern. Indeed, while this decision and its mandatory directions bode well for environmental protection, the premise of such protection is troubling for the future of minority rights and India's democratic secular consensus'. See http://www.iconnectblog.com/2017/06/indian-court-recognizes-rivers-as-legal-entities.
[195] Kauffman and Martin (n 4) at 2.

status of the rivers is currently uncertain since the Indian Supreme Court agreed to hear an appeal against this ruling, and in doing so, halted the effect of the original case.[196]

(a) Context and background

The Ganga is one of the most sacred rivers for Hindus, revered as *Ganga Mata* or *Ganga Maa*—the divine mother—who sustains and nurtures life.[197] According to Hinduism, the Ganga and the Yamuna (the Ganga's longest tributary) are believed to have miraculous properties. These rivers are also pivotal in the economic and social life of the country as many cities are built on its banks with one of the world's highest densities of humans (around 40% of the Indian population) depending on them for water, agriculture, industry, and navigation[198]. Despite their economic and cultural significance both rivers face serious pollution challenges, mainly because of the accelerated growth of cities, agriculture and industries in recent decades. In response to these challenges, since 1986 the Indian government has launched different cleaning action plans for the river[199], however failing to reverse its deteriorated status.

The Ganga river rises in the western Himalayas in the Indian state of Uttarakhand, which until 2000 was formally part of the Uttar Pradesh State. The creation of the new State saw the start of years of wrangling over encroachment disputes as well as a dispute over the management of Water Resources Development particularly in relation to the rivers Ganges and Yamuna and their tributaries[200]. Moreover, despite an explicit provision embedded in the *Uttar Pradesh Reorganization Act, 2000* ordering the constitution of the Ganga Management Board, up to 2014 the government had not taken any step to fulfill this mandate. This situation aggravated the already critical pollution status of the river putting at risk its very existence and the health and survival of the population depending on it.

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[196] O'Donnell and Talbot (n 133) at 6.
[197] Clark et alt. (n 139193) at 812.
[198] For a general discussion on the symbolism and the influence of the Ganges River, see Dilip Kumar, River Ganges – Historical, Cultural and Socioeconomic Attributes, 20 Aquatic Ecosystem Health & Mgmt. 8: 8–9 (2017).
[199] 'The government's first attempt to clean up the Ganga was the 1985 National Ganga Action Plan. The second was the National Ganga Basin Authority's 2009 Mission Clean Ganga. Both were unqualified failures (Das 2017). The latest attempt to restore the Ganga is "Namami Gange" ("Obeisance to Ganga" in Sanskrit), an initiative launched in 2014 by the Hindu nationalist BJP government.' Kauffman and Martin (n 4) at 13.
[200] Vrinda Narain, Indian Court Recognizes Rivers as Legal Entities, INT'L J. CONST. L. BLOG (June 13, 2017), http://www.iconnectblog.com/2017/06/indian-court-recognizes-rivers-as-legal-entities.

In view of the above, in 2014 Mr. Salim brought a public interest litigation claim before the High Court of Uttarakhand asking for the government to remove illegal construction and encroachments along the bank of the Ganges River. He also sought a direction that the central government better manage land and water resources in the area. Mr. Salim did not petition the Court to grant legal rights to the river; rather, he was concerned with the issues of federalism, and weather a State, through its judiciary, could order the central government to take steps to protect the Ganges river.[201]

(b) Decision: **Mohammed Salim v. State of Uttarakhand & others**

In response to Mr. Salim petition, on December 5, 2016, the High Court of Uttarakhand held that constitutional law enabled the Court to issue such an order and went on directing that the illegal encroachments and construction on government land be removed and that central government set up a Ganga management board to manage the river.[202]. Moreover, the judges stated that every citizen has a right to clean water under article 21 of the Constitution and, after acknowledging that large scale mining was being carried out in the river bed of Ganga as well as in its highest flood plain area impeding its natural flow of water, banned all mining activities in those areas with immediate effect.[203]

More than three months later none of these orders had been fulfilled, thus, the Court handed down two follow-up decisions in 2017.[204] On March 20, 2017 the Court unilaterally granted legal personhood to the Ganges and Yamuna and their tributaries by declaring them as 'juristic persons '*having the status of a legal person with all corresponding rights, duties and liabilities of a living person'*[205].

In justifying this extraordinary step, apart from relying on existing theories of legal personhood, including corporate personhood, the Court gave three main reasons, as follows: i.) The negligence of the states in not following previous orders; the Court argued that the exposure of these "sacred" rivers to environmental degradation was causing the rivers to lose *"their very*

[201] Kauffman and Martin (n 4) at 14.
[202] Salim v. State of Uttarakhand, Uttarakhand High Court. 2016 (n 149) at 20.
[203] Ibid., at 20 n° 4.
[204] Uttarakhand High Court. 2017. Judgment by High Court of Uttarakhand at Naintal regarding Writ Petition (PIL) No. 126 of 2014, [http:// lobis.nic.in/ddir/uhc/RS/orders/22-03-2017/RS20032017WPPIL1262014. Pdf] accessed 10 may 2019
[205] Ibid., at 11.

existence [and that this] requires extraordinary measures to be taken to preserve and conserve Rivers Ganga and Yamuna";[206] ii.) In order to give effect to the articles 48A and 51A of the Indian Constitution. 48A is a directive principle of state policy and obliges the state to protect the environment[207], on the other hand, 51A provides that is the fundamental duty of every Indian citizen, "to protect and improve the natural environment including forests, lakes, rivers, and wildlife, and to have compassion for living creatures";[208] iii.) 'To protect the recognition and the faith of society'.[209] Drawing on precedent case law of the Supreme Court of India, the High Court reaffirmed the recognition of a Hindu deity or idol as a juridical person entitled to hold property as well as to be subject to taxation[210]. The judges further referred to the spiritual and physical value of the Ganga and Yamuna rivers, by stating that '(…) they support and assist both the life and natural resources and health and well-being of the entire community. Rivers Ganga and Yamuna are breathing, living and sustaining the communities from mountains to sea.'[211]

To give effect to the legal personality for the Ganga and Yamuna Rivers, the Court used the guardianship model by establishing them as minors under the law. 'This arrangement ensures the legal status and rights of the rivers, whilst acknowledging that they cannot speak for themselves'[212] The Court declared a group of officials including the Advocate General of Uttarakhand as legal representatives of the rivers, in charge to protect, conserve and preserve them by promoting their health and wellbeing.

(c) Challenges

Differently from the New Zealand Case, the responsibility of acting on behalf of the Ganga and Yamuna Rivers is imposed on existing roles in the state government without creating any independent positions. Since the Court do not have the faculty to allocate funds, and the government was reluctant to cooperate, it has been difficult to implement the new management arrangements for the River. In fact, the State Uttarakhand took the case to the Supreme Court

[206] Ibid., at 4.
[207] Constitution of India, 1950, article 48A, "The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country."
[208] Vrinda (n 200).
[209] Uttarakhand High Court. 2017 (n 204) at 11.
[210] Vrinda (n 200).
[211] Uttarakhand High Court. 2017 (n 204) at 11.
[212] O'Donnell and Talbot (n 133) at 4.

of India arguing that it was legally unsustainable. The State manifested its concern for the responsibility such a mandate can entail in terms of accountability for the representatives of the rivers, stressing the fact that these are transboundary rivers that stretch across several states in India, as well as into neighbouring Bangladesh. The legal personhood of these rivers has been withdrawn, pending the outcome of the appeal.

Apart from the reluctance of the Uttarakhand State to commit both politically and financially to the ruling, therefore perpetuating the continuity of the situations that triggered the litigation in the first place, according to O'Donnell, the Court seems to conflate the concepts of legal personality and living being, thus blurring the long-established distinction between legal rights and human rights.[213] This results particularly problematic in light of the ongoing debate regarding the appropriateness of human rights to protect the environment from human impacts.[214]

Furthermore, despite declaring the rivers as subjects of rights, the Court does not elaborate on what the implications of such a declaration of rights would be, which can turn the ruling into an unpractical legal tool for the protection of the river and the communities that depend on it. Unfortunately, a collaborative scheme for the protection of the rivers was not established either, thus excluding the communities that have always had either a sacred or vital connection with the rivers from the decision making processes aimed at creating and implementing the strategies to protect, conserve and preserve the Ganga and Yamuna rivers.

3. **Conclusion**

To face the tremendous challenges posed by the current global ecological crisis, humans will have to reconsider the human-centred worldview underpinning the modern socio-legal institutions used to regulate the human-environment interface, including human rights. Although human rights do not and cannot provide all the answers to the challenges of the Anthropocene[215], an ecologically revamped version of the mechanisms offered by human rights

[213] (O'Donnell 2017a) as in O'Donnell and Talbot (n 133) at 7. 'Legal personality is a specific legal creation that enables law to deal with a particular entity without conferring human rights. The Uttarakhand High Court blurs this distinction by creating legal rights equal to rights of a living person.'
[214] O'Donnell and Talbot (n 133) at 7. As suggested by O'Donnell and Talbot (2018). See also discussion in Conor Gearty, 'Do Human Rights Help or Hinder Environmental Protection?' (2010) 1 JHRE 7.
[215] Kotzé (n 14) at 265.

to establish duties, entitlements, moral boundaries and governance obligations, could create the foundation of a legal normativity responsive to the ecological crisis.

Along these lines, for human rights to maintain their legitimacy in discourses concerning socio-environmental justice, it is essential to recognize their ecological embeddedness from a multidisciplinary perspective. Efforts to revamp the historically anthropocentric approach to human rights imply the acknowledgment that 'individual freedom is not only determined by a social context - the social dimension of human rights-, but also by an ecological context.'[216] Furthermore, they involve revisiting the environmental ethics underlying human rights discourse and its relation to the notion of sustainable development. Human rights legitimacy will ultimately depend on them becoming tools for contesting unjust structures driving socio-ecological destruction.[217] This entails delimiting the broad category of 'humanity' to critically address the narrow group of humans -and companies- whose actions are the primary causes of the crisis, as well as using the human rights framework as a tool to protect the most vulnerable in society, including human and non-human beings.

It must be noted that, despite the numerous calls on shifting to a more holistic ecocentric approach to rights, a degree of anthropocentrism may always be a necessary part of environmental protection. This is 'not because humanity is at the center of the biosphere, but because humanity is the only species which possesses the consciousness to recognize and respect the morality of rights. In this view, the interests and duties of humanity are inseparable from environmental protection.'[218] Nevertheless, emphasis must be placed on the fact that this human consciousness should be understood as a responsibility rather than a privilege. The capacity of humans to recognize moral value to living and non-living beings must acknowledge the interdependency of the human- nonhuman worlds as well as the fact that we, as human species, are only a part of the ecosystems we inhabit, hence our actions contribute to their flourishment or detriment, and indirectly to ours.

This ecological revamping of human rights seems to be gaining momentum. The recognition of environmental rights, especially the right to a healthy and sustainable environment, are increasingly mushrooming the world over. Moreover, there is a growing trend towards the more radical extension of rights beyond humans to other species, ecosystems, and Nature herself.[219]

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[216] Bosselmann (n 48), at 2.
[217] Lundberg and Fisher (n 23), at 177.
[218] Borràs (n 92) at 128.
[219] *Ibidem.*

Similarly the contribution of indigenous peoples to conservation is slowly being acknowledged and framed in human rights terms through the notion of 'biocultural rights', as a means to enhance the health and wellbeing of both humans and ecosystems. While the acknowledgement of the link between environmental protection and human rights is now strongly recognized, its implementation has been hugely controversial. Further analyses on the impact, effectiveness and on-the-ground challenges of these innovative approaches are still pending.

As asserted by Bosselmann, 'there is little to believe that an ecocentric turn-around can be achieved just by adding rights of nature to the catalogue of the rights of humans',[220] the same might be applied to the idea of declaring indigenous peoples and local communities as stewards of the humanity's natural patrimony without granting them the adequate conditions for the fulfilment of this responsibility. Law and pleas for new morality cannot and do not exist in vacuums, thus other important parallel transformations, such as a change in consciousness, must also occur to achieve lasting sustainable changes.[221] Moving towards a holistic approach to nature requires a radical shift in human culture - including values, laws, institutions and so forth- that can only be incrementally achieved. As stressed by Kotzé, the role of human rights alone in contributing to that cultural transformation is realistically limited. [222] The extent to which an ecocentric approach to human rights can contribute to an ecologically conscious human is yet to be explored.[223] Meanwhile, earth-friendly judicial, legislative and political initiatives, such as those presented in this chapter, denote the new environmental direction that the human rights discourse seems to be taken and represent a valuable learning ground for future decisions in similar scenarios.

CHAPTER II. THE COLOMBIAN ATRATO RIVER CASE

In a ground-breaking decision, the Colombian Constitutional Court adopted an unprecedented ecocentric approach to human rights by recognizing the River Atrato as a subject of the rights to protection, conservation and restoration, that need to be protected alongside the riverine communities' biocultural rights.[224] Moreover, the judges established the obligations of the

[220] Bosselmann (n 48) at 20.
[221] Ibid., at 19.
[222] Kotzé (n 14), at 259.
[223] *Ibidem.*
[224] ABC Colombia, Colombian Constitutional Court sets a Global Precedent, at https://www.abcolombia.org.uk/constitutional-court-sets-global-precedent/

State and communities to restore and maintain the river. This pioneering ruling was the final outcome of a litigation process initiated by local ethnic communities settled by the river's basin that had seen their livelihoods and health damaged due to illegal mining activities near the Atrato river and its tributaries.

The following chapters will present an overview of the historical and socio- economic context in which the Colombian Constitutional Court adjudicated such rights – the Chocó Region. It will further provide a bottom up description of the way in which the case was built, based on the interviews conducted with community leaders and Viviana Gonzalez, lawyer from the Center of Studies for Social Justice 'Tierra Digna', which represented the communities in this case. Finally, the main legal elements of the ruling and the specific orders it established will be analysed.

1. The Atrato River and the Region of Paradoxes: Chocó

The Atrato River is located in one of the most biologically diverse places in Colombia and on the Planet: The Chocó Region. This Region extends along Colombian's pacific coast and is home to four regions of humid and tropical ecosystems, where 90% of the territory is a special conservation area[225]. The riches of this eco-region go beyond gold, platinum and wood as they pass through the ancestral culture of multiple racial groups converging in Chocó, which has a population of nearly 500,000 inhabitants of whom 87% are of African descent, 10% are indigenous and 3% are mestizo.[226]

Paradoxically, despite its natural wealth, Chocó remains Colombia's poorest and most disadvantaged region, with nearly half of the department's population living in extreme poverty.[227] Its geostrategic location and the presence of natural and minerals resources, added to the historical abandonment and absence of the State, has brought threats to the effective control of these territorial areas by the local communities[228]. The region and its inhabitants

[225] Tierra Digna and others v Presidency and others [2016] Constitutional Court of Colombia T-622/16, M.P. Jorge Iván Palacio Palacio, Expediente T-5.016.242, 10 November 2016, (hereinafter Atrato-Ruling), at 6.
[226] *ibidem*
[227] At present, Chocó has a population rate of 48.7% living in extreme poverty and 78.5% in poverty. Ibid., at 9
[228] Those who have dealt with the issue in depth agree that the poverty of Chocó is due, among other factors, to the following: 1) a colonial legacy of weak institutions; 2) difficult geographical and climatic conditions that increase the costs of production factors and isolate the department from the rest of the country; 3) an economic structure focused almost exclusively on a single sector, gold mining; and 4) the isolation of the department from national economic activity. See Colombian Ombudsman's Office, *Defensoría del Pueblo*, 2014 Report "Humanitarian Crisis in Chocó: Diagnosis, Evaluation and Actions of the Colombian Ombudsman", (hereinafter Col. Ombudsman, Humanitarian Crisis in Chocó 2014), available at https://www.defensoria.gov.co/public/pdf/crisisHumanitariaChoco.pdf

have been caught up in Colombian's internal armed conflict and *guerilla* groups, including FARC-EP, ELN, paramilitary organizations and drug dealers have all had a presence in the territory at one time or another.[229] The escalating nature of the conflict along with the impact of extractive activities and coca cultivation have triggered a humanitarian and environmental crisis of deep proportions. Local population in these areas have suffered directly from violence and massive forced displacements. *"From the perspective of the local social movements, all of these actors-including guerrillas, paramilitaries, capitalists and the State- share the same project, namely, the control of people, territories and resources."*[230]

In this respect, the Colombian Ombudsman's Office, *Defensoría del Pueblo*, in its 2014 Report "Humanitarian Crisis in Chocó: Diagnosis, Evaluation and Actions of the Colombian Ombudsman", highlighted the fact that indigenous and Afro-descendant communities face precarious living conditions with limited guarantees for the effective enjoyment of their rights, which has negatively affected their possibilities of ethnic and cultural survival, already hindered by having their settlement in sites of high strategic value of interest to both legal and illegal actors.[231]

Unfortunately, the war for territorial control in the Region did not end with the signing of the Colombian Peace Agreement in 2016 and a new wave of conflicts is subjecting local communities to violence and terror again.[232] The demobilization of the FARC-EP left a power vacuum in areas they controlled in Chocó. This led to disputes between other armed groups seeking to control territory, illicit economies (mainly drugs and mining), and strategic corridors for smuggling persons, drugs and weapons.[233]

This complex reality takes place in the riverbeds of the Atrato river. The Atrato river basin, with 40,000 km2, represents just over 60% of the department's area and is considered one of the highest water's yields in the world. It is the largest river in Colombia and also the third most navigable in the country, after the Magdalena River and the Cauca River. [234] It is a basin of a transboundary nature that overlaps with the collective territories of black and indigenous

[229] Macpherson (n 31) at 142
[230] Arturo Escobar. Territories of difference: place, movements, life, redes, Durham, N. C.: Duke University Press, 2008 (hereinafter Escobar Territories of difference 2008), at 64.
[231] Col. Ombudsman, Humanitarian Crisis in Chocó 2014, (n 228), at 12
[232] Anderson Maximo, 'Colombia: ELN bombardea oleoducto a horas de final de cese el fuego', Mongabay Latam, 31 January 2018, available at https://es.mongabay.com/2018/01/colombia-oleoducto-eln/
[233] *Ibidem*
[234] Ibid., at 7

communities, as recognised by "Law 70" of 1993,[235] after the tireless struggle of black social movements to secure their land rights.[236]

The socio-territorial affiliation in the region has been historically linked to the "river". The communities inhabiting the riverbanks have made the Atrato not only their territory, but the space to reproduce life and recreate culture.[237] The river is the axis through which settlements are located, where houses are built, and where communication and economic, social and cultural exchanges take place. To be sure, the river is the primordial element of territorial ascription and identity of local communities. *"It is an element of what it means to live and to live in a territorial space. It represents a relationship of life and kinship* [since colonial times].[238]

Black riverine communities are politically organised in community councils (*Concejos Comunitarios Mayores)* while indigenous groups live in their ancestral territories within *resguardos.*[239] These communities identify themselves as "agro-miners", since they have traditionally carried out seven productive activities simultaneously or interspersed with each other, according to the seasons: artisanal mining, artisanal fishing, agriculture, fruit gathering, hunting, breeding of minor species and forest exploitation.[240] Some of these activities - with which they guarantee their total food supply- remained intact until the 1980s when the aggressive development of foreign mechanised illegal mining and forestry exploitation

[235] Transitory Article 55 (AT 55) of the 1991 Colombian Constitution established that the state recognizes and protect the cultural and ethnic diversity of the nation, enacting a special law securing the definitive recognition of black communities' ethnic, territorial, cultural, economic and political rights. Arguably the most significant piece of legislation issued in development of AT 55 was "Law 70" of 1993 granting black communities the right to own collective property within their ancestral territories. For the english translation of Law 70 of 1993 (hereinafter Law 70 of 1993) see https://www.wola.org/sites/default/files/downloadable/Andes/Colombia/past/law%2070.pdf

[236]The concept of territory is of crucial significance for black and indigenous peoples in Chocó. Local movements in the 1990s, supported by catholic groups inspired on the liberation theology, produced the concept of territory by articulating a place-based framework – where the "river" plays a central role- linking history, culture, environment and social life. See Escobar, Territories of difference 2008, (n 230), at 52.

[237] The Atrato Ruling (n 2) at 10.

[238] Interview with Leineider Hinestroza (Bogotá, 24 May 2019)

[239] 'Colombia's policy on the indigenous people includes recognising their rights relating to political and administrative autonomy, land tenure, education and health. (…) This policy has been carried out by the establishment of the indigenous reserves called *resguardos* in Spanish, which is a collective property title of the land in a legal form that protects both the territory as well as the indigenous cultural and political autonomy." Van der Hammen, María Clara. The indigenous Resguardos of Colombia: their contribution to conservation and sustainable forest use. Guiana Shield Initiative of the Netherlands Committee for IUCN, 2003.

[240] Interview with Viviana González, Tierra Digna (Bogotá, 24 May 2019). See also Escobar Territories of difference 2008 (n 230) at 132 -138 on the traditional production systems of the pacific.

activities (without permit or concession from the State or the communities) in the region began.[241]

The progressive transformation of mining extraction methods in Chocó resulted in the intensive use of heavy machinery and highly toxic substances such as mercury and cyanide which, once entered into the river system, pollute the water and consequently generate cumulative and significant impacts on biodiversity, health and the well-being of the communities.[242] The discharge of Mercury -the most toxic non-radioactive substance in nature- in the Atrato bed and its tributaries is one of the most serious factors of contamination related to mining, as the river water is used for direct consumption, fishing, agricultural activities, bathing, washing clothes and cooking utensils.[243]

The serious impacts of the river pollution on the communities' food security are already tangible. Scientific studies have found alarming levels of mercury concentration in fish from the Atrato River directly impacting the main region's protein source.[244] Moreover, this environmental crisis has had a dramatic effect concerning the loss of life of the indigenous and Afro-descendant children. In 2013, 3 minors died, and 64 people were poisoned after having ingested water from the river. Similarly, in 2014 the riverine indigenous community Embera-Katío reported the death of 34 children for analogous reasons.[245]

In addition, illegal logging has changed the flow of the river, as well as increased its level of toxicity by using chemicals to immunize wood. Logging has also caused sedimentation in the river, which threatens many species and affects the river navigability directly impacting fishing activities.[246] In 2014, the Colombian Ombudsman's Office reported that, as a consequence of the contamination produced by illegal mining and forestry activities, there is a growing

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[241] Colombian Ombudsman's Office, *Defensoría del Pueblo*, "Minería de Hecho en Colombia" 2010, at 12 available at http://www2.congreso.gob.pe/sicr/cendocbib/con4_uibd.nsf/F11B784C597AC0F005257A310058CA31/%24FILE/La-miner%C3%ADa-de-hecho-en-Colombia.pdf

[242] Tutela Writ presented by 'Tierra Digna' to the Administrative Court of Cundinamarca, at 5

[243] The Atrato Ruling (n 2) at 7

[244] Mercury has the capacity to transform itself into the organic compound methylmercury, an even more dangerous substance, which is capable of bioaccumulating in living beings and increasing its concentration as it ascends the food chain, for example, in fish meat, which represents the primary source of food for the Chocó population. Heinrich Böll Stiftung , La Corte Ambiental - Expresiones Ciudadanas sobre los Avances Constitucionales (hereinafter La Corte Ambiental, 2019), at 300; available at https://co.boell.org/sites/default/files/la_corte_ambiental_version_web.pdf

[245] The Atrato Ruling, (n 2) at 10, para. 2.4 and Kauffman, C., & Martin, P. (2017). When Rivers Have Rights: Case Comparisons of New Zealand, Colombia, and India. In International Studies Association Annual Conference, (hereinafter Kauffman and Martin, When Rivers Have Rights 2017), at 9

[23] Interview with Viviana González, Tierra Digna (Bogotá, 24 May 2019)

proliferation of diseases such as diarrhoea, dengue and malaria within the riverine communities.[247]

This serious situation is significantly aggravated by the lack of water and sewage systems as well as the inexistence of waste-water treatment facilities in the riverine settlements and municipalities. Solid and liquid waste are practically deposited in the river which contributes to the deterioration of water quality.[248]

All the forgoing adds to the socio-cultural problems generated by illegal mining activities in the region. Jose Américo Mosquera, legal representative of the Community Council of the Popular Farmers Organization of the Alto Atrato – COCOMOPOCA and Guardian of the Atrato River, describes how mining has become the only livelihood alternative for Atrato communities, who often find themselves forced to rent their land for illegal mining activities, even without the authorization of the Community Councils, which triggers conflicts among community members. *"Mining is going to stop, and people are going to be left living here with everything contaminated."*[249] He also narrates, how families and social relations have been disrupted by temporary mining stations. Foreign miners with a higher economic capacity than local men will engage with women from the community tearing families apart and often leaving women alone with children after they leave the territory. In conclusion, says Jose Américo, "w*e do not agree with the way mining is being done on our territory. Because where there are companies, national or multinational, there are problems. Sometimes we think that money brings development, but it only brings problems*."[250]

This scenario, full of both richness and complexities, has witnessed the long-standing struggle of local social movements for a satisfactory government response to their countless needs[251].

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[247] Col. Ombudsman, Humanitarian Crisis in Chocó 2014, (n 228)

[248] The Atrato Ruling (n 2) at 96. "The precarious living conditions of the people of Chocó are based on the low coverage of administrative services (institutional presence) and essential public services (water supply, sewerage and sanitation) which have a direct impact on the health conditions of the population. (…) The vast majority does not have access to quality drinking water or to water supplies to meet their most basic needs. Regarding sanitation service, the coverage of the department is 32%, while rural coverage is only 6%."

[249] Interview with José Americo Mosquera, Leader Cocomopoca, Guardian of the Atrato, (Quibdó, 31 May 2019)

[250] *Ibidem*

[251] Local communities had already activated different routes for the protection of their rights and the river. 'In 2011, local communities asked the National Mining Agency to stop illegal activity, producing Decree 4134 to suspend mining concessions. In 2013-2014, the National Mining Agency worked in Choco to create sustainable mining practices with the community. The Agency argues that these policies were successful. Nevertheless, in 2014 the Defensoria del Pueblo declared a state of human and environmental emergency in Choco. The Defensoria noted with alarm that the competent national and local authorities had not provided actions to confront and solve the serious situation that threatened the Rio Atrato, its tributaries, and the existence of the forest and the people.' See Kauffman and Martin, When Rivers Have Rights 2017, (n 245), at 9. In addition, the Atrato communities have filed both administrative and constitutional (three class actions, six injunctions) for the protection of water

However, to this day the situation remains the same. The structural racism to which these communities have been subjected since colonial times is still reflected in centralized policy making processes that seem to prioritize the economic benefits arising from the exploitation of natural resources over the very existence of the indigenous and afro-descendant communities of Chocó.

2. Building the Atrato case: from the heart of the river to the Colombian Constitutional Court

Taking a case to court with the objective of going beyond the boundaries of the individual case and establishing a precedent that can eventually transform or balance unjust power relations, is usually known as strategic or public litigation. For this tool to achieve its full potential, litigation should be part of a wider strategy in which the work with community-based groups and social movements is essential. It is in the framework of these social and political projects that one can understand the real issues that need to be addressed through courts and thus, ensure that change can be sustained or implemented if a positive legal outcome is actually achieved.

The strategic case of the Colombian Atrato River was born as part of a highly committed and articulate social movement of black communities in the Pacific region, that for more than 30 years has fought for the defense of their territory and their life. As narrated by José Americo Mosquera, one of the greatest achievements of the black movement was the recognition of collective black property as part of the 1991 constitutional reform process[252]. The Transitory Article 55 (AT-55) of the Colombian Constitution gave way to the "Law 70" in 1993, which recognized the right of Black Communities living on barren lands along the rivers of the Pacific Basin to their collective property and established mechanisms for protecting the cultural identity and rights of Afro-Colombian communities as an ethnic group.[253]

Following the adoption of the "Law 70/93", Community Councils were formed as the internal administrative body of each community. Approximately 2.915.339 hectares have been registered as collective territories of black communities in Chocó[254]. As explained in the previous chapter, this victory represented only a step further in the black movement's battle for their territory. The escalating dynamics of the armed conflict and the extractive activities in the

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and the environment, that have resulted in decisions favorable to the claimants that have, however, never been implemented. The Atrato Ruling (n 2) at 25

[252] Interview with José Americo Mosquera, Leader Cocomopoca, Guardian of the Atrato, (Quibdó, 31 May 2019)

[253] Law 70 of 1993, (n 235)

[254] The Atrato Ruling (n 2) at 2

region constitute imminent threats for their life and the conservation of natural ecosystems. This situation has been a cause of concern for the Community Councils from different viewpoints. One of them was related to Articles 20 and 21 of the "Law 70/93" which provides for the ecological function of their collective property.[255]

According to these articles, black communities must be responsible for protecting the environment and for the renewal of natural resources of the territory covered by the collective title. Moreover, they must assist the authorities in protecting that patrimony. Due to the armed conflict and the serious ecological, cultural and social impacts of mining and forestry activities in the region, the communities' duty to preserve and protect the natural environment became an impossible task. Against this background, community leaders realized there was an impellent need to shield their collective property by casting light on the fact that the impossibility to comply with the ecological function of their communal territory was due to the failure of the State to grant the adequate conditions for its fulfillment.[256]

At the heart of this complex problematic lies the loss of autonomy of the Atrato river communities to manage their territory. An autonomy that, as already mentioned, had been previously recognized to them through the 1991 Constitution and the "Law 70/1993." As Escobar (2008) argues, in the past, communities maintained relative autonomy as well as forms of knowledge and ways of life conducive to certain uses of natural resources; in the present, there is a need to defend their territory.[257] This knowledge to which Escobar refers, is intrinsically linked to the conservation of biodiversity -which for local activists equals territory plus culture- and, consequently, to the 'ecological function' of the collective titles granted to afro-descendant peoples in the country. The long-term results in terms of biodiversity conservation and local autonomies would have been noticeable if the process had not been disrupted drastically after 2000 by a series of factors, including the arrival of people foreign to the region to impose the excessive exploitation of resources, the terrorizing strategies used by armed actors and inadequate state development policies.[258] Ultimately, the environment, the river, was to be put at the center of attention to desperately reclaim for the protection of these autonomies, and with it, the territory and the lives of the Atrato people.

[255] Law 70 of 1993, (n 235), Articles 20 and 21.
[256] Interview with José Americo Mosquera, Leader Cocomopoca, Guardian of the Atrato, (Quibdó, 31 May 2019)
[257] Escobar, Territories of difference 2008, (n 230), at 145
[258] Ibid., at 63

This being the case, the decision to start a legal action against the Colombian State for the protection of their territory, and specially the river, was developed by local communities accompanied by the Center of Studies for Social Justice 'Tierra Digna',[259] which had been closely working with local communities in the region since 2010.[260] In 2013, the interethnic Solidarity Forum of Choco (FISCH)[261] entrusted 'Tierra Digna' with the role of identifying the main socio-environmental conflicts in the four sub-regions comprising Chocó (Upper basin, Lower basin and Darién, the Pacific Coast and Baudó).[262] Within the framework of this investigation, 'Tierra Digna' delivered a legal workshop, *diplomado,* aimed at strengthening the legal skills of local leaders in the different sub-regions. The primary aim of the course was to provide community leaders with sound knowledge on the legal tools they could rely on to demand the fulfillment of their rights. The secondary objective was to map the regional socio-environmental conflicts with the participants sand, as a practical exercise, to find a legal avenue to solve these conflicts by applying the legal tools they were being taught during the sessions.[263]

During the first workshop, which took place in the lower Atrato sub-region, participants referred to the river contamination, caused by forestry exploitation since the 1970's,[264] as the main cause of impact on community life. They also casted light on the fact that, although the lower Atrato is not a mining area, pollution from mining activities in the upper and middle Atrato flows downstream, affecting their daily life. This showed the structural nature of the Atrato river contamination and the need to act collectively with all the Mayor Community Councils to counteract its grave consequences.

While community leaders diagnosed the region's territorial conflicts, the role of 'Tierra Digna' was to articulate the findings to trace the real causes behind them. As explained in the previous

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[259] Tierra Digna is an organization dedicated to the defense of the territory, life and culture of marginalized communities in Colombia, concentrating its efforts in the realization of an integral accompaniment to the communities, through four lines of action: 1. Legal support for strategic litigation through judicial or administrative actions; 2. Political advocacy for communities to be able influence decisions on the management of their territory; 3. Organizational strengthening, so that local organizations can undertake by themselves a greater legal defense of their territory ; 4. Research and documentation of the social, economic and environmental situation on a given territory and the potential risks, i.e. mining titles requested, which companies are present in the territory, which public policies are supporting the arrival of external actors. Interview with Viviana González, Tierra Digna (Bogotá, 24 May 2019)

[260] *Ibidem*

[261] The FISCH is a space for inter-organizational coordination of black, indigenous, mestizo, social, youth, women, rural and urban communities, which emerged in 2001 as a strategy for the protection of communities, organizational strengthening, and the definition of regional strategies to overcome social and armed conflicts. https://www.forointeretnico.com.co/acciones-juridicas/

[262] Interview with Viviana González, Tierra Digna (Bogotá, 24 May 2019)

[263] *Ibidem.*

[264] *Ibidem.* When the multinational company 'Maderas del Darien' arrived in the area to install an aggressive exploitation model that was then reproduced by other companies in the region.

section, mining, logging and the mismanagement of discharges and solid waste disposal were identified as the main causes for the deterioration of the river. Communities stressed that their lives were crossed by and built around the Atrato river, hence its deterioration was significantly impacting their cultural, economic and social life.[265]

These impacts were translated by 'Tierra Digna' and community leaders into legal language by determining which fundamental rights were being violated in this context. As a primary conclusion, violations of the rights to life, territory, food security, health, self-determination and transport were listed.[266] Following many sessions of reflection and discussion, members of the FISCH and Tierra Digna decided to gather evidence on the environmental injustices present in the Chocó. This task involved the collaboration of several stakeholders, such universities and humanitarian and environmental organizations. This network worked together for two years in a collective process where everyone contributed to the debate bringing different information, skills and help.[267]

2.1. The legal course of action: constitutional *Tutela* action

Due to the fundamental character of the rights affected by the pollution of the river, the legal avenue chosen by the communities to demand the protection of the Atrato river and, consequently, their rights, was the Constitutional *Tutela* Action. The 1991 Colombian Constitution was born as an answer to the desperate demand of substantial change in Colombian politics.[268] Several mechanisms and institutions were introduced in the Constitution to facilitate that the text was applied at both the abstract level and in quotidian disputes.[269] Besides the inclusion of a generous bill of rights, the 1991 Constitution established a Constitutional Court and extended the constitutional jurisdiction to all judges in Colombia.[270] Additionally, new safeguarding procedures for the protection of different types of rights were

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[265] *Ibidem*
[266] *Ibidem.*
[267] Interview with Viviana González, Tierra Digna (Bogotá, 24 May 2019)
[268] The movement to convene a Constitutional Assembly, kwon as the seventh ballot (séptima papeleta), was led by the national student's movement organized after the murder of liberal leader and presidential candidate Luis Carlos Galán in August 1989. According to Eslava, the Colombian constitutional reform process began with a twofold purpose: *"(1) to promote participatory democracy and empower citizens for direct, effective involvement in the public and private decision-making processes, and (2) to strengthen State institutions, especially the judiciary, with the aim of level vast social inequalities and struggles of authority and power."* Eslava, Luis (2009) Constitutionalization of Rights in Colombia: Establishing a Ground for Meaningful Comparisons (hereinafter Eslava, Constitutionalization of Rights in Colombia 2009). Revista Derecho del Estado, 22 pp. 183-229. ISSN 0122-9893, at 201; available at https://kar.kent.ac.uk/40966/1/Constitutionalization%20of%20Rights%20in%20Colombia.pdf
[269] Ibid, at 202
[270] *Ibidem*

introduced, including a writ to order administrative authorities to fulfil their legal mandates in specific situations (*Acción de Cumplimiento*)[271], to protect collective rights (*Acción Popular* or class action),[272] to secure rights of specific social groups (*Acción de Grupo*),[273] and finally the writ of protection of fundamental rights (*Acción de Tutela*).[274]

The *Tutela* action enables any person (or their relatives, friends, or lawyers) to directly request any judge with territorial jurisdiction to protect his or her fundamental rights when they are being threatened or violated by the act or omission of any public authority or private individual.[275] The judge is legally bound to give priority attention to the request which must be ruled on within 10 days.[276] Moreover, in accordance with the requirements of the specific situation under revision, the tutela procedure allows the judge to order the adoption of any measure necessary to protect threatened fundamental rights, even before pronouncing a final judgment.[277] These protectionist features of the *Tutela* writ prompted Atrato riverine communities to choose this constitutional mechanism as the legal avenue to demand the enforcement of their rights.

Viviana Gónzalez, explains that the natural action for this case would have been a class action, thus, deciding to file a Tutela writ implied a tremendous legal challenge. However, other constitutional mechanisms had been already activated to stop mining activities in the region without achieving any effective response to the problem.[278] In 2011 a class action was filed to demand the protection of the rights of the communities settled by the Atrato river basin in the town Río Quito. By 2015 -when the Atrato River *Tutela* was filed- a final judgement was still pending.[279] The length of this procedure was incompatible with the urgency of the situation in the Atrato, where lives were at high risk and many fundamental rights were being systematically violated. Moreover, class actions do not provide the competing judges with the necessary tools to issue a structural ruling as required in the Atrato case. Finally, adds Gónzalez, it is intended for the protection of collective rights and interests related to the

[271] Col. Const. art. 87.
[272] Col. Const. art. 88.
[273] *Ibidem*
[274] Col. Const. art. 86. Regulated by Decree 2591/1991, available at http://www.secretariasenado.gov.co/senado/basedoc/decreto_2591_1991.html
[275] Decree 2591 of 1991, Chapter III.
[276] Ibid., Article 29
[277] Manuel José Cepeda Espinosa. (2004), 'Judicial Activism in a violent context: The origin, role and impact of the Colombian Constitutional Court', Washington University Global Studies Law Review 529, 575, available at https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1256&context=law_globalstudies#page=25&zoom=100,0,-72
[278] Interview with Viviana González, Tierra Digna (Bogotá, 24 May 2019)
[279] The final judgement was handed down on 19 November 2015 by the Administrative Court of Cundinamarca

environment and public health, among others, but in this case, the impact on the right to a healthy environment was not abstract, but had specific repercussions on life, health and food security. Accordingly, a class action was not considered to be the appropriate avenue to ensure the protection of these individual rights in concrete terms. [280]

With this in mind, on 27 January 2015, Mayor Community Councils of the Region,[281] represented by 'Tierra Digna', filed a *Tutela* action before the Administrative Court of Cundinamarca, against 26 national and local authorities for the protection of their fundamental rights to life, human dignity, health, water, food security, a healthy environment, culture and the territory of the ethnic communities.*[282]* Substantiated with solid and extensive evidence on the negative impacts of mining and logging on the Atrato river, the *Tutela* writ clearly explained how these impacts had significant repercussions on the ability of the communities to enjoy their basic human rights due to their strong cultural, social and economic relationship with their natural environment and particularly the river. As argued by community leaders during the workshops, protecting the Atrato river would almost automatically translate in the protection of the communities' rights.[283]

The Atrato communities expected the Court to order alternative measures to those that had been advanced so far, without any positive results for the regional crisis[284]. Accordingly, they asked the Court to issue concrete orders and measures to articulate structural solutions for the unprecedented socio-environmental crisis in the main river artery of Chocó.[285] The idea was to obtain a structural judgment for a whole region. Therefore, the *Tutela* aimed at showing the disarticulation of State institutions by exposing the massive omission of their functions in relation to the dramatic situation in Chocó, which had systematically deepened the condition of vulnerability of local communities.[286]

Among other measures, the claimants demanded a technical and comprehensive diagnosis of the real environmental, social and health impacts experienced by the populations of the Atrato basin, as well as the formulation of comprehensive reparation programs aimed at remediating

[280] Interview with Viviana González, Tierra Digna (Bogotá, 24 May 2019)
[281] Major Community Council of the Popular Peasant Organization of the Alto Atrato (Cocomopoca), the Major Community Council of the Integral Peasant Association of the Atrato (Cocomacia), the Association of Community Councils of the Bajo Atrato (Asocoba), the Chocó Inter-Ethnic Solidarity Forum (FISCH) and others.
[282] The Atrato Ruling (n 2) at 81
[283] Interview with Viviana González, Tierra Digna (Bogotá, 24 May 2019)
[284] *Ibidem.*
[285] The Atrato Ruling (n 2)
[286] Interview with Viviana González, Tierra Digna (Bogotá, 24 May 2019)

these impacts, including the productive and environmental restoration of the river and the territories affected by mining and forestry activities. [287]

As stated by Gónzalez, the abandonment of the State had paved the way for private actors and armed groups linked to the mining and logging industries, to impose an extractive economic model on the region. Communities have been unable to oppose to this model due the use of violence and the lack of a minimum standard of living ,and economic opportunities which has made them economically dependent on illegal mining and logging, activities that in turn deteriorate their natural environment and community life.[288] This loop, that has trapped communities in Chocó, became evident when member of the community tried to reach an agreement on the filing of the *Tutela.* Some community members interpreted the action as a means to stop mining activities in the region, which represented a threat to their main and only source of income.[289] Thus, the legal action to be pursued required structural measures that could break this dangerous cycle and open the door to alternative avenues of development or, in the words of local communities, ethno-development.[290]Along these lines, a claim included in the *Tutela* writ was that the State must contribute to strengthening sustainable and lasting productive alternatives that would provide communities with a solid base of sustainable income, allowing them to live in dignified conditions.[291]

Ultimately, the aim of the Tutela was to stop the intensive and large-scale mining in the Atrato River its basins, swamps, wetlands and tributaries, which had been intensifying for several years and were having harmful and irreversible consequences on the environment, thereby affecting the fundamental rights of the ethnic communities and the natural balance of the territories they inhabit.[292]

2.2.First and Second Instance Judgments

The Administrative Court of Cundinamarca handed down the first instance judgment on 11 February 2015, declaring the *Tutela* action inadmissible due the collective nature of the rights that the claimants were seeking to protect through the *Tutela* action. The Court stablished that the appropriate legal action for the defense of the plaintiffs' interest was the class action.

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[287] Public statement of the Colombian network for environmental justice, 18 February 2016, available at https://justiciaambientalcolombia.org/comunicado-rio-atrato/
[288] *Ibidem*
[289] Interview with José Americo Mosquera, Leader Cocomopoca, Guardian of the Atrato, (Quibdó, 31 May 2019)
[290] Interview with Jeison Palacios, member of the FISCH Technical Secretariat, (Quibdó, 30 May 2019)
[291] *Ibidem.*
[292] The Atrato Ruling (n 2) at 9

Finally, the tribunal considered that before filing a *Tutela* action, the plaintiffs should have filed an injunction before the class action judge, who retains the competence to execute the necessary measures to address the State's failure to comply with the judgment.[293]

'Tierra Digna', appealed the first instance ruling, presenting three arguments: (i) ignorance of the violation and threat to the fundamental rights of the petitioning communities; (ii) irregularities in the judicial process of the action of protection and (iii) the activation of other judicial actions that have not been effective.[294]

On 21 April 2015, the State Council, Second Section, as second instance Court, issued a ruling confirming the contested decision.[295] Despite the double defeat, 'Tierra Digna' lawyers were convinced that the *Tutela* Action was the appropriate and only legal option able to provide the needed measures to enforce the fulfilment of the communities' fundamental rights. Hence, decided to present a direct request to the Constitutional Court for the revision of the ruling

2.3. Constitutional Review of *Tutela* judgments

According to Article 241 of the Colombian Constitution[296], every single tutela can be potentially reviewed by the Constitutional Court, which will select those that it considers necessary to correct or pertinent for the development of its own case law and issue a corresponding judgment[297]. In compliance with this mandate, Tutela rulings from all corners of the county are sent to the Constitutional Court for "potential review", once a judgement has become final. In accordance with Articles 86 and 241, n. 9 of the Colombian Constitution the review carried out by the Court is of an ad hoc nature and does not constitute a third instance that allows the parties to discuss all of their arguments in a new venue or to seek specific protection for their requests. Moreover, the review is carried out on an exceptional basis and in

[293] Ibid., at 17
[294] *Ibidem.*
[295] According to Colombia's Constitutional Charter, the Council of State is the highest tribunal on administrative law (Arts. 236-238), while the Supreme Court is the highest tribunal in all other legal matters (Arts. 234-235). The Constitutional Court is the ultimate forum on supra-legal matters, that is, constitutional affairs (Arts. 239-245). Besides, there are special jurisdictions, such as indigenous jurisdictions (by indigenous for indigenous, within indigenous reserves and under indigenous rules, Art. 246), peace jurisdictions (Arts. 247, and particularly the *Jurisdicción Especial para la Paz* (Especial Peace Jurisdiction) created in the context of the Peace Agreement through Acto Legislativo 001 of 2016) and the criminal jurisdiction for the military (Art. 221).
[296] Colombian Constitution, Article 241. *"The safeguarding of the integrity and supremacy of the Constitutional Court according to the strict and precise terms of this article. For this purpose, it will fulfill the following functions: (...) 9. Revise, in the form determined by law, the judicial decisions connected with the protection of constitutional rights."* See especially, Articles 86 and 241.9 of the Constitution; Articles 32 and 33 of Decree 2591/91; Internal Rules of Procedure of the Constitutional Court, Agreement 02 of 2015.
[297] Eslava, Constitutionalization of Rights in Colombia 2009, (n 268) at 201

the exercise of its authority, the Court may delimit the legal issues on which it will rule and eventually cease to analyze matters raised in the action.[298]

The discretionary power of the Court to select the *Tutela* judgements to be reviewed, must be exercised in accordance with the guiding principles and criteria established by the rules of procedure of the Court.[299] The Selection Chambers have a period of 30 working days following receipt of the *Tutela* to select or exclude the case for possible review.

In the Atrato case, 'Tierra Digna' filed a direct request for the Court to review the judgement rendered by the State Council on 21 April 2015, explaining the urgency and importance of the case.[300] The Colombian Ombudsman's Office, *Defensoría del Pueblo,* supported the petition highlighting the humanitarian crisis in Chocó and its connection with the deplorable state of the river.[301] The Sixth Selection Chamber of the Constitutional Court,[302] selected the case thanks to the persistence of the Ombudsman,[303] and assumed responsibility for reviewing the first and second instance judgments that rejected the admission of the *Tutela* Action.

Once the Atrato case was selected by the Court for exceptional review, 'Tierra Digna', submitted a brief redirecting the evidentiary strategy of the case.[304] From the negative decisions

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[298]Colombian Constitutional Court, Auto 273/2013, available at https://www.corteconstitucional.gov.co/RELATORIA/Autos/2013/A273-13.htm#_ftn50

[299] According to the Rules of Procedure of the Court, a Tutela judgment might be selected for review when it offers the possibility of unifying the Court's jurisprudence, providing an opinion on a certain line of case-law, clarifying the content and scope of a fundamental right and addressing the potential violation of a Court precedent (objective criteria); it might also be chosen when there is urgency to protect a fundamental right or the need to materialize a differential approach (subjective criteria); finally when the case involves fight against corruption, examination of pronouncements of international judicial or quasi-judicial bodies, preservation of the general interest and serious damage to public assets (complementary criteria). See For further information see Constitutional Court Accord 02 of 2015, "By means of which the Regulations of the Constitutional Court are unified and updated", Article 51. Available at https://www.corteconstitucional.gov.co/inicio/Reforma%20Reglamento-19.pdf and Ferrer, Ana Giacomette. "Selección y revisión de tutela por la Corte Constitucional:¿ Nuevo litigio constitucional?." La Constitución y sus garantías: 405.

[300] Tutela judgements might be submitted for consideration of the Selection Chambers by the Constitutional Court's Unit of Analysis and Monitoring of Tutela rulings, by one of the Magistrates in the correspondent Selection Chamber, by a citizen's initiative or through the Insistence proceeding, *Insistencia*, which can be initiated by any Constitutional Magistrate or directly by the Attorney General, the Ombudsman the National Legal Defense Agency, within fifteen (15) calendar days from the date of notification by status of the Selection Board's order.

[301] Interview with José Americo Mosquera, Leader Cocomopoca, Guardian of the Atrato, (Quibdó, 31 May 2019); Report of the Colombian Ombudsman on the https://www.defensoria.gov.co/public/rendiciondecuentas/assets/delegada-asuntos-constitucionales-y-legales.pdf at 9, footnote 11.

[302] The Chamber was composed of Aquiles Arrieta, who acted as the judge in charge, Alberto Rojas Ríos and Jorge Iván Palacio Palacio, who presided it.

[303] Originally the Court had not selected the case during the standard internal procedure of nationwide judgement review. Interview with Felipe Clavijo-Ospina, former law clerk at the Constitutional Court of Colombia (23 May 2019).

[304] Interview with Viviana González, Tierra Digna (Bogotá, 24 May 2019)

issued at first and second instance, it became clear to the applicants that unless the Court had detailed evidence on the facts of the case and unless it could directly verify the status of the river, the likelihood of obtaining a favorable decision was decisively reduced.[305] This being the case, 'Tierra Digna' requested the inclusion of several reports from recognized authorities and institutions giving account of the importance of rivers for communities of the Colombian Pacific, and specifically of the Atrato region, as evidence in the case. Detailed and reliable studies on the impact of mining and logging activities on the biodiversity of Chocó were also presented to the Court.[306] Moreover, the claimants requested the Court to conduct an onsite inspection in the Atrato River basin. As will be discussed later, the judicial inspection carried out by the Court had a significant impact on the decision taken by the judges and their ability to make the final ruling a mirror capable of reflecting the reality of the Atrato river and the communities inhabiting its basin.

Building the Atrato case with a bottom up approach was possible due to the strength of the Afro-Colombian social movements and their collaboration with other stakeholders, who along with 'Tierra Digna', played a vital role in the litigation process. The National Ombudsman Office, NGOs, universities and other civil society groups collaborated with local communities to create more evidence on the social and environmental injustices they were facing and to exercise pressure for the revision of the ruling by the Constitutional Court. Furthermore, as discussed above, the mechanisms for the protection of the fundamental rights of ethnic minorities embedded in the Colombian Constitution, such as the *Tutela* writ and the revision powers of the Court, proved to be crucial in giving voice to those who are often silenced by powerful political and economic forces.

3. The Atrato Ruling - T-622-2016

'(…) el respeto por la naturaleza debe partir de la reflexión sobre el sentido de la existencia, el proceso evolutivo, el universo y el cosmos'[307]

As discussed in the previous chapter, the Atrato case was built around the protection of the river as the central axis of the communal -and individual- life of ethnic peoples inhabiting the river basin. Ultimately, based on this inextricable connection, the aim of the claimants was to enforce the protection of their rights by restoring the ecosystem they inhabit and on which their

[305] *Ibidem.*
[306] *Ibidem.*
[307] The Atrato Ruling (n 2) at 140

life mainly (inter)depends. Concretely, the Court assumed the responsibility for determining whether due to illegal mining activities in the Atrato River Basin (Chocó), its tributaries and surrounding territories, and whether by the omission of the state authorities sued (in charge of dealing with this situation, both at the local and national levels), there is a violation of the fundamental rights to life, health, water, food security, a healthy environment, and to the culture and territory of the Atrato ethnic communities."[308]

The decision of the Court leans towards the protection of all Atrato communities, including those who had not filed the *Tutela* but are equally affected by the deterioration of their natural ecosystems. Significantly, the Court recognizes the existence of biocultural rights of the ethnic communities living by the river and consequently, declares the Atrato River as a subject of rights. Furthermore, the Court orders a series of actions to be carried out jointly by several State agencies at national, regional and municipal levels aimed at implementing its decision.

As it will be seen further on, the Atrato Ruling is deeply grounded on an *ecocentric* approach, underpinned by the vast Colombian and Interamerican jurisprudence on indigenous, afro-descendants and environmental rights. Similarly, the Court relies on the so called 'ecological' or 'green' Constitution as the justification for a progressive distancing from the *anthropocentric paradigm*, which has historically ruled the relations between human beings and the environment.[309] Furthermore, the Atrato ruling draws on the international evolution of the rights of nature and the nascent concept of biocultural rights through comparative 'precedents' and multidisciplinary theoretical review.[310]

In the following sub-sections, an overview of the Atrato-Ruling will be provided. The first part will focus on the admissibility of the Tutela action; the second part portrays the way in which the notion of the so-called 'Social Rule of Law' (SRL) is placed by the Court as the constitutional basis for the measures adopted to address the social and ecological crisis in the Atrato region. The third part focus on the introduction of the pillar concept of biocultural rights,

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[308] *Ibidem.*

[309] García J. F.A. and Hernández M.C., La Corte Constitucional y la transformación del gobierno de los recursos naturales en Colombia: el caso de los mineros tradicionales de Marmato, La Corte Ambiental, 2019, at 145.

[310] The decision of the court was heavily influenced by international comparative 'precedents', including laws from Ecuador (2008) and Bolivia (2010), as well as the recognition of legal personhood to the Whanganui River in New Zealand (2014). In addition, the court relies on the academic work of scholars like Sanjay Kabir Bavikatte, Bennett and Robinson (Bavikatte, K., & Bennett, T. Community stewardship: the foundation of biocultural rights, Journal of Human Rights and Environment, Vol. 6 No. 1, 2015 and Bavikatte's and Robinson's 'Towards a People's History of the Law: Biocultural Jurisprudence and the Nagoya Protocol on Access and Benefit Sharing' (2011)) and Arturo Escobar (Escobar, Arturo. "Encountering Development: The making and unmaking of the third world", Princeton University Press, Princeton, New Jersey, 1995).

to then address the Court's factual considerations regarding mining activities in the region and finally, the declaration of the Atrato River as a subject of rights.

3.1.Admissibility of the *Tutela* action: Transiting from the collective to the individual

The first legal element the Court analyses is the admissibility of the *tutela* in a case concerning the violation of the collective right to a healthy environment, the protection of which should be invoked through a class action enshrined in Article 88 of the Political Constitution. the Court referred to the immediacy, legal standing and subsidiarity requisites of the *Tutela* in the Atrato case. The Court found the claim to be actual and persistent over time. The illegal activities causing the damages were continuous as a result of the omission in the fulfillment of the functions by the defendant entities, thus the preliminary matter met the requirement of immediacy. Secondly, the Court reminded that in order to facilitate access to justice to populations that have been traditionally excluded from the judicial system, such as afro-descendant groups, constitutional case law has established that both the leaders and the individual members of these communities have standing to file the *Tutela* Action in order to pursue the protection of their community's rights.[311]

Finally, the Court referred to the principle of subsidiarity. According to Article 86 of the Colombian Constitution, the *Tutela* action *"will only proceed when the affected party does not dispose of other means of judicial defence, unless it is used as a transitory mechanism to avoid irreparable damage."*[312] Nevertheless, in cases where there are ordinary judicial means of protection available to the plaintiff, the protection will be exceptionally applicable if the constitutional judge is able to determine that: *(i) ordinary defense mechanisms and resources are not adequate and effective enough to guarantee the protection of rights allegedly violated or threatened; (ii) constitutional protection is required as a transitory mechanism, since, otherwise, there would be irremediable damage; and (iii) the holder of the fundamental rights threatened or violated is a subject of special constitutional protection."*[313]

In the sub-examine case, the trial judges rejected the *tutela*, arguing that non-fundamental collective rights -as those involved in this case- are susceptible to protection through other means of judicial defense, such as the class action. The Constitutional judges dismissed

[311]The Atrato Ruling (n 2) at 23
[312] Col. Const Article 86
[313] Cons C. Judgment T-177 - 2011

this reasoning based on two main arguments: i) the impairment of both fundamental and collective rights. While the right to enjoy a healthy environment is a collective right, in the present case, its violation has repercussions on concrete fundamental rights such as the right to life, human dignity, health among others. Moreover, the plaintiffs belong to a protected minority, whose rights to a collective territory, traditional and cultural practices have been constitutionally recognized. To that extent the protection of a healthy environment represents a necessary condition for the effective enjoyment of other fundamental rights of ethnic communities, such as the right to territory, collective identity and cultural integrity;[314] ii) the ineffectiveness of class actions as a suitable resource to solve the complex problems raised in the preliminary case. The Court noted that the plaintiffs had filed and previously won several class actions for the protection of their collective rights without having concrete results of the implementation of said decisions.[315]

Furthermore, the Court noted that the ineffectiveness of the class action in this case, could be explained, by the structural nature of the matter to be resolved, which requires the adoption of complex measures and an inter-institutional articulation that exceeds the normative and practical scope of class actions. Thus, according to the Court, the *tutela* action, which was designed precisely to respond to complex and structural problems is the appropriate means for the effective protection of the fundamental rights of the ethnic communities of the Atrato River Basin.[316]

3.2. The Social Rule of Law

The principle of the SRL or *socia*l *welfare state*,[317]introduced by the 1991 Constitution as the founding pillar of the Colombian State and the ultimate goal of its society, represents the basis for the Court's political statement in the Atrato ruling. Differently from the Rule of Law-ROL, in which the role of the State exclusively responds to the concept of formal equality and individual freedom, the SRL is deeply rooted in the principle of substantive equality.[318] Hence, the realization of the *welfare state*, on which the ontological existence

[314] The Atrato Ruling (n 2) at 21
[315] Ibid, at 25
[316] *Ibidem.*
[317] The roots of the notion of SRL are linked to the theorist Hermann Heller, who years after the First World War, in a famous article entitled "Rechtsstaat oder Diktatur?" (1930), would define the Rule of Law- in the terms of a SRL as a form of opposition to the old abstract vision of liberal constitutionalism. The Constitutionalization of the SRL model took place with the enactment of the fundamental Law of Bonn in 1949. The Atrato Ruling (n 2) at 26
[318] Ibid, at, 27

of the Colombian State actually depends,[319]implies affirmative actions from the authorities aimed at correcting existing inequalities, promoting inclusion and participation, and guaranteeing the realization of fundamental rights of everyone and particularly of the most vulnerable members of society.[320]

The adoption of the SRL formula, which led to the definition of the Colombian State as a *"democratic, participatory and pluralist Republic"*[321],is historically explained by the desire of a democratic renewal capable of overcoming the homogenizing discourse of the previous 1886 Constitution. The 1991 constitutional reform can be summarized in a twofold purpose: (i) to promote participatory democracy and empowerment of civil groups for direct, effective involvement in the public and private decision-making processes. Especially the recognition of participation spaces for the historically marginalized ethnic minorities, and (2) to strengthen State institutions, especially the judiciary, with the aim of level vast social inequalities and struggles of authority and power."[322]

It is against this constitutional framework that the Court assumed an active role in protecting the rights of the claimants. Indeed, the afro-descendant and indigenous communities inhabiting the Atrato River represent the marginalized sector of society that the 1991 Constitution sought to include in the national political project by making the legal world attainable to them and thus defeating the invisibilizitation of their ethnic and cultural diversity. The Court underpins its reasoning on the fact that not only the rights but the very existence of the claimants have historically been threatened by the abandonment of the State and the displacement of their cultural and economic traditions due to new ways of understanding the territory.[323] The dramatic environmental and social crisis in Chocó proves then to be a failure in the realization of the SRL, which the Court addresses by reinterpreting the content and scope of existing legal institutions to fill them with novel meanings directly informed by the conditions on the ground and an open critique of one of the root causes that, in the view of the Court, have generated and sustained the crisis: the western development model.[324]

[319] Constitutional Court, T-406/1992
[320] The Atrato Ruling (n 2) at 24 and 39
[321] Colombian Constitution, Article 1
[322]Eslava, Constitutionalization of Rights in Colombia 2009, (n 297)
[323] Interview with Felipe Clavijo-Ospina, former law clerk at the Constitutional Court of Colombia (23 May 2019).
[324] The Atrato Ruling (n 2) at 51, citing Escobar, Arturo. "Encountering Development: The making and unmaking of the third world", Princeton University Press, Princeton, New Jersey, 1995. Pág. 44.

The Court appears to recognize that an alternative understanding to the national development model, requires a cultural transformation underpinned by a shift in the environmental ethics currently determining the way human beings interact with the ecosystems we inhabit. In the Atrato ruling, this resulted in the adoption of the *ecocentric approach* -already present in domestic constitutional case-law- as the philosophical basis for the development of the biocultural rights and the legal personhood of the Atrato river. The Court's reasoning, which clearly surpasses the classical frameworks of environmental and individual human rights law, draws legal support from precepts of national and international law contained in the domestic constitutional concepts of *"Cultural Constitution"* and *"Ecological Constitution",* informed by the so-called *"Constitutional Block".*

a. The Constitutional Block

The notion of "Constitutional Block" (Bloque de Constitucionalidad), refers to a set of rules, norms and principles that, without formally appearing in the text of the Constitution, have been granted the same supra-legal value, by the mandate of the Constitution itself.[325]To be sure, they are truly principles and rules of constitutional value and hierarchy, and as such directly enforceable interpretative and applicative criteria that no judicial "operator" should fail to consider" when adjudicating a constitutional matter.[326] This is the case of international norms dealing with human rights, international criminal law and international humanitarian law.[327] By virtue of the "forward clause" contained in article 93 CP, "international treaties and agreements ratified by Congress, which acknowledge human rights and which prohibit limitation of these rights in states of emergency, prevail in the domestic legal order. The rights and obligations enshrined in the Constitutional Charter are to be interpreted according to the human rights treaties ratified by Colombia." Thus, fundamental rights falling under the Constitutional Block are directly enforceable and subject to the expedite judicial redress provided by the tutela track.

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[325] In Colombia, the 'supra-legal' order refers to the Constitutional world, which is above statutory law.

[326] Rodrigo, El Bloque de Constitucionalidad en Colombia. Un análisis jurisprudencial y un ensayo de sistematización doctrinal, 2017 (hereinafter Uprimny Bloque de Constitucionalidad 2017). Available at https://www.dejusticia.org/wp-content/uploads/2017/04/fi_name_recurso_46.pdf,

[327] Constitutional Court T 280A – 2016 "*This Corporation has indicated that for an international standard to become part of the constitutionality block, at least two requirements must be met. On the one hand, (i) there must be a normative resubmission. That is to say, that in the constitutional articles there must be a reference to a group of treaties or to a specific one. Or on the other hand, as a general rule, (ii) only international norms dealing with human rights, international criminal law and international humanitarian law are part of the bloc",* available at https://www.corteconstitucional.gov.co/relatoria/2016/T-280A-16.htm

For the Court, the "Constitutional Block", fulfills two fundamental purposes. On the one hand, it serves as a mechanism for normative coordination between the international legal system and domestic law, and on the other hand, it prevents the Constitution from becoming immobile in the face of social, legal and political dynamics that require the incorporation of new rights adapted to changing realities.[328] Based on these premises, and in the face of the Anthropocene -as a changing reality-, the Court shaped the domestic legal order, particularly the constitutional mandates arising from the so called '*Ecological*' and '*Cultural*' Constitution, in harmony with contemporary international environmental and human rights law.[329] This served as the legal basis for the introduction of the concept of biocultural rights and the declaration of the Atrato river as a subject of rights.[330]

b. The protection of Cultural Integrity and Diversity – 'Cultural Constitution'

The concept of 'Cultural Constitution',[331] relies on the constitutional mandate to protect the ethnic and cultural diversity of the nation. It incorporates the idea that cultural heritage, customs, languages and ancestral traditions of ethnic communities, are values that overflow territorial and time limitations and as such express and form human identities.[332] Furthermore, as the Court acknowledges, the Cultural Constitution entails the mandate to protect the right to culture as a guarantee that determines values and references not only for those who belong to the present, but as a mechanism of constant dialogue with the past and the future generations, and their history.[333]

Building on national and international instruments as well as case-law on indigenous and tribal rights and cultural heritage,[334] the Court establishes the importance of territorial

[328] Uprimny Bloque de Constitucionalidad 2017, (n 326)
[329] The Atrato Ruling (n 2) at 29 and 53
[330] *"Currently, the concept and scope of biocultural rights is widely recognized not only in the framework of environmental law but also international law. In fact, a series of international instruments that are integrated into the Colombian legal system as part of the block of constitutionality contribute to a constitutional foundation, and the legally recognized intrinsic relationship that exists between biological and cultural diversity, which gives rise to bioculturalism and biocultural rights."* The Atrato Ruling (n 2) at 53
[331] The «Cultural Constitution » is a notion developed based on T-428/1992, C-027/1993 (which declared that the Concordat between Colombia and the Holy See was 'integrationist and homogenizing'. Ibid, 57), T-188/1993, T257/1993, T-380/1993, C-058/1994, T-342/1994, C-519/1994, C-139/1996, T-349/1996, T-496/1996, SU-039/1997, T523/1997, SU-510/1998, T-652/1998, T-552/2003, C-742/2006, T-955/2003, C-639/2009, C-434/2010, T-129/2011 and T-256/201. Arenas (n 5) at footnote 175
[332] Ibid., at 56
[333] The Atrato Ruling (n 2) at 80
[334] E.g. the American Decl. on the Rights of Indigenous Peoples (2016); UNESCO Convention for the Safeguarding of Intangible Cultural Heritage (2003); ILO Convention 169 on Indigenous and Tribal Peoples

rights and the profound relations that the Atrato communities have with nature as a part of the cultural heritage to be constitutionally protected. In this respect the Court recognizes that illegal mining *'would put in imminent risk not only their physical existence, the perpetuation and reproduction of the ancestral traditions and culture, but also the habitat and the natural resources of the place where the identity of the communities is built, strengthened and developed acting as ethnic groups.*'[335]

As explained in the following sub-sections the close relation between environmental protection and the preservation of culture and ancestral traditions of ethnic communities, represent a cornerstone for the introduction of biocultural rights and the declaration of the Atrato river as subject of rights, in connection to its vital significance for the communities inhabiting therein.

c. The protection of the Environment and Biodiversity as Primary Objective of the Social Rule of Law -Ecological Constitution

The notion of "*Ecological Constitution*",[336] is comprised of several provisions–including international law harmonized with the domestic system via the '*Constitutional Block*'- that regulate the relationship between society and nature, and whose essential purpose is the protection of the environment. Within this framework, in the Colombian system the environment is a right in a threefold dimension: i) it is a constitutional principle that radiates the entire legal order aimed at the realization of the SRL, ii) it is both a fundamental right and a collective right protected respectively by the *tutela* action and class actions and iii) it has been recognized as a constitutional duty of State authorities and individuals.[337]

Drawing on its extensive ecological case-law, the Court navigates the different theoretical approaches to the protection of the environment it has endorsed overtime. It first refers to an *anthropocentric approach* which responds to an old philosophical and economic tradition -from naturalist theoreticians such as Smith and Ricardo to pragmatic neoliberals

(1989); Convention on Biological Diversity (1992); The UN Declaration on the Rights of Indigenous Peoples (2007).

[335] The Atrato Ruling (n 2) at 80

[336] The Court refers to the following precedents on the 'Ecological Constitution' in the Atrato Ruling: T-411/1992 (see for a compendium of the 34 constitutional provisions that form the 'Ecological Constitution'), T-415/1992, T-536/1992, T570/1992, T-092/1993, C-519/1994, C-401/1995, C-126/1998, C-200/1999, C-431/2000, C-432/2000, C-431/2000, C-671/2001, C-293/2002, C-339/2002, T-760/2007, C-486/2009, C-595/2010, C-632/2011, T-282/2012, C-123/2014, T-080/2015, C-449/2015, T-606/2015, C-035/2016, and C-298/2016.

[337] The Atrato Ruling (n 2) at 44

like Stiegler and Friedman – which have conceived of men as the only rational, complete and worthy being in the planet.[338] It then mentions a *biocentric approach*, which advocates for human responsibility towards nature in relation to future generations.[339] Finally, the Court endorses a holistic *ecocentric approach*, which in its own words:

> *"departs from a basic premise according to which the land does not belong to man and, on the contrary, assumes that man is part of the earth, like any other species. According to this interpretation, the human species is just one more event in a long evolutionary chain that has lasted for billions of years and therefore is not in any way the owner of other species, biodiversity, or resources, or the fate of the planet. Consequently, this theory conceives nature as a real subject of rights that must be recognized by the States and exercised under the protection of its legal representatives, such as, for example, [namely] by the communities that inhabit nature or that have a special relationship with it."*[340]

Based on this ecocentric approach, the Atrato-Ruling makes a progressist interpretation of the protection of the environment as a superior interest of the nation, by establishing that the existence of the communities that inhabit an ecosystem depends on the stability of its ecological cycles and vice versa. That is to say, the conservation of biodiversity necessarily entails the preservation and protection of the ways of life and cultures that interact with it and the protection and preservation of cultural diversity is [thus] an essential premise for the conservation and sustainable usage of biological diversity.[341]

3.3. Biocultural rights as an alternative vision of the collective rights of indigenous and Afro-Colombian peoples in Colombia

According to the Court, in a country as rich in environmental and cultural aspects as

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[338] Ibid, at 46. The Court cites as examples of the anthropocentric approach the Declaration of the United Nations Conference on the Human Environment or Stockholm Declaration (1972) and the Rio Declaration on Environment and Development (1992).

[339] The following constitutional precedent adopted a biocentric approach: C-519 de 1994, C-595 de 2010, C-703 de 2010, C-632 de 2011 y C-449 de 2015, among others. *'Under this interpretation, nature is not subject to rights, but simply an object at man's disposal. However, it differs from the purely anthropocentric approach in that it considers that the environmental patrimony of a country does not belong exclusively to the people who inhabit it, but also to future generations and to humanity in general*.' The Atrato Ruling (n 2) at 46

[340] The Atrato Ruling (n 2) at 46. The Court refers to its previous case law, particularly rulings C-449 of 2015, C-595 of 2010, C-632 of 2011 and T-080 of 2015, to demonstrate that the ecocentric approach was already embedded within its former jurisprudence. In this regard the ruling C 632 of 2011 states that *"at present, nature is not only conceived as the environment that surrounds human beings, but also as a subject with its own rights, which, as such, must be protected and guaranteed. In this sense, ecosystem compensation involves a type of restitution applied exclusively to nature'. This is a position that has mainly found justification in the ancestral knowledge according to the principle of ethnic and cultural diversity of the Nation (Article 7 Superior)"*

[341] The Atrato Ruling (n 2) at 49

Colombia, the protection and preservation of cultural diversity is essential to the conservation and sustainable use of biological diversity and vice versa.[342] As a result, the Court asserted that, considering the principle of cultural and ethical pluralism that underpins Colombian constitutionalism,[343] the protection of the environment results intrinsically, inherently, and inextricably connected to an *alternative vision* of the collective rights of ethnic communities in relation to their natural and cultural surroundings, the so called, biocultural rights.

The notion of biocultural rights refers "*to the rights that ethnic communities have to administer and exercise autonomous guardianship over their territories - according to their own laws and customs - and the natural resources that make up their habitat, where their culture, their traditions and their way of life are developed based on the special relationship they have with the environment and biodiversity."*[344] Thus, its central premise is a relationship of profound unity between Nature and the human species. [345]

As a legal concept, biocultural rights are not intended to create new rights for ethnic communities at the domestic level, but rather to unify already recognized rights to natural resources and culture into a special category based on their integrated and interrelated nature.[346]Considering that ethnic peoples have a collective understanding of their *territory*, the added value resulting from this *cluster of rights*, is that their rights to collective property, healthy environment, territory, culture, life and to health, among others, are no longer understood as independent legal categories but as interconnected with each other.

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[342] From the ecocentric perspective, *"the conservation of biodiversity necessarily leads to the preservation and protection of the ways of life and cultures that interact with it. In a country as rich in environmental aspects as Colombia, which is considered fifth among the seventeen most mega- biodiverse countries in the world (...)The protection and preservation of cultural diversity is essential to the conservation and sustainable use of biological diversity and vice versa."* The Atrato Ruling (n 2) at 49

[343] Col. Const. art. 7.

[344]The Atrato Ruling (n 2) at 48

[345] The Court refers to the philosophical foundation of biocultural rights as a holistic vision, that encompasses three approaches: (i) the combination of nature and culture, where biodiversity and culture are considered as inseparable and interdependent elements; (ii) the analysis of the concrete community's experiences over time, from a perspective that values the past and the present and that projects towards the future in order to establish an analysis of the current system, with the aim of helping them to preserve their biocultural diversity for future generations; and (iii) the emphasis on the singularity and at the same time the universality that represents the existence of ethnic peoples for humanity. The Atrato Ruling (n 2) at 49-50, citing Chen, C; Gilmore, M. Biocultural Rights: A New Paradigm for Protecting Natural and Cultural Resources of Indigenous Communities. The International Indigenous Policy Journal. Vol. 6, No. 3, 2015.

[346] The Atrato Ruling (n 2) at 49 quoting the Indian author Sanjay Kabir Bavikatte, *"the concept of biocultural rights is old. It has been widely used to indicate a way of life that develops within a holistic relationship between nature and culture. Biocultural rights reaffirm the deep link between indigenous, ethnic, tribal and other communities, with the resources that comprise their territory, including flora and fauna"*.

Based on an ecocentric approach, people and nature are considered as a single ecosystem, thus, the protection of one right is reflected in the protection of the others.[347]

A central element within the paradigm of biocultural rights relates to the concept of *communities* as beneficiaries of such rights. In this sense, the Court asserted that it should be understood as the groups of peoples whose ways of life are predominantly based on the *territory* and those who have strong cultural and spiritual ties, with their traditional lands and resources. To be sure, those communities whose way of life is determined by the ecosystem they inhabit.[348]

The narrative followed by the Court to justify the introduction of the holistic biocultural rights approach, went beyond previous constitutional case-law linking cultural integrity and land rights, 'even if they did not explicitly mention the term 'biocultural',[349] to find ground on various instruments of international law as well as jurisprudence of the IAtCHR on biodiversity conservation and ethnic groups rights.[350] In addition, the Court heavily relies on the work of the Indian scholar Sanjay Kabir Bavikatte on biocultural rights, although reinterpreting the theoretical concept developed by the author in light of the particularities of the Atrato case.

Bavikatte's theory holds that biocultural rights are constructed upon two foundations: one related to the interests of indigenous peoples and local communities, and the other to the environmental stewardship duty of these communities towards humankind itself.[351] In the Atrato ruling, the Court reinterpreted this core concept of biocultural rights *"not only as an instrument to manage stewardship of biocultural protocols but as a possibility to understand the protection of human communities and nature as a whole unto.*"[352] This interpretation, might be understood as a localization of the theoretical concept of

[347] Interview with Felipe Clavijo-Ospina, former law clerk at the Constitutional Court of Colombia (23 May 2019); According to Professor Lisneider Hinestroza Cuesta, from the Technological University of Choco (Universidad Tecnológica del Chocó Diego Luis Córdoba), *"Biocultural rights go beyond the doctrine of connexity, according to which one right [usually from the ESC rights] is assimilated to a fundamental right so that it can be protected as fundamental. That is to say that one right depends on another, as when we say that the right to a healthy environment is fundamental because the right to life depends on it. Conversely, biocultural rights are and articulated group of rights that are interrelated. Each right is mutually dependent on the other".* Interview with Professor Lisneider Hinestroza Cuesta, Technological University of Chocó (Bogotá, 24 May 2019).
[348] The Atrato Ruling, (n 2) at 50
[349] Arenas (n 5) at 76
[350] See (n 334); The Court refers to the Inter American Court judgements in the Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua 2009, the Case of the Saramaka People v. Suriname (2007)
[351] Sajeva, G. (2015). Rights with limits: biocultural rights–between self-determination and conservation of the environment. Journal of Human Rights and the Environment, 6(1), 30-54, at 38
[352] Interview with Felipe Clavijo-Ospina, former law clerk at the Constitutional Court of Colombia (23 May 2019)

biocultural rights, according to which the Court endorses the cosmovision of the Atrato communities and their understanding of the notion of *territory*. Furthermore, this reinterpretation seems to be founded on the Court's deep awareness of the conditions on the ground -i.e. armed conflict, lack of public services, state abandonment -which significantly interfere with the fulfillment of the river communities' environmental stewardship duty, as explained earlier in this chapter.[353] To be sure, it is not possible for the State to entirely transfer the responsibility to protect nature to local communities since, first, it is a constitutional duty of the state, and second the state has not been able to guarantee the conditions, security and resources for citizens to do it properly.[354]

The Court then refers to the historical origins of biocultural rights, which emerged as a response to the economic, social and ecological effects of western development models. Based on this consideration, the Court takes a strong political stand by criticizing the sustainable development model as a centralist hierarchical global strategy, based on the conception of economic growth and the modern restructuring of nature as capital.[355] This critique is relevant in the Colombian context where almost all substantial decision-making is carried out from the center (Bogotá), thus out of touch of regional political realities and needs. In this regard, the Atrato ruling emphasizes the need for alternative development models that consider the cultural and natural heterogeneity of the country and in which the people, especially ethnic minorities whose way of life depends on the ecosystems they inhabit, have the possibility to be part of the decision-making process in which the

[353] See page 6 of this document. In this regard, Professor Lisneider Hinestroza, asserts that the Court did not emphasize on the stewardship duty of the river communities, because this would have led to the impossibility of arguing the responsibility of State authorities for their omission in protecting the fundamental rights of the communities and the environment. "*The Court calls on the community to respect and protect the river as its primary guardians, but it is not possible to shift this responsibility entirely to them and leave the State outside of the scene.(…) In fact many say 'if the river is contaminated, it is because of the communities, because they allowed people that do not belong to the community to do mining in their territories'. But this issue is more complex that simply imposing that burden on the communities There has not yet been an analysis of the type of responsibilities that can be attributed to community councils for allowing the extraction of natural resources in their territories without all the requirements of the law. However, this requires a proper assessment on what is happening in the territory, what assistance and intervention from the State is available , how the communities meet their basic needs, the influence of the armed conflict, the threats, the economic pressure from armed groups"* Interview with Professor Lisneider Hinestroza Cuesta, Technological University of Chocó (Bogotá, 24 May 2019).

[354] In the Atrato Ruling, the Court recognizes that it is the State who has the greatest responsibility to protect nature. "*In effect, if the State neglects its responsibility to grant the greatest possible protection to our natural resources, it ends up transferring the responsibility it to the citizens and local communities, which, consequently, would have - if such a situation occurs - to make front the administration itself, businessmen, multinationals and mining workers*." The Atrato Ruling (n 2) at 154

[355] The Atrato Ruling (n 2) at 51

economic future of their regions is at stake.[356] This entails a significant transformation of the governance of natural resources,[357] which in the view of the Court implies that the protection of biocultural diversity is to become a central aspect informing public policy and national law.[358] State policies, norms, and interpretations on biodiversity conservation must recognize the existent link between culture and nature and, consequently, guarantee the necessary conditions for the survival of ethnic communities and their forms of being, perceiving, and apprehending the world.[359]

Despite asserting that the duty of protection and care of biodiversity and natural ecosystems assists the State in its centralized and decentralized branches, the Court stresses that it involves also the responsibility of civil society at large and local communities themselves. In this sense, the ethnic communities that inhabit the Atrato River Basin are called to protect, within the exercise of their customs, uses and traditions, the environment of which they are its first guardians and responsible for it.[360]

As such, the materialization of the ecocentric approach embraced by the Court represents an answer from the legal science to the devastating environmental consequences of the ecosystems' large-scale transformation since the industrial era. The Court identifies and responds to the need of creating appropriate institutions and legal forms to protect people and their environment.

3.4. Conditions on the Ground and Mining in the Atrato River.

As part of the revision procedure, the Court invited several universities, NGOs and international organizations to render specialized opinions on the case and ordered the conduction of an on-site judicial inspection in Chocó's capital city, Quibdó, and some areas of the Atrato River Basin.[361] These valuable scientific and factual sources ascertained the severity

[356] Interview with Felipe Clavijo-Ospina, former law clerk at the Constitutional Court of Colombia (23 May 2019). See also Constitutional Court SU-039 de 1997
[357] García & Hernández (n 309) at 145.
[358] The Atrato Ruling (n 2) at 53
[359] *Ibid.*, at 53 and 153. In the Atrato Ruling the Court includes some considerations regarding public mining-energy policy. It suggests, for instance, that *"(…), it would be necessary for the national Government to build a public mining-energy policy that considers the environmental and social realities of the nation, which go through climate change, the biodiversity crisis and the increase in environmental devastation as a result of the development of extractive industries."*
[360] The Atrato Ruling (n 2) at 141
[361] The Atrato Ruling (n 2) at 18. This adds to the comprehensive and strong evidence scientific presented by 'Tierra Digna', who also asked for the on-site inspection that was further ordered by the Court.

of social and environmental damage on the ground, providing a strong evidentiary support for the Court's final decision on the case.

The Court's on-site inspection in the cities of Quibdó and Paimadó and throughout the Atrato River Basin heavily influenced the decision of the Court. According to Viviana Gónzalez, from Tierra Digna, it was an inspection of a *sui generis* nature.[362]An informal evidentiary hearing was held with witnesses from local communities who confirmed the facts given rise to the case. Toxicology experts participated in the hearing confirming the facts on a scientific basis. Moreover, the Court visited Paimadó, municipal seat of Rio Quit and one of the most affected tributaries of the Atrato river by mining activities. The close proximity of Paimadó to Quibdó - capital of Chocó- where the main offices of local and regional authorities are located instructed the Court on the inability of state institutions to contain the crisis and effectively respond to the claims brought by the petitioners.[363]

This significative Court's attempt to rule the case outside the comfort of its offices, allowed the judges to immerse themselves in the actual conditions in which people lived and to comprehend the true magnitude of the ecological and humanitarian emergency they were facing.[364] Furthermore, the impellent demand for a structural solution became apparent. According to Felipe Ospina, the on-site inspection was an eye-opener for the Chamber. It represented a decisive turning point in which the Court understood that the legal notion of 'unconstitutional state of affairs' (*Estado de Cosas Incostitucional*)[365] was insufficient to address the critical situation of the claimants. This led the Court to look for promising

[362] Interview with Viviana González, Tierra Digna (Bogotá, 24 May 2019)

[363] Ibidem and Interview with Felipe Clavijo-Ospina, former law clerk at the Constitutional Court of Colombia (23 May 2019). Illegal mining dredges operating in Rio Quito pass in front of the offices of the main local control authorities such as Codechocó, the public prosecutor's office, the governor's office, and the army and police checkpoints. The situation is so blatantly obvious for the authorities, yet they are unable (or unwilling?) to stop it.

[364] During the onsite inspection the Court could verify that "*the impact of illegal mining on the river is so strong that today it is practically impossible to determine the original channel that river once had, its arms and its tributaries. Along with what can be seen a considerable growth of deforested areas, given that illegal mining takes place both in rivers - alluvial mining - and in land - open-air mining -, exploitations that together produce serious deforestation processes*". The Atrato Ruling (n 2) at 144.

[365] The '*Estado de Cosas Incostitucional*' has been used by the Constitutional Court to remedy the massive violation of fundamental rights affecting a significant number of people, caused by a persistent failure of the authorities to fulfil their obligations. Its declaration involves the intervention of several State institutions. Some relevant constitutional precedents include: social security for civil servants (SU-559/97, T-068/98, T-535/99 and SU-090/00), prison overcrowding (T-153/98), deficient protection of human rights defenders (T-590/98), displaced persons (T-025/04) and the right to health (T-760/08). See https://repository.oim.org.co/bitstream/handle/20.500.11788/975/Capitulo%2006.pdf?sequence=10&isAllowed=y for a brief introduction to the topic.

international experiences that addressed similar legal problems, such as the Whanganui river case in New Zealand.

Based on the factual and scientific evidence gathered by the Court, including numerous references to the reports of the Colombian Ombudsman on the Chocó humanitarian crisis,[366] the judgement exhaustively describes the humanitarian and ecological emergency in the area and the inaction of numerous State agents to address it. In the view of the Court, this inaction is related to the difficulty of State institutions, from the local to the national level, to articulate policies, plans and programs aimed at effectively tackling the complex challenge implied by illegal mining activity that in most cases is in the hands of illegal armed groups.[367]

Moreover, the Court offers a highly nuanced argument about mining. After providing a detailed categorization of mining practices in the Region, the Court asserts that illegal mechanized mining is the most widespread and problematic for the environment and the ethnic communities of the Atrato river.[368] This type of mining is carried out in an intensive and indiscriminate manner with the use of dredges, dragons, backhoes and toxic chemicals such as mercury and cyanide, which has contributed greatly to the outrageous contamination of the river.[369] Similarly, the Court stresses the fact that mechanized mining has slowly displaced ancestral and artisan mining as well as the traditional forms of food production of ethnic communities. This has resulted in the imposition of a model of life and development that it is not compatible with their ancestral practices. Not only has it affected the food supply of indigenous and Afro-descendent groups by putting at risk the availability, access, quality and sustainability of food (especially fish), but it has also made communities dependent on the miners present on their territory for their economic survival.[370]

Acording to the national Ombudsman, the main impacts generated by this type of mining are: the destruction of water sources, polluted rivers become a high risk to human health and the environment and the loss of biodiversity and genetic erosion through intervention and

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[366] See Colombian Ombudsman Reports "*Minería de hecho en Colombia*" (2010); y "*Crítica situación de derechos humanos en Chocó por impacto de la minería ilegal y enfrentamientos entre grupos criminales*" (2014).
[367] The Atrato Ruling (n 2) at 129. *"(...) The Court does not intend to ignore* ***the efforts of the Government*** *or the legal provisions that favor the protection and preservation of a healthy environment and even for the sustainable development of mining, but has verified that these in reality (in the regions, in fact)* ***they have lost their binding effect and have become what the doctrine has described as "the symbolic efficacy of the law****".* (Bold not in original text).
[368] Ibid., at 93 -105
[369] Ibid., at 98
[370] *Ibidem.*

destruction of fragile ecosystems.[371] In the view of the court, all these impacts have already materialized in the Atrato river basin, affecting the rights to life, human dignity, health, water, food security, a healthy environment, culture and territory, of the riverine ethnic communities.

Significantly, the Court asserts that Atrato river is one of the most important water and biodiversity sources in the world. Thus, the illegal mining causing its degradation, constitutes an open violation of the right to water beyond the confines of ethnic settlements along the river basin, as it also threatens the survival of present and future generations.[372] Moreover, the right to water is a precondition for the exercise of other rights which are being also violated due to illegal mining and logging in the Atrato river. In this respect, the Court stablishes that *"water is necessary to produce food (right to food)[373]; to ensure environmental hygiene (right to health); to procure life (right to work) and to enjoy certain cultural practices (right to participate in cultural life)".* This reasoning led the Court to offer an extended interpretation of the scope of the right to water.[374] In accordance with its previous case law, the Court had held that water was considered a fundamental right provided that it was directly associated with human consumption. Conversely, in the Atrato Ruling, the Court stablishes that water itself has an irrefutable value as an essential part of the environment, the existence of which is necessary for the life (including the cultural life) of many organisms and species.[375]

Furthermore, the Court is emphatic in pointing out that the boom in illegal mining of gold and other precious metals - as a financier of the armed conflict - has a strong impact on ethnic communities to the extent that it generates displacement, increase in school desertion, high rates of prostitution and generally undermine the traditional ways of life of the communities.[376] These traditional ways of life, acknowledges the Court, are intrinsically linked to the

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[371] Ibid., at 100
[372] Ibid., at 97
[373] The Court refers to its precedent case law in which the right to food has been recognized as a fundamental right, see Constitutional Court T-348 of 2012, C-644 of 2012 and T-606 of 2015. . Moreover, it cites several international instruments on the right to food, among which, The Universal Declaration on the Eradication of Hunger and Malnutrition (1974), The World Declaration and Plan of Action for nutrition – FAO (1992), the Rome Declaration on World Food Security (1966), the UN General Assembly Resolution 2004/19 and the FAO Voluntary Guidelines (2004).
[374] Although the right to water is not provided for in the Colombian Constitution as a fundamental right, the Constitutional Court does consider it as such. In this regard, the Court, in the Atrato Ruling, reiterates that the right to water has a double dimension as a fundamental right and as an essential public service. "*In particular, this is of special relevance for ethnic groups insofar as the preservation of water sources and the supply of water in decent conditions is essential for the survival of indigenous and tribal cultures, from a biocultural perspective."* The Atrato Ruling (n 2) at 70
[375] Ximena González Serrano, ¿Qué significa que el Atrato sea un sujeto de derechos?, Revista Semana 20 December 2017. Available at https://www.semana.com/contenidos-editoriales/atrato-el-rio-tiene-la-palabra/articulo/acerca-de-los-derechos-bioculturales-del-rio-atrato/551290
[376] The Atrato Ruling (n 2) at 148

communities' notion of territory and nature, which is 'alien to the legal canons of Western culture'. In their view, the territory is not an object of dominion but an essential element of the ecosystems and biodiversity with which they interact on a daily basis. Thus, illegal and legal mining -the latter, when not carried out in compliance with the legal requirements or with adequate control of the State-, pose an imminent risk on the physical existence of ethnic communities, the perpetuation of their culture and the ecosystems where their identity is built, strengthened and developed.[377] This situation, evidences what, according to the Court, represents the greatest challenge of contemporary environmental constitutionalism: the effective protection of nature, cultures and the forms of life associated with it, not simply for the sake of utility, but because it is a living entity composed of multiple forms of life, that is, subjects of individualizable rights.

In this respect, the Court acknowledges that there has been a re-dimensioning of the principles guiding environmental protection towards a stricter application thereof, in accordance with the ultimate criterium of *in dubio pro natura*.[378] Therefore, the ruling asserts the subordination of mining to the precautionary and prevention principles. The former, under the understanding that activities posing a serious and irreversible danger to the environment must be ceased even if absolute scientific certainty is lacking. The latter based on the States' duty to avoid or reduce environmental damage by adopting early measures instead of applying remedial actions after harm has occurred or increases. The application of these principles led to both the declaration of the Atrato river as a subject of rights and the prohibition of the use of toxic substances as mercury in mining activities, whether legal or illegal.[379]

Once the facts given rise to the case were verified and acknowledged by the Court, it declared that the claimants' rights to life, health, water, food security, and a healthy environment, as well as the ethnic rights to culture and territory, were being seriously violated by the omission of various State agencies to tackle the "multiple historical, socio-cultural, environmental and humanitarian problems affecting the region, which recently have been aggravated by intensive activities of illegal mining.[380]

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[377] Ibid., at 80

[378] According to the principle of *in dubio pro natura* or *in dubio pro ambient,e* in the face of tension between principles and conflicting rights, the authority must favor the interpretation that is most consistent with the guarantee and enjoyment of a healthy environment, with respect to the one that suspends, limits, or restricts it. Ibid., at 110

[379] Ibid., at 147

[380] Ibid., at 165

Significantly, due to the massive nature of the violation of the rights of the communities living in the Atrato river basin, the Court decided to extend the legal protections granted in the ruling to all those communities in Chocó that are in the same factual and legal situation as the petitioners, regardless of whether they joined the tutela or not. To this purpose the Court declared *inter comunis* effects for the ruling, contrary to the typical *inter partes* effects.[381]

Consequently, the Court ordered a series of actions to be carried out jointly by several State agencies at national, regional and municipal levels. The Court's mandates are devoted to definitively stopping illegal mining activities,[382] decontaminating the river,[383] and recuperating traditional forms of subsistence farming and cleaner food sources.[384] Moreover, as explained in the further section, the Court recognized the Atrato river as a subject of rights and issued a number of orders aimed at the effective implementation of the river's rights and the ruling's orders in general. It has to be noted, that the Court's mandate requires the participation of the river communities at every stage of the execution orders.[385]

3.5. The Atrato River as a subject of rights

In the Atrato case, the interdependence between nature and humankind, embodied in the concept of biocultural rights,[386] derives in a new socio-legal understanding in which nature must be taken seriously and with plentiful rights.[387] This argumentation line, underpinned by an *ecocentric approach,* led the Court to declare the Atrato river as a *sui generis* person or an entity subject of rights *('entidad sujeto de derechos'*).[388] Far from any utilitarian

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[381] Ibid., at 152-153

[382]Several state agencies, under the guidance of the Ministry of Defense, must joint action plans to definitely neutralize and eradicate illegal mining along the basin and the Province of Chocó

[383] Several government departments and universities are required to get together to design and implement environmental plans to decontaminate the basin, recover its ecosystems and halt additional damage.

[384] Several State agencies at national, regional and municipal level were to formulate and conduct ethnic-development plans to recover ancestral means of subsistence and food security of the communities affected, ensure a minimum degree of food security and food sovereignty, prevent further displacement, and restore the communities' rights to culture, participation, territory.

[385] Macpherson (n 31) at 149

[386] "*The former clerk of the Constitutional Court involved in drafting the decision explains: In the Atrato ruling ecocentric and biocultural rights perspectives have been developed to allow new interpretations on the relationship between humans (ethnic communities) and nature (a river, a mountain), giving each of them equal character as* ***one*** *entity subject of the* ***same*** *rights.* ***This characterization is the birth of the declaration of the Atrato River as a subject of rights****, a whole new interpretation in or constitutional law."* Ibid., at 154

[387] The Atrato Ruling (n 2) at 140

[388] 'The concept '*entidad sujeto de derechos'* is distinct, in actual fact, from the concept of legal personality. In Colombia, despite the widespread misunderstanding the concept of '*sujeto de derechos'*, is not equivalent to a legal person, although both physical and legal persons are '*entidades sujetos de derechos'*, or legal subjects.' Macpherson (n 31) at 146

perspective, the Court founded its decision on the constitutional principles of pluralism and cultural diversity and the protection of the environment as a superior interest of the nation, in light with the "Ecological Constitution".

Drawing on its preceding case-law on the protection of nature,[389] as well as on key Inter-American Court decisions on indigenous territorial rights, the Court recognized the river as common heritage of humankind and vested its basin and tributaries with concrete rights. This progressists decision was heavily influenced by international comparative 'precedents', including laws from Ecuador (2008)[390] and Bolivia (2010),[391] as well as the recognition of legal personhood to the Whanganui River in New Zealand (2014)[392].

Notably, the Court recognized that the Atrato communities have made of the Atrato River Basin not just their territory, but the space to reproduce life and recreate culture. [393] Thus, it envisaged the declaration of the River as a subject of rights as the most comprehensive solution to the vast and multidimensional crisis of Chocó.[394] With this decision, the Court managed to bridge its 'earth-centered' approach - according to which Nature is articulated as a legal subject- with the concept of biocultural rights and the stewardship duty arising therefrom. Moreover, the challenge of materializing the theoretical argumentation underpinning the ruling, led the Court to imagine a threefold mechanism, that would generate a common dialectic path between the State, the riverine communities and relevant civil society groups. As a result, citing heavily the precedent established by New Zealand's RoN laws,[395] the court issued, among others, the following prescriptive orders to implement its decision:

i. To declare the Atrato River as a **subject of rights** to protection, conservation, maintenance and restoration. It has to be noted, that the recognition of Nature as an entity to be protected as of itself, was already embedded in pre-existing jurisprudence of the Colombian Constitutional Court, whereby the court previously established that

[389] Even more explicitly, the court inscribed this ontological spectrum within pre-existing jurisprudence of the Constitutional Court, whereby the court previously established that *"[c]onstitutional jurisprudence has acknowledged ancestral knowledges and alternative currents of thoughts, asserting that nature cannot be exclusively conceived as the environment surrounding human beings, but rather as a subject with its own rights, which, as such, must be protected and guaranteed.*" C-632/2011. See also C-449/2015 and T-080/ 2015
[390] Ecuadorian Constitution 2008
[391] Ley de Derechos de la Madre Tierra (Ley 071) 2010 (Bolivia)
[392] Te Awa Tupua (Whanganui River Claims Settlement) Bill, 2017
[393] The Atrato Ruling (n 2) at 10.
[394] Interview with Felipe Clavijo-Ospina, former law clerk at the Constitutional Court of Colombia (23 May 2019).
[395] The Atrato Ruling (n 2) at 140

"[c]onstitutional jurisprudence has acknowledged ancestral knowledges and alternative currents of thoughts, asserting that nature cannot be exclusively conceived as the ***environment*** *surrounding human beings, but* ***rather as a subject with its own rights, which, as such, must be protected and guaranteed.****"*[396] Nevertheless, it was the first time that the Court granted concrete rights to an ecosystem. While the Rights of Nature are not recognized in the Colombian Constitution, the Court reasoned that the rights of the Atrato communities are intrinsically linked to the rights of the river. Thus, both -the peoples and the river- deserve biological and cultural protection as elements of a shared ecosystem in which the all living beings are interconnected[397]. While the court gave little space to elaborate on the content and scope of the rights of the river, it imparted specific orders involving public authorities from the national, regional and local levels to decide and coordinate the actions needed for its protection, conservation and maintenance.

ii. The rights of the river will be **jointly represented** by the State and the ethnic communities living therein, each appointing a legal representative or **Guardian of the River.**[398] While granting powers to the guardians to further the river's interests, the court asserts the desperate need to materialize the river communities' right to be involved in the decision-making processes involving their territory. In this sense, the court reconstitutes the deteriorated relationship between the state and the river communities, which implies both institutional and cultural shift.[399]

iii. In order to protect and restore the Rio Atrato, the two designated guardians[400] must create a *Comisión de Guardianes del Río Atrato* (**Commission of Guardians of**

[396] Constitutional Court C-632/2011
[397] The Atrato Ruling (n 2) at 35
[398]In doing so, the Court took inspiration from the *Te Awa Tupua* model from New Zealand, which utilizes a guardian with dual membership model from the Court and the riverine communities. Macpherson (n 31) at 146
[399] Macpherson (n 31) at 156. According to Juan Felipe Garcia (2019), this shift is ultimately related to a transformation in the governance of natural resources, underpinned by the principle of democratic participation consecrated in the 1991 Constitution. 'The "new standards" of natural resources management introduced by the court in the Atrato Ruling, and further elaborated in the SU 133 de 2017, imply shifting the management tasks from the 'center of the nation' to the regions, through the involvement of regional and municipal authorities, local communities and ultimately the river, represented by its guardians.' García & Hernández (n 309) at 144
[400] By decision of the Atrato communities, their guardian was created as a collegiate group that includes two guardians per each Major Community Council, one female and one male. Therefore, as it will be explained in the

the Atrato River), within three months. The Commission should include an **advisory team** comprised by the two guardians, the Humboldt Institute, WWF Colombia,[401] as well as other relevant public and private stakeholders, wishing to engage in the protection project of the Atrato River and its basin.[402]

iv. The *Procuraduría General de la Nación*, (The Attorney General's Office), *The Contraloria General de la Nación* (the Comptroller General's Office) and the *Defensoría del Pueblo* (The Office of the Ombudsman), will be in charge of monitoring the implementation of the ruling orders. To this purpose regular reports on the implementation of the ruling must be submitted to the Court. In addition, an interdisciplinary **panel of experts,** headed by the *Procuraduria General de la Nación* must be created, to advice on the follow-up and execution process. The panel should be comprised of several experts from the river communities and public, private, academic and non-government organizations and is charged with ensuring the Court's orders are carried out promptly and correctly.[403]

The detail and strength of the Court's mandates - including those related to the decontamination of the river, the eradication of illegal mining and the recuperation of traditional forms of subsistence of the Atrato communities (see page 28) - are intended to overcome the lack of articulation and coordination between the different state institutions involved in the implementation of appropriate measures for the protection of the Atrato River and its surrounding communities[404]. In addition, it represents the Court's awareness

next chapter there are 14 guardians of the Atrato River in addition to the guardian designated by the national government.

[401] These institutions have developed the project for the protection of the Bita River in the Vichada Region, and therefore have the necessary experience to guide the actions to be taken for the protection of the Atrato River.

[402] This advisory group is similar in many respects to the representative collaborative governance institutions for the Whanganui River: The Karewai and Te Kopuka. Macpherson (n 31) at 148.

[403] The Colombian the State is not structurally organized in an integrated manner to adequately meet the needs presented by the case. Consequently, the ruling orders a restructuring of the state and the creation of a framework for not only guardianship, but also integrated care of the peoples and the ecosystem from the national to the local levels. (See Atrato Ruling orders 2 to 7). Kauffman and Martin (n 2), at 11

[404] The Court's orders have *"[...] broad aims and clear means of implementation, establishing maximum deadlines and ordering the preparation of follow-up reports, while leaving the substantive decisions and detailed results to government agencies*". The Atrato Ruling (n 2) at 32

of the ambivalence surrounding the implementation of the river's rights if a strong institutional framework is not established to accompany their enforcement.[405]

In this sense, the implementation mechanism is probably one of the most significant elements of the ruling. The ruling and particularly its orders, represent an experiment in getting the monitoring and verification of the judgment out to civil society, experts, universities, institutions and state control authorities that may exert the pressure necessary to help the policy mechanisms move forward.[406] As stated by Felipe Ospina, a former law clerk of the Constitutional Court involved in the drafting of the decision, *"the greater the external involvement and focus on the ruling's implementation, the greater the chance of achieving an effective solution to this crisis."*[407] This mechanism is intended to allow stakeholders to share knowledge, mistakes and best practices to guard the river. [408]

Against this background, the ruling provides for the engagement of civil society and the State in a constructive dialogue for the creation and implementation of actions to address the crisis generated by the degradation of the Atrato River. This has made of the Atrato Ruling an example of 'dialogic judicial activism', which broadly refers to rulings that forge dialogues between key actors to generate structural reforms.[409] In the Atrato Ruling the court mandated public entities from the national, regional and local levels - which have been partially responsible for the public policy failures that led to the ecological and social crisis in the region- to sit together and build effective plans to ensure the protection of the rights of the river and its surrounding communities.[410] In addition, the ruling returned the

[405] Macpherson, reasons that the adoption of the legal subject as a model for recognizing right of natural resources in the Atrato Ruling is itself a response to the problem of enforceability. She argues that the lack of clarity about who has standing to take action to uphold nature's rights has determined the lack of implementation of Ecuadorian and Bolivian right for nature laws. Macpherson (n 31) at 158.

[406] Interview with Felipe Clavijo-Ospina, former law clerk at the Constitutional Court of Colombia (23 May 2019).

[407] *Ibidem.*

[408] Macpherson (n 31) at 157, citing an Interview with Felipe Ospina (12 August 2018).

[409] The 'dialogic judicial activism' is part of a neo-constitutionalist trend in Latin America and other regions of the Global South such as India and South Africa. According to this intervention, courts become true activists who moderate and promote processes necessary to confront and resolve cases of massive violations of social and economic rights. *'It involves a gradual and relatively lengthy monitoring process in which the judicial branch takes on the role of promoting public deliberation and accountability. Furthermore, it requires judicial decisions that, rather than dictating the details of public policy, provide guidelines and set broad goals while leaving the creation of specific policies to government agencies.'* Rodríguez, C. G., & Rodríguez, D. F. (2015). Juicio a la exclusión: El impacto de los tribunales sobre los derechos sociales en el Sur Global. Siglo XXI Editores, at 163; available at https://www.dejusticia.org/wp-content/uploads/2017/04/fi_name_recurso_758.pdf

[410] This proactive attitude of the Court might constitute, for some, an extra-limitation of the judiciary, due to the policy nature of the orders. Felipe Clavijo explains that, even though it is not possible for the Court to fill in the governance gaps of the legislative and executive powers, the decision of the Court attempts to provide general guidance for public policy making aimed at overcoming certain massive and systematic violations that have been historically ignored by the competent state authorities. Interview with Felipe Clavijo-Ospina, former law clerk at the Constitutional Court of Colombia (23 May 2019). In this regard, García and

voice to the communities, to speak up for themselves and the river and to be part of that constructive dialogue around the protection of the ecosystems they inhabit.

Similarly, the involvement of actors from the civil society, as NGO's and the academia, allows for a direct interaction between the State and the civil society around the problem, which provides the right environment for the generation of innovative -and potentially democratic- alternatives, for the judicial protection of the affected rights.[411] The latter aligns with the intention of the Court to remain involved in the future implementation of the ruling by ordering the regular submission of reports on the execution of the orders by the Attorney General's Office.

The added value of this dialogic approach adopted by the court, relies on its attempt to shift the adversarial attitude of those who were counterparties into a collaborative one that could lead to a new definition of the problem and its solution.[412] Antagonist are to become a collaborative team *"whose mandate must harmonize the values and interests of dissimilar stakeholders despite their differences."*[413]

4. Conclusion

By and large, it has been established how the Colombian Atrato case was built upon the historical struggle of afro-descendant and indigenous communities inhabiting the Atrato River basin. The strong social movement that has sustained and advanced the defence of their territory -which aligns with an inherently alternative vision of 'development'- seems to have succeeded in having its cause translated into the normative constitutional and environmental underpinnings that converge in the Atrato ruling.

Thus, contrary to what most of the literature around this case might have emphasized, the Atrato Case is *"not only a judgement about a river's rights but a ruling challenging traditional approaches to environmental law, human rights protection and policymaking.*"[414] It is a ruling where the doctrinal notion of biocultural rights and the rights of nature are intertwined in an attempt to create a structural formula that may effectively address the socio-economic and

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Varón argue that, "[*i*]*n any case, in the Atrato River ruling, the Court issued open orders that propose and direct the necessary dialogue between key actors so that they can make the final decisions, instead of granting concrete orders that oblige the other branches to act in a certain way, which could be considered an interference in the actions of the other branches of power*." García, A., & Varón, D. La sentencia del río Atrato: un paso más allá de la Constitución Verde. La Corte Ambiental, 2019, (n 244) at 308.

[411] Ibid., at 305

[412] *Ibidem*

[413] Arenas (n 5) at 67

[414] Arenas (n 5) at 14

environmental crisis of the Pacific basin.[415] Furthermore, it is a response to the historical state abandonment of indigenous and afro-descendant peoples living alongside the river, whose rights and experiences have been overlooked in the distribution of decision-making powers with respect to the river and other natural ecosystems within their territories.[416]

It has to be emphasized that the Atrato Ruling is not an unexpected decision within the Colombian constitutional landscape, but the landing point of a large body of constitutional jurisprudence progressively redrawing core notions of law, in the attempt to carve out space for alternative narratives of sustainable development and environmental protection.[417] Likewise, the Court's decision is upheld by a deep dialogue with global alternative narratives gaining ground in constitutional and environmental discourses.

After analysing the Atrato Ruling, three spheres interacting with each other can be identified. A political one, related to the foundational concept of the Social Rule of Law, according to which the protection of the environment and the plurality and cultural diversity are the pillars that give meaning to the very existence of the Colombian State. The realization of the SRL, led the Court to take an inherently political position regarding the core values and rights at stake in the Atrato case. While analyzing the specificities of the case, the Court establishes that extractive activities, such as mining, pose a deep constitutional tension between the right to development of states and the fundamental rights of communities where such projects are developed.[418] By doing so, the Court evidences the essential conflict between two economic worldviews. On the one hand, that of indigenous and afro-descendants life projects, based on the notion of *bienestar* and their intention to inhabit a territory with which they have established an ancestral connection; on the other hand, that of government policies and corporations operating in the extractive industry, based on the increased profitability resulting from the transformation process of the resources extracted from the same territory. By declaring the Atrato river as a subject of rights and recognizing the biocultural rights of the riverine ethnic communities, the Court clearly inclined for the defense of the former, thus adding a political-economic dimension to the ruling, expressed through the exercise of enquiry and control over performance of State duties.[419]

[415] Interview with Felipe Clavijo-Ospina, former law clerk at the Constitutional Court of Colombia (23 May 2019).
[416] Macpherson (n 31) at 132
[417] Arenas (n 5) at 14
[418] The Atrato Ruling (n 2) at 58 Policy and mining policy "repercussions that illegal mining can have on the content, scope and limitations of the Colombian State's policy on mining and energy
[419] Arenas (n 5) at 14

A philosophical level, in which an ecocentric approach to environmental ethics is implemented. The Court upholds that the way in which the relationship between human beings and nature should be understood, involves a profound reflection on the meaning of existence, the evolutionary process, the universe and the cosmos[420], *"[...] that is, recognizing ourselves as integral parts of the global ecosystem -biosphere, rather than on the basis of normative categories of domination, simple exploitation or utility".*[421] These two spheres are finally translated into the legal realm through the recognition of biocultural rights for the riverine communities and of the Atrato river as a subject of rights, under the premise that local communities, with their cosmovision, values, knowledge, and ways of being and living, are the ecosystem's prime stewards.

As remarked by Felipe Clavijo, the Atrato ruling represents a political manifesto that not only introduces new and alternative interpretations to the classical legal notions of legal personhood, but also poses a number of fundamental reflections on the relation of human beings and the ecosystems we inhabit.[422] The ruling draws attention on the impellent need of creating alternative economic development paths for the Chocó region that move away from economic activities of high environmental impact at the expense of ways of life that are more beneficial to Nature conservation but do not function under market-driven values.[423] Furthermore, it emphasizes on the importance of *"building the country from the regions,"* which necessarily implies creating space for local communities to participate in the decision-making processes related to the governance of their territory and their common future. [424] This vision is reflected in the new holistic river governance set up, which operates as a bridge between the state, civil society and the Atrato river. This framework is aimed at the conservation of the region's biodiversity, including the environment, the culture and ultimately the very existence of the Atrato communities.

Reinterpreting the concept of biocultural rights to bridge its foundational notions with the granting of rights to nature might prove to be an effective structural solution to tackle ecological and social crises, such as the one experienced in Chocó. The way in which local communities have incorporated those notions in their understanding of the complex problems brought before

[420] The Atrato Ruling (n 2) at 140
[421] Ibid., at 34
[422] Interview with Felipe Clavijo-Ospina, former law clerk at the Constitutional Court of Colombia (23 May 2019)
[423]Arenas (n 5) at 84
[424] Interview with Felipe Clavijo-Ospina, former law clerk at the Constitutional Court of Colombia (23 May 2019).

the Court in this case are yet to be explored and analyzed. The extent to which the progressivist legal narrative of the Court in the Atrato Ruling managed to apprehend the claims of the Atrato communities will be further addressed in this work. The next chapter will then focus on the tangible and intangible impacts that the Atrato ruling has so far generated on the ground, drawing from interviews with local community members and relevant stakeholders.

CHAPTER III. THE ATRATO RIVER: NAVIGATING NEW RIGHTS AND NEW RESPONSIBILITIES

The waters of the Atrato River reflect some of the most important challenges facing Colombia, and as we have seen in the course of this work, arguably of contemporary humanity itself. Yet the river is also a place in which the unspeakable wisdom of the Atrato communities, their tireless processes of resistance, solidarity, and understanding of the collective as a principle of the community fabric meet. These concepts are intertwined in a determined commitment to ways of being according to which human life is an inseparable part of a wider and more complex natural and spiritual world.[425] The Atrato Ruling arises from this context, responds to these contrasts and proposes solutions to these great challenges.[426]

The Atrato Ruling has been internationally recognized as a ground-breaking decision adhering to a nascent and progressive global trend, namely, the rights of nature. [427] However, as stated in the previous chapter, the Atrato Case is not only a judgement about a rivers' rights but a ruling that questions traditional approaches to environmental law, while touching upon the spheres of human rights protection and policymaking.[428]

It must be noted that the introduction of the notions of biocultural rights and the rights of nature in the Colombian legal system results from the persuasive exercise conducted by the Constitutional Court in the attempt to create a legal reality that would accurately reflect the factual reality it was trying to address in the Atrato River case. This reveals the reciprocal relation between facts and law that led the Court to not only interpret the norms in light to the facts, but most importantly, to interpret the reality on the ground against the notion of ecocentrism -embedded in the so called 'ecological constitution'- in order to create new legal

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[425] Heinrich-Böll-Stiftung, 'Majestuoso Atrato, relatos Bioculturales del río' (2018), at https://co.boell.org/es/2018/02/05/majestuoso-atrato-relatos-bioculturales-del-rio

[426] *Ibidem.*

[427] Heinrich Böll Stiftung , La Corte Ambiental - Expresiones Ciudadanas sobre los Avances Constitucionales at 308, at https://co.boell.org/sites/default/files/la_corte_ambiental_version_web.pdf

[428] Interview with Felipe Clavijo-Ospina, former law clerk at the Constitutional Court of Colombia (23 May 2019); Arenas (n 5) at 14.

categories capable of encompassing the complexities of that reality[429]. The extent to which this interpretative exercise has been successful may be assessed, for instance, by looking at the Atrato communities' experiences of law -in this case, in the form of a ruling-, and the meaning they attach to it from that experience;[430] the judgment's implementation process and its results; or the political effects of the ruling, triggered by the potential alteration of a reality, that although detrimental for the river and local communities, was beneficial to other actors' economic interests.

The main purpose of the present chapter is to get closer to the Atrato communities' experience of law and the meaning afforded to it through the litigation process of the Atrato case and its final judgment. It seeks to understand the impact of the arguments and orders imparted by the Colombian Constitutional Court on the lives of those who they are supposed to protect. This analysis goes beyond practical implementation to embrace the non-material impacts of the ruling while trying to look at how the significance and application of a right depends on context and may vary according to social or political setting and according to local structures.[431] If we agree on the premise that courts' opinions construct an entire world of meaning[432], does the meaning constructed by the Court in the Atrato case reflect the claimants' understanding of their own world?, or was it a merely rhetorical and highly academic interpretation of facts parroting trending global discourses on Rights of Nature?. The perceptions of local communities on these questions as well as the opportunities and challenges they have encountered in the aftermath of the Atrato Ruling are addressed in this final chapter.

Based on the interviews conducted with community leaders from the Atrato Region, including some of the Guardians of the River and the case's lawyer from 'Tierra Digna',[433]the thoughts, feelings and ideas of the Atrato people are portrayed here as an attempt to strengthen human rights legal research by going beyond a purely normative basis.[434] To this purpose, the first

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[429] As argued by Khan, this reciprocal relation between facts and law begins with the [Court] opinion's choice of a context in which to present the case. This choice is determined by the persuasive work of lawyers to get the Court to frame a conflict one way rather than other. The context chosen by the court determines how and what are we to see in a given case. Kahn, Paul W. Making the case: The art of the judicial opinion. Yale University Press, 2016, at 138 and 140.

[430] García Arboleda, Juan Felipe. *El exterminio de la isla de Papayal (Bolívar): Etnografías sobre el Estado y la construcción de paz*. Editorial Pontificia Universidad Javeriana, 2019, at 36.

[431] Brinks et al (2015) as in McInerney-Lankford, Siobhán. "Legal methodologies and human rights research: challenges and opportunities." *Research Methods in Human Rights*. Edward Elgar Publishing, 2017, at 43.

[432] Kahn (n 429) at 10.

[433] For the purpose of this research, the interview conducted with the case's lawyer from Tierra Digna is considered as an opinion from the community, due to the degree of Tierra Digna's involvement with the community processes and the long time it has been working in the Region.

[434] McInerney-Lankford, (n 431) at 40.

section addresses the way in which the ruling was welcomed by local communities; the second section focuses on the processes activated by local communities to forward the implementation of the ruling according to the Court orders, including the creation of the Commission of Guardians of the River and cooperation with government institutions; the third section presents some of the challenges faced by local communities for the effective protection of their biocultural rights and those of the river. Finally, the last section provides a structured presentation and discussion of the localized impacts of the Atrato Ruling by categorizing the opinions and perceptions of local community members in a tri-partite taxonomy of impacts: material, instrumental, and non-material.

1. Welcoming the Atrato Ruling: a starting point

"We always knew the ruling was not going to be the point of arrival but of departure"[435].

It could be argued that the Atrato Ruling is the landing point of decades of structural discrimination and abandonment of communities in Chocó. Nevertheless, Viviana Gónzalez, lawyer from 'Tierra Digna', sees the ruling as a starting point for the achievement of socio-environmental justice in the Region. 'The judgment provides the legal tools, but everything else is to be done, and to be done in a context of conflict and state neglect.'[436] This recognition, almost premonitory, has marked both the practical implementation of the Court's orders and the way in which the Atrato communities have welcomed and understood the Ruling.

The following paragraphs will focus on the reaction of the communities after the ruling was handed down. These perceptions, underpinned by the Atrato communities' experience and visions of the Region's past and future, result essential for a comprehensive and localized understanding of the judgments' impacts.

It was through the media article, 'Un salvavidas para el Río Atrato'[437] that the glad tidings on the Court's ruling reached the Tierra Digna's team. Feelings of both excitement and anguish invaded the team of lawyers. Telling the communities that, despite the systematic violation of all kinds of human rights in the Region, the river was granted rights and it was around its

[435] Interview with Viviana González, Tierra Digna (Bogotá, 24 May 2019)
[436] *Ibidem.*
[437] https://www.elespectador.com/noticias/nacional/un-salvavidas-para-el-atrato-articulo-691575

protection that most of the Court's orders were ruled, represented a challenge in the lawyers' mind. [438] Conversely, it was nothing but an obvious conclusion for the Atrato communities.

For the leaders of the Major Community Councils involved as claimants in the case, the decision of the Court aligned with the communities' traditional understanding of the river as a living being. [439] For the Atrato communities, the river has always been alive[440] and, even if not legally, they had already recognized the river as a subject of rights in their daily actions.[441] Community members affirmed, for instance: 'we have learned that because we are alive we have rights, thus, it is only natural to think that the river, which besides being alive gives us life, also deserve rights'.[442] In this sense, 'granting rights to the river means protecting the communities, because we live in a 'river mood''.[443]

Interestingly, Abid Manuel Romaña, Guardian of the river and coordinator of the FISCH[444], affirms that there should be no ruling to safeguard the rights of the Atrato river as the Colombian Constitution already provides for the creation of government institutions in charge of protecting water bodies, including rivers. However, the material inefficiency of these provisions has led the Court to grant rights to the river as a 'last resource' to safeguard both its survival and that of local communities.[445]

The acknowledgment of the river's significance implied the Court's recognition of an alternative way of understanding the relationship between humans and nature in the context of Chocó. Indeed, the claimants were surprised that a judge, who did not belong to a black or indigenous minority, decided to highlight the economic, cultural and spiritual significance of the river and vest it with rights.[446] According to Jeison Palacios, member of the FISCH Technical Secretariat[447], rescuing this vision from the periphery of the 'modern' worldview underpinning the extractive economic model that rules the region, implies an external rather

[438] Interview with Viviana González, Tierra Digna (Bogotá, 24 May 2019)
[439] *Ibidem.*
[440] Interview with José Nixon Chamorro Caldera, Mesa Indígena del Chocó, Secretary of Development and Natural Resources of the Governor's Office of Chocó, Guardian of the Atrato River, (Quibdó, 30 May 2019).
[441] Interview with Jeison Palacios Robledo, FISCH, member of the Technical Secretariat of the Commission of Guardians of the Atrato River (Quibdó, 30 May 2019).
[442] Interview with Viviana González, Tierra Digna (Bogotá, 24 May 2019), referring to the reactions of the communities regarding the Court's decisions.
[443] Interview with Abid Manuel Romaña, Coordinator FISCH and Guardian of the Atrato River, (Quibdó, 28 May 2019).
[444] *Ibidem.*
[445] Interview with Abid Manuel Romaña, Coordinator of FISCH and Guardian of the Atrato River, (Quibdó, 28 May 2019).
[446] Interview with José Nixon Chamorro Caldera, Mesa Indigena, Secretary of Development and Natural Resources of the Governor's Office of Chocó, Guardian of the Atrato River, (Quibdó, 30 May 2019).
[447] See (n xx) on FISCH.

than an internal impact.[448] Atrato communities have traditionally upheld a holistic vision of their territory, it is now the *others* who have to embrace that worldview as part of the Colombian national reality.

Similarly, although the essence of the *Tutela* writ coincided with the foundational notions of biocultural rights, it was the Court reasoning that led to the introduction of this new legal category and its ecocentric connotation. Communities were receptive of the new set of rights; however, their understanding is still vague and needs to be developed and reinforced both within the Atrato communities and at a policy level.[449] When asked about biocultural rights, community leaders related their content to local notions of "territory" and "ethno-territorial rights", which encompass the interdependence between Atrato communities and the ecosystems in which they live.[450] Some of their answers asserted that the Court formally recognized what they already thought.[451] Along these lines, the notion of biocultural rights is explained by community leaders in relation to familiar categories of rights, such as the right to free prior and informed consent, self-determination and collective property[452]. In this regard, Alexander Rodríguez, Guardian of the river, states, 'the notion of biocultural rights seems to be connected to the notion of collective property. We have been defending these rights without knowing we were doing it. Defending territory, culture and life against, for instance, the armed groups who were killing us.'[453] José Americo Mosquera, a longtime leader in the region and Guardian of the river, adds the conservationist tone by defining biocultural rights as 'the right to decide over our territory which has to do with caring for nature, because we have traditionally preserved it.'[454]

In light of the foregoing, some interviewees referred to the sentence as a mirror of local reality. The ability of the Court to reflect that reality in a judgement -issued from its offices in Bogotá-

[448] Interview with Jeison Palacios Robledo, FISCH, member of the Technical Secretariat of the Commission of Guardians of the Atrato River (Quibdó, 30 May 2019).
[449] *Ibidem.*
[450] As argued by Escobar (n xx) at 62, 'the concept of territory is of crucial significance for black and indigenous peoples in Chocó. It was developed by a number of local movements in the 1990s by articulating a place-based framework – where the "river" plays a central role- linking history, culture, environment and social life. (…)"This conception resonates with academic frameworks in which nature and culture are seen as interconnected in overlapping webs of humans and other beings, and communities are multiply located"
[451] Interview with Jeison Palacios Robledo, FISCH, member of the Technical Secretariat of the Commission of Guardians of the Atrato River (Quibdó, 30 May 2019).
[452] *Ibidem.*
[453] Interview with Alexander Rodríguez Mena, COCOMACIA, Guardian of the Atrato River, (Quibdó, 29 May 2019).
[454] Interview with José Americo Mosquera, COCOMOPOCA, Guardian of the Atrato River, (Quibdó, 31 May 2019).

is explained by community members and 'Tierra Digna' due to the solid and extensive previous investigative work carried out to substantiate the Tutela, the influence of judicial realism[455] and the Court's on-site inspection in Chocó.[456] The latter, in particular, had a powerful meaning for the Atrato communities.

We are heard, therefore we exist

The Colombian Constitutional Court has conducted on-site inspections in some previous cases; however, this is not the rule. In the Atrato case, community leaders decided where to take the Court, carefully choosing the areas where mining and logging had created the greatest impacts on the river. Mosquera reports that after an informal hearing in Rio Quito, the Court officials' boat not only ran aground but the group got lost due the flooded state of the river.[457] In the opinion of local communities, these situations, together with the presence of local miners and the firsthand experience of the armed conflict' local dynamics, brought the Court down to earth and provided it with solid elements to make a final decision. Most importantly, people felt heard. They felt their narratives had touched the Court and their demands for specific orders rather than rhetoric legal arguments had been accepted.

For a population that has been historically discriminated against and relegated to oblivion, the presence of the Court, represented the long-awaited real interest of the State in their structural problems. Being able to share their desperate concerns with and without words -due to the manifest pollution of the river which was evident to all other senses- somehow legitimized their longstanding struggle. This legitimacy, further reinforced by the Court's final decision, had a powerful effect on the empowerment of local communities, which as will be shown below, has been essential to the tireless local attempts to implement the Court's orders and keep the ruling alive.

2. Owning the Ruling

Local communities identify two moments connected to the execution of the Atrato Ruling following its entry into force. First, the structuring of the collegiate body of Guardians and their

[455] 'Many exogenous variables beyond the legal merits of a case influence the impacts of court decisions. A range of factors—including the personal values and capacity of the individual judge assigned to a case, advocates' sophistication in combining litigation with other tools, the political climate (…)- can shape a case's outcomes as much as any strategy. Open Society Justice Initiative. "Strategic Litigation Impacts: Insights from Global Experience." *New York: Open Society Foundations* (2018): 139, at 29.

[456] See section (n) above.

[457] Interview with José Americo Mosquera, COCOMOPOCA, Guardian of the Atrato River, (Quibdó, 31 May 2019).

technical secretariat; and second, the consequent articulation with the correspondent State institutions for the fulfillment of the Court's orders.[458] The development, content and challenges linked to these two moments, as seen by the Atrato communities, will be explored as follows.

2.1. The Commission of Guardians of the Atrato River

The Court made several prescriptive orders to implement its decision, including that the rights of the river will be jointly represented by the State and the ethnic communities living therein, each appointing a legal representative or Guardian of the River[459]. Although the Court gave the President and the communities one month to choose their representative, it was not until July 2018 -almost two years after the ruling was issued- that the Commission of Guardians of the River was formally installed.[460]

The creation process of the commission of Guardians was marked by the communities' decision to form a collegiate body of Guardians, instead of the only Guardian that the Court had envisioned for their representation. This choice was grounded on the vast extension of territory covered by the Atrato Ruling -roughly 40.000 km2-, which would have made it impossible for a single Guardian to comply with her duties.[461] Moreover, the Atrato basin is divided in Major Community Councils, each of them constituting an independent organization. Hence, community leaders decided to appoint one Guardian per organization. To the surprise of females in the communities, all organizations appointed male representatives. Women reacted by pointing out the importance of women in the historical struggle of Black communities and by demanding that each organization be represented by one female and one male representative. In addition, each organization has five members that act as support team of the dual Guardian.[462] Today, the Atrato River is jointly represented by 15 Guardians, of which 14 belong to local communities and one is the Ministry of Environment and Sustainable

[458] Interview with Abid Manuel Romaña, Coordinator FISCH and Guardian of the Atrato River, (Quibdó, 28 May 2019).
[459] The Atrato Ruling, (n 2) at 35
[460]Ministry of Environment and Sustainable Development (2018),, 'Minambiente instala la Comisión de Guardianes del río Atrato', at https://www.minambiente.gov.co/index.php/noticias-minambiente/4053-minambiente-instala-la-comision-de-Guardianes-del-rio-atrato;
[461] Interview with Ingris Katherine Asprilla, COCOMACIA, Guardian of the Atrato River, (Quibdó, 29 May 2019).
[462] *Ibidem.*

development appointed as representative of the President[463]. The Interethnic Solidarity Forum of Choco (FISCH)[464], the main hub for local inter-organizational coordination in the region, serves as Technical Secretariat for the Commission of Guardians.[465]

This autonomous decision is the result of one of the main gains of the litigation process led by Tierra Digna, namely, the regional cooperation achieved around the *Tutela* writ.[466] In this regard, Viviana González affirms, 'we tried to convene the most relevant actors, and that was a tremendous articulation effort. Although, they are all Community Councils and share similar problems, they are different from each other, have different mechanisms and diverse interests. In this, we feel successful, because they came to a common consensus around the protection of the Atrato, although it was not a peaceful issue.'[467]As it will be further addressed, several Atrato communities rely on mining as their only source of income. While they understand that mining is destroying the river and consequently their lives, addressing the issue of mining through the *Tutela* writ was controversial as it could represent a threat to their livelihood. Furthermore, the decision to create a female/male body of Guardians, accounts for the prominent place of women within the black social movement and the importance of gender complementarity for the socioeconomic and political project of the region-territory. [468]

The role of Guardians: navigating new rights and new responsibilities

The role of the river's Guardians is to ensure the protection, recovery and proper conservation of the Atrato[469]. Nevertheless, the Court did not establish how the Commission of Guardians should carry out these activities nor did it make any consideration of budget allocation in this regard. To fill in this gap, local organizations have made use of their existing organizational mechanisms and traditional community gatherings to socialize the ruling and the Court's orders. In the Guardians' view, in addition to achieving a successful cooperation with government institutions, the main pillar for the effective implementation of the ruling is the commitment of local communities to its notions and meanings. 'Local communities are the

[463] Decree No. 1148 Designating the Representative of the Rights of the Atrato River Giving Effect to Sentence T-622 of 2016 of the Constitutional Court, at article 1.
[464] See n (38) above.
[465] Interview with Abid Manuel Romaña, Coordinator FISCH and Guardian of the Atrato River, (Quibdó, 28 May 2019).
[466] Interview with Viviana González, Tierra Digna (Bogotá, 24 May 2019).
[467] *Ibidem.*
[468] On women, gender and ethnic ethnicity in the Colombian Pacific see Escobar Territories of difference 2008 (n 230) at 236-250.
[469] Atrato Ruling (n 2) at 160

basis of our organizational process. They need to understand the ruling premises and make them their own, so that they can also become Guardians of the river in their daily lives.'[470]

Following the issuing of the ruling, the Guardians have carried out many educational activities, within the different existing academic, institutional and cultural spaces in the region. The pedagogical element is transversal for the judgment's implementation, due to heterogeneity of the populations inhabiting the river basin. An intercultural vision of the watershed in which three worldviews - indigenous, mestizo and Afro- can reconcile and make decisions about their livelihood is needed.[471] Drawing on the Major Community Councils' financial and human resources, the group of Guardians have worked in this direction by trying to signify the judgment and the river as the common goal of these diverse communities. To achieve this, they created a campaign called *'Todos Somos Guardianes del Atrato'*.[472] This campaign seeks to engage as many people as possible in the movement to support the defense of the river. Communities are called to renovate their commitment to the territorial defense. The campaign included an advocacy and a cultural tour. The former included visits to ministries and international cooperation agencies to generate awareness on the state of the river and communicate their needs for implementing the ruling at the institutional level; the latter, involved spaces for civil participation and reflection on the ruling through art, communication and culture.[473]

One of the promising results of this work is that a bid designed to support the communities in the implementation of the Atrato Ruling led by Glasgow University was approved with funding to help different groups to better understand drivers of the river's destruction and identify sustainable, peaceful solutions to it.[474] In October 2019, some of the Guardians of the river travelled to Scotland to attend a symposium aimed at exploring how the Scottish Government and academics from Scotland could further support communities living along the River

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[470] Interview with Ingris Katherine Asprilla, COCOMACIA, Guardian of the Atrato River, (Quibdó, 29 May 2019).

[471] Gutiérrez Ana, (20 December 2017), *'#TodosSomosGuardianesDelAtrato'*, Revista Arcadia, at https://www.revistaarcadia.com/agenda/articulo/sentencia-rio-atrato-sujeto-de-derechos-choco-colombia/67553

[472] Tierra Digna, *'Todas y Todos somos Guardianes del Atrato'*, at https://tierradigna.org/pdfs/SomosGuardianesDelAtrato.pdf

[473] Gutiérrez (n 471). '*With that in mind, from November 16th to December 2nd of this year the 'Cultural Circuit We are all Guardians of the Atrato' was held. It was a success, spreading with a variety of activities and social network campaigns that invited people to use #We are all Guardians of the Atrato or #I am a Guardian of the Atrato to accompany selfies or other publications*.'

[474] University of Glasgow (September 2018), Funding to UK Researchers to Help Communities and their River hit by Illegal Mining, at https://www.gla.ac.uk/myglasgow/news/peopleprojects/headline_604768_en.html

Atrato.[475] Moreover, the United Nations Environmental Programme has prioritized their involvement in the implementation of this sentence, along with other renowned international organizations.[476] For the river's Guardians the fact that national and international academics are interested in the implementation of the Ruling and the communities' local reality represents a valuable impact that has added resources and new forces to save the river and the Atrato people.[477]

Despite this hard work, supported by Tierra Digna and a strong network of stakeholders, the Guardians express that the challenges they face to protect the river are beyond their physical and financial means. Due to the lack of funding they have not been able to reach all communities in the territory. These Guardians are social leaders that not only have to support the region's social processes but also their families. The carry out these activities on a voluntary basis without a fixed salary or any form of official remuneration, which implies a huge social and personal responsibility for them. Mosquera, expressed this concern as follows: 'How can I work for fifteen days in activities for the implementation of the ruling, and my children? What are they going to eat?'.[478] Some budget has been allocated for food and transportation costs when Guardians have to attend meetings with the team from the Ministry of Environment and Sustainable Development's in Quibdó.[479] Apart from that, the government is not effectively taking responsibility for this situation, thus transferring a burden that initially corresponds to the State, to community leaders who already face several challenges in their daily life. In addition to that, some Guardians have reported threats from illegal armed groups, while continuing their active involvement in issues related to illegal mining, illicit crops and environmental pollution.[480]

Arriving to the communities located in the Atrato river basin is not an easy enterprise. It is not only time consuming -it may take up to seven hours by boat to go from Quibdó, the capital, to other Atrato municipalities- but it is also costly. Community leaders, including the Guardians,

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[475] University of Glasgow (October 2019), Colombian River Guardians Rally Support in Scotland, at https://www.gla.ac.uk/news/headline_678538_en.html

[476] ABC Colombia, A River with Rights: Community Response to Illegal Gold Mining in Chocó, Colombia, at https://www.abcolombia.org.uk/a-river-with-rights-community-response-to-illegal-gold-mining-in-choco-colombia/

[477] Interview with Jeison Palacios Robledo, FISCH, member of the Technical Secretariat of the Commission of Guardians of the Atrato River (Quibdó, 30 May 2019).

[478] Interview with José Americo Mosquera, COCOMOPOCA, Guardian of the Atrato River, (Quibdó, 31 May 2019).

[479] Interview with Viviana González, Lawyer, Tierra Digna (Bogotá, 24 May 2019)

[480] Ávila Carolina (2 April 2018), '*Guardianes del río Atrato: amenazados e ignorados*', available at https://www.elespectador.com/colombia2020/territorio/Guardianes-del-rio-atrato-amenazados-e-ignorados-articulo-856577

are generally exposed to the legal language, including the notions of ethno-development, public policies and collective rights. However, as I could experience while conducting a group interview in the locality of Tangui, other community members 'live' these notions but their understanding in terms of rights is limited. When asked about the Atrato Ruling, some participants manifested to have 'heard of the ruling'; children expressed that 'they have to care for the river' including 'not to throw the rubbish into the water'. However, the externalities they are subjected to, including the lack of sewage and waste collection systems, as well as the mine waste flowing downstream the river, were constantly brought up as complaints or justifications for their frequent disrespect towards the river.

This reality confirms what constantly asserted by the Guardians of the river, 'if we do not have a sensitized community that can truly safeguard the rights of the river, the effects of sentence will not be materialized'[481]. A shift in the Atrato communities' consciousness in relation to their connection with the natural world and their environmental responsibilities is crucial for the application of the ruling's premises. To this purpose environmental education programs and community awareness workshops are impellent.[482] This, however, goes hand in hand with the responsibility of State institutions to tackle the structural conditions underpinning the environmental and humanitarian crisis in the region. In this regard, Palacios stresses that 'communities need to see some material changes, such as infrastructure and waste water services, to regain trust in a different scenario in which the river can return to its original state; but this is something that compels the government'[483].

The co-responsibility call launched by the Court in the Atrato Ruling has been attended by local community leaders. In order to be effective in their mission, it is necessary that the Guardians be recognized both at the institutional and community levels. The ruling has mobilized the organizational forces in the territory. Local organizations have stretched their resources and possibilities to the maximum; however, the threat of violence, and endless bureaucratic and political barriers have slowed progress towards the implementation of the

[481] Interview with Abid Manuel Romaña, Coordinator FISCH and Guardian of the Atrato River, (Quibdó, 28 May 2019).
[482] Interview with Alexander Rodríguez Mena, COCOMACIA, Guardian of the Atrato River, (Quibdó, 29 May 2019).
[483] Interview with Jeison Palacios Robledo, FISCH, member of the Technical Secretariat of the Commission of Guardians of the Atrato River (Quibdó, 30 May 2019).

ruling.[484] Without an effective and committed answer from local, regional and national state institutions there is a high risk that the ruling remains a trophy inside the cabinet.

2.2. Interaction with Government Institutions

Despite the progressivist nature of the Atrato ruling and the several Court orders demanding a high degree of state involvement, the Colombian government seemed to have embraced the decision.[485] The Ministry of Environment and Sustainable Development has been appointed as Guardian of the river on behalf of the President.[486] While acknowledging the complexities attached to the implementation of the ruling,[487] the Ministry has embraced its role and engaged in a dialogue with local communities. The latter recognize the efforts done by the Ministry, including the development of a plan for the decontamination of the river[488] and the set-up of a team exclusively dedicated to its implementation. Moreover, the Ministry has established a methodology of technical round tables to work with the Guardians on the implementation of the Court's orders. This has been both encouraging and challenging for local community leaders. The national government's eyes are finally looking towards the forgotten Chocó; however, it is not always easy to put traditional and technical knowledge into dialogue.[489] According to Palacios, 'there is only formal recognition of the Atrato communities as peers, but they [government officials] do not know how to engage with the communities nor recognize our autonomy in the territory. It is our new struggle, but it is hard due to the government's centralized vision of the country.'[490]

The Ministries of Defense, Internal Affairs and Health have also developed action plans following the Court's orders in the Atrato Ruling[491]. Nevertheless, local communities accuse

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[484] Gilles, Allan (2019), '*Humanitarian Crisis, Dignity and Hope on the Río Atrato'*, The Drouth, available at http://www.thedrouth.org/humanitarian-crisis-dignity-and-hope-on-the-rio-atrato-allan-gillies/

[485] There is a mechanism under the Colombian Constitution by which the government could have applied for the decision to be nullified, however it was not activated by the government. Col. Const. article 237; Macpherson (n 31) at 149.

[486] Decree No. 1148 (n 463).

[487] Macpherson (n 31) at 149.

[488] *Listo el Plan de Acción para descontaminar el río Atrato* (2019) https://www.elespectador.com/noticias/medio-ambiente/listo-el-plan-de-accion-para-descontaminar-el-rio-atrato-articulo-896946; *Propuestas para el plan de descontaminación del río Atrato* (2018) https://www.minambiente.gov.co/index.php/noticias-minambiente/3641-propuestas-para-el-plan-de-descontaminacion-del-rio-atrato

[489] Interview with Viviana González, Tierra Digna (Bogotá, 24 May 2019),

[490] Interview with Jeison Palacios Robledo, FISCH, member of the Technical Secretariat of the Commission of Guardians of the Atrato River (Quibdó, 30 May 2019).

[491] See https://www.paismineno.com/mineria/mineria-colombiana/17465-erradicar-extraccion-ilicita-minerales-criminal; https://www.minsalud.gov.co/sites/rid/Lists/BibliotecaDigital/RIDE/VS/PP/SA/protocolo-sentencia-

the government of excessive delay in implementing the orders and failing to actively involve the Guardians in the decision making about the river and its advocacy.[492] Particularly, regional and local authorities have been conspicuous by their absence[493]. Local communities report that there has been no cohesion between the institutions on which the implementation progress mainly depends.[494] Professor Hinestroza, reiterates that this lack of coordination is due to the State's centralization of decision making power accompanied by a fragmented articulation of those decisions. The Colombian State 'lacks a concerted and decentralized planning, therefore the challenges that the [Atrato] ruling is mirroring are huge'.[495]

Unfortunately, this disarticulation is reflected in the 2019 Comptroller General's Office Audit Report on the compliance of the Atrato Ruling.[496] The report concludes that there is an 'adverse material breach' of the Court orders.[497] The plan for the decontamination, recovery and prevention of additional damage to the ecosystems of the Atrato river basin has not yet been implemented and progress is still incipient in relation to the toxicological and epidemiological studies in the Atrato River basin.[498] Further analysis of compliance with the Court's orders at the government level is beyond the scope of this work,[499] however, the views of Atrato

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t622-vcolciencias.pdf; https://www.mininterior.gov.co/conoce-la-mision-al-corazon-del-rio-atrato-que-busca-fortalecer-la-presencia-institucional-y-propender-por-el-mejoramiento-de-la-calidad-de-vida-de-los-pobladores-en-la-cuenca-del-rio-atrato

[492] Macpherson (n 31) at 151.

[493] In 2018 the Colombian Ombudsman Office reported that 'despite the fact that the Atrato River was recognized by the Constitutional Court in December 2016 as a subject of rights, the municipal authorities have failed to guarantee the human right to water and the mayors are hiding behind ignorance, lack of resources and the consequent inability to act.' Defensoría del Pueblo (2018), 'Al río Atrato lo están usando como una cloaca' at https://www.defensoria.gov.co/es/nube/comunicados/7689/%E2%80%9CAl-r%C3%ADo-Atrato-lo-est%C3%A1n-usando-como-una-cloaca%E2%80%9D-R%C3%ADo-Atrato-miner%C3%ADa-ilegal-cloaca-defensor%C3%ADa-riosucio-vig%C3%ADa-del-fuerte-carmen-del-dari%C3%A9n-turbo.htm

[494] Interview with Abid Manuel Romaña, Coordinator FISCH and Guardian of the Atrato River, (Quibdó, 28 May 2019).

[495] Interview with Professor Lisneider Hinestroza Cuesta, Technological University of Chocó (Bogotá, 24 May 2019). '*If you look at the orders in the sentence, they say concretely that the state entities have to do, but there are bets beyond the power that these orders will have, because the orders are complex and involve structural decisions of the state entities of budgetary and planning type and so in Colombia we are a disaster, the dis-articulation of the entities to reach and remain in the territories is terrible, then with the sentence, almost that the judicial apparatus is forcing the executive to adopt an institutional model, which is proposed in our constitution of harmonious collaboration of relationship, of economy, of speed in all administrative processes but that in real life does not happen, and that is what it is costing.'*

[496] Comptroller General's Office Audit 2019 Report on the compliance of the Atrato Ruling, available at https://www.contraloria.gov.co/documents/20181/1478524/038+Informe+Auditoria+Cumplimiento+MADS+Rio+Atrato+a+30+de+junio+2019+ls.pdf

[497] Ibid at 14

[498] *Ibidem.*

[499] Paz Cardona, Antonio J. (2018), '*Colombia bans the use of mercury in mining'*, Mongabay, 'The Colombia's government announced on July 16 that it has banned the use of mercury in all mineral extraction activities. By 2023 mercury will be entirely prohibited for industrial use. Furthermore, in March 2018, Colombia also ratified the Minamata Convention, an international treaty that seeks to reduce global emissions of mercury and its

community members are in line with the findings of the above-mentioned report. The Guardians of the river are concerned that the window of opportunity created by the Atrato ruling may be lost if government institutions do not take it seriously.[500]

This section has shown that owning the Constitutional Court's decision in the Atrato case is a duty that involves both riverine communities and government institutions. Only when these two actors start using a common language will the efforts to protect the biocultural rights of the Atrato communities and the rights of the river be fruitful.[501] The main challenge to achieve this goal is linked to the collision of two phenomenologies embedding different ways of knowing the world, which, in turn, generate different intentionalities about reality[502]. The phenomenology of the indigenous and Afro-Colombian peoples of the Atrato would be underpinned by the intention to 'inhabit' (*habitar*) the territory on which their survival depends; while that of government institutions and corporations is grounded on the intentionality of extracting resources from the same territory to obtain profits or 'economic development', regardless of environmental considerations or cultural roots.[503] This dichotomy is clear to community leaders in Chocó, including the river's Guardians. Indeed, one of their main objectives is to be able to place their intention to 'inhabit' their territory -through the notions of ethno-development, and now, biocultural rights- at the center of the policy decision making processes concerning their land. It must be also noted that this collision of worlds is traversed by other elements that support the extractive logic and undermine ethnic life choices. These elements are for instance, corruption, the stigmatization of ethnic-territorial organizations, and forced displacement as a territorial expropriation strategy.[504] In this sense, Jeison Palacios reminds us that it is crucial to question who are the actual beneficiaries in a given 'development' strategy; he asserts that for instance, 'in the lower Atrato, communities were displaced by African palm crops with the excuse of development.'[505] Ultimately this implies a

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detrimental effects on health and the environment.' Available at https://news.mongabay.com/2018/08/colombia-bans-the-use-of-mercury-in-mining/

[500] During the interviews, references to the panel of experts ordered by the Court were absent.

[501] Interview with José Americo Mosquera, COCOMOPOCA, Guardian of the Atrato River, (Quibdó, 31 May 2019).

[502] Juan Felipe García develops this line of thought in his book *El exterminio de la isla de Papayal (Bolívar): Etnografías sobre el Estado y la construcción de paz*. See García (n 430) at 32.

[503] García (n 430) at 32.

[504] Tierra Digna, and D. Melo Ascencio (2016). "La minería en Chocó, en clave de derechos. Investigación *y propuestas convertir la crisis socio-ambiental en paz y justicia territorial*" at https://tierradigna.org/pdfs/LA%20MINERIA%20EN%20CHOCO_web.pdf at 38.

[505] Interview with Jeison Palacios Robledo, FISCH, member of the Technical Secretariat of the Commission of Guardians of the Atrato River (Quibdó, 30 May 2019).

reconfiguration of the governance of natural resources. And it is there, where finding a real commitment from government institutions becomes challenging as it involves a transformation of the state development policies. Indeed, the extractivism development model imposed on the region is precisely one of the main issues that, in the view of local communities, is currently hindering the implementation of the Atrato Ruling.

The efforts of local communities to own the Atrato Ruling are accompanied by several complexities that characterize the Atrato region and that must not be overlooked when analyzing the effects of the Court's decision in the territory, nor when trying to find effective strategies for its implementation. Before presenting a conclusion on the localized impacts of the Atrato Ruling, the next section will address three issues that in the opinion of local communities require urgent action for a successful execution of the Court's orders.

3. The Complexities Upon Our Shoulders

Understanding the challenges linked to the social and economic dynamics of the Atrato Region, as well as the violence to which it has been historically subjected to, is crucial to apprehend the localized meaning of the Atrato Ruling. Following the issuing of the ruling, and despite the peace agreement signed between the Colombian government and the FARC in 2016, a violent dispute for control over the region -which remains a strategic area for drug trafficking- continues to heavily impact the life of local communities.[506] In the course of 2019 intense fighting in the lower Atrato region displaced some communities and confined others to their villages.[507] Environmental and human rights defenders are particularly at great risk.[508] Violence has shaped nearly every aspect of life in the Atrato region, tearing down the relations of reciprocity among community members.[509] Nevertheless, the people of Chocó have repeatedly asserted their independence from armed actors on all sides and forcefully resisted to the extermination of their natural environment, their cultural traditions and ultimately, their very existence.

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[506] Navarrete, Maria Alejandra (15 January 2020), '*Bojayá: primer brote de violencia en Colombia en 2020'*, Insight Crime, at https://es.insightcrime.org/noticias/noticias-del-dia/bojaya-violencia-urabenos-colombia/
[507] Gilles 2019 (n **Error! Bookmark not defined.**)
[508] Sánchez-Garzoli, Gimena (10 March 2020), *'Colombian Social Leaders at Great Risk in Chocó, Arauca, Cauca and Elsewhere'*, WOLA at https://www.wola.org/2020/03/social-leaders-great-risk-colombia/
[509] García Arboleda, Juan F. (n 430) at 40.

Beyond the dynamics of the armed conflict and the lack of commitment from government institutions, the interviews conducted within the course of the present research revealed three main issues that, in the view of local communities, are hindering the implementation of the Atrato Ruling. Firstly, the extractivism development model imposed in the region, whereby mining has become the only source of livelihood. This is strictly linked to the second issue, namely, the loss of food sovereignty; and third, the lack of water and sewage systems as well as the inexistence of waste-water treatment facilities in the riverine settlements and municipalities. The following paragraphs will briefly address each of these elements.

a. Mining in the Atrato River

People from the Atrato River identify themselves as "agro-miners". Although they have traditionally combined mining with other livelihood activities, mining remains the main economic activity in the region. [510] Artisanal mining[511] used to be the traditional form of mining, however, its technical characteristics (low productivity, low profitability and high physical effort) in addition to the agricultural devaluation of the '*monte*' or farmland, led to the drastic and abrupt expansion of mechanized mining in the region. [512] Through leases and in exchange for money, families have given their land to foreign miners who destroy the river using dredges and backhoe loaders.[513] These families have tolerated mechanized mining with the idea that this was the best economic alternative to the decline of agricultural work. In this sense, there is a partial social acceptance of this type of mining justified in the economic and social vulnerability of the population. 'People end up working for foreign miners, despite knowing it is wrong because they need a livelihood source'.[514] This has triggered several conflicts between dredgers, community councils and families whose land has been destroyed

[510] Interview with Viviana González, Tierra Digna (Bogotá, 24 May 2019). See also Escobar Territories of difference 2008 (n 230) at 132 -138 on the traditional production systems of the pacific.
[511] Local communities described this type of mining as 'mining systems traditionally used by Black mining communities using simple hand tools. It dates back to the mid-17th century, from the extractive practices left by the first slaves who were introduced to the gold mines that were discovered in the rivers of the Pacific. It is an activity combined with other productive activities that seeks to supplement family income. Technical characteristics: low productivity, low profitability, high physical effort and high maintenance costs of the family nucleus". Tierra Digna (n 503) at 38.
[512] "El caso de Río Quito también sugiere que la valorización rentista de los terrenos familiares para el uso minero se intensificó tras el declive del ciclo agrícola en los montes o trabajaderos familiares y tras el agotamiento del metal en los suelos superficiales de las vegas." Meza, Carlos Andrés (2019), El caso de la minería mecanizada ilegal en el municipio de Río Quito, Chocó, Majestuoso Atrato, at http://majestuosoatrato.tierradigna.org/pdf/MAJESTUOSO_ATRATO_2.pdf at 83.
[513] Ibid., at 46.
[514] Interview with Alexander Rodríguez Mena, COCOMACIA, Guardian of the Atrato River, (Quibdó, 29 May 2019).

by flow alterations, meandering and flooding, as well as mercury contamination of water, soils, plants, animals and people.[515]

This reality significantly aligns with Sajeva's call to attention in relation to the risk of falling into the trap of the noble savage when romanticizing the role of indigenous and ethnic communities as stewardships of the humanity's biodiversity patrimony.[516] In the case of the Atrato communities this consideration becomes relevant as there are several external factors that force these communities to adopt practices that are contrary to the conservationist traditional approaches linked to their cosmovision. This does not mean that these communities lack of an interdependent, cultural, social and spiritual relation with their natural ecosystems, and particularly the river; however, their condition of deep social and economic vulnerability have led them to put aside the environmental consequences of these practices in order to meet their basic survival needs. This realization is crucial for the localized definition of biocultural rights and its policy implementation. As suggested by Tierra Digna's lawyer, González, 'the definition of biocultural rights 'in action' should be jointly constructed between the state and local communities. In this sense government institutions require a conceptualization of the notion of biocultural rights as a guidance for their policy decisions.'[517] Until there is a real government willingness to apprehend this reality in relevant policy decision-making processes, the implementation of the ruling will be compromised.

In the view of local communities, one of the greatest shortcomings of the Atrato Ruling is precisely linked to Court's decision to frame the eradication of illegal mining -category into which some families supporting mechanized mining may fit- as a security issue rather than a policy one. Despite analyzing the existing policy gap in relation to gold trade policies and the process of extraction,[518] the Court vests the Ministry of Defense instead of the Ministry of Mines, with the competencies for the control and eradication of illegal mining in the region.[519]In doing so the Court appears to ignore the fact that military control is very harmful for the communities.[520] Moreover, the Court did not pronounce in relation to the validity of

[515] Ibid., at 84.
[516] See (n 118) above.
[517] Interview with Viviana González, Tierra Digna (Bogotá, 24 May 2019).
[518] This is explained by Viviana González in these words: 'The illegal mining policy is completely inefficient as it seeks to combat the weakest link in the chain which is the one that extracts the minerals, while the one that imports the mercury, the one that trades with the dredges, the backhoes, the gasoline and finally, the one that buys the gold and sells it in the foreign market,(because 99% of the gold in the country is exported after it is illegally extracted,) they are not tackled'. *Ibidem.*
[519] Illegal mining is developed without being registered in the National Mining Registry and, therefore, without a mining title.
[520] Interview with Viviana González, Tierra Digna (Bogotá, 24 May 2019).

mining titles in the region as expected by the claimants.[521] With this omission the Court seems blind to the fact that both legal and illegal mining cause great damage in the territory and that, consequently, a real solution for the Atrato is not merely linked to the eradication of illegal mining but to the transformation of the State's mining and environmental policies.

Against this background, eradicating mining in the region without providing alternative economic activities would leave communities in a deeper situation of vulnerability. As asserted by Mosquera, 'for people to stop working in mining we must provide them with alternative options. Mining will be over one day, and people will be left without economic alternatives and living in a completely polluted environment.[522] The extent to which Atrato communities are able to fulfil their role as Guardians of the river is determined by the State's ability to ensure the appropriate conditions for this to happen. Sustainable practices can only be advanced if there are external and external conditions that allow their successful implementation.

The implementation process of the Atrato Ruling needs to be constantly reminded of this local reality. The ecocentric approach the Court intends to materialize through the realization of biocultural rights is crossed by state policies that openly favor extractivism as a development model at the expense of biodiversity. For local communities, the Atrato Ruling represents an opportunity to engage in dialogue with government authorities to not only convey their problems and needs but also their ideas and proposals for a better future in the Region. The common spaces created by the Court makes it harder for national and local authorities to be 'willfully blinded' to the local reality of Atrato communities.

b. Food Sovereignty

The Guardians of the river were empathic in highlighting the need for economic alternatives to mining for the Atrato communities. This impellent demand is closely linked to their loss of food sovereignty due to the drastic river contamination. The agricultural devaluation of the collective property land of black communities and its subsequent revaluation as a profitable good to be destroyed by miners, has converted large tracts of fertile and cultivable land in desolate infertile areas.[523] Food shortages are accentuated by the deficiencies in the sewage systems (or the lack thereof) which make access to clean water sources difficult. According to

[521] *Ibidem.*
[522] Interview with José Americo Mosquera, COCOMOPOCA, Guardian of the Atrato River, (Quibdó, 31 May 2019).
[523] Meza (n 512) at 86.

Meza, 'the communities dependence on mining not only deepens the environmental crisis (…), but also makes them dependent on chains of debt and prostitution in order to satisfy basic needs such as food, as they no longer have alternative economic activities.'[524] Mining has triggered flooding, intense summers and the relocation of local communities. This has worsened the progressive loss of traditional agricultural and fishing practices that allowed local communities to be food self-sufficient.[525]

The Court addresses this issue by ordering the Ministry of Agriculture, among other State institutions, to develop a comprehensive action plan to recover traditional forms of subsistence and food sovereignty.[526] For the river's Guardians if this order is fully implemented it would represent a great gain for local communities. To engage in alternative activities to mining people require to have trade secured, so they can 'guarantee food, payment of public services and their children's education'.[527] The Atrato people need raw material, seeds, means of transport. Community leaders recognized this is part of a long-term macro plan; however, they consider that local governments should implement medium-term actions that would progressively alleviate the situation.[528]

Abid Manuel Romaña, Coordinator of the FISCH, refers that community leaders have already formulated a proposal for the creation of a productive development center. They have identified productive initiatives in the Atrato basin that can be potentialized. This involves self-supply and product transformation and commercialization. Within the framework of the Atrato Ruling's implementation, local communities are planning to present this project to various ministries, among other governmental institutions. [529] These propositive actions have found in the Atrato Ruling a legal and political leverage to put the communities' ideas on the government's table, so that local policies could be developed based on what the people 'live, want and need'.[530] The government political will and openness to local proposals grounded on

[524] Ibid., at 51.
[525] Ibid., at 86.
[526] Atrato Ruling (n 2) at 167.
[527] Interview with José Americo Mosquera, COCOMOPOCA, Guardian of the Atrato River, (Quibdó, 31 May 2019).
[528] Interview with Jeison Palacios Robledo, FISCH, member of the Technical Secretariat of the Commission of Guardians of the Atrato River (Quibdó, 30 May 2019).
[529] Interview with Abid Manuel Romaña, Coordinator FISCH and Guardian of the Atrato River, (Quibdó, 28 May 2019).
[530] *Ibidem.*

an ethno-development paradigm -which in this context could be also framed as biocultural rights- is yet to be fully demonstrated.

c. The lack of sewage and waste collection systems

As contradictory as it could seem, the Atrato communities, whose special relationship with their natural ecosystems has been widely recognised, are also one of the main sources of the Atrato river's contamination. It took me a while to understand this paradox while conducting the research. However, just as in the case of families who rent their piece of collective land to foreign miners in order to meet their economic needs, local communities justify the practice of dumping their household waste in the river in the lack of sewage systems and waste-water treatment facilities. In this sense, until local governments adhere to their obligations and provide basic sanitary services to the Atrato people it is hardly likely that natural ecosystems and the health and life of local communities will be protected.

While acknowledging this reality, the Guardians are certain that there is a need for a consciousness shift in the mind of local communities so they can also become and feel stewards of the river. 'Many people are not aware that they pollute the river with which they have such a strong relationship'.[531] They need to understand that the protection of the river does not only take place outwards but inwards. This is one of the main goals of the group of Guardians who, as mentioned above, are tirelessly working to get to all riverine communities with the Atrato Ruling's message. They argue that after the ruling was issued, their organisational process has strengthened, however, most communities are yet to be empowered and educated about their environmental responsibilities. The ecocentric vision that lies at the heart of the region's ethnic worldviews, is being lost due to multiple factors, mainly the failure of the state to guarantee decent conditions for the well-being of these communities. [532]The hope is that the Court's call to Atrato communities for self-reflection on their agency and responsibility towards the ecosystems they inhabit is heard and government institutions guarantee the conditions for them to be real stewards of the biodiversity of Chocó.

[531] Interview with Alexander Rodríguez Mena, COCOMACIA, Guardian of the Atrato River, (Quibdó, 29 May 2019).
[532] González, Viviana (2018), Introduction Majestuoso Atrato, Relatos Bioculturales del Río, at http://majestuosoatrato.tierradigna.org/pdf/MAJESTUOSO_ATRATO_1.pdf

4. Localized impacts of the Atrato Ruling

While acknowledging that it is challenging and often impossible to establish causative or even correlative relationships between a judicial decision and subsequent changes,[533] this section aims at summarizing and discussing the opinions and views of the Atrato community members, that participated in the interviews conducted for this research, in relation to the Atrato Ruling's impacts (and, to some extent, those of the litigation process itself). For this purpose, a tri-partite taxonomy of impacts: material, instrumental, and non-material will be used.[534] Material impacts include direct changes as a result of the litigation[535]; instrumental impacts include changes in policy, law, jurisprudence, and institutions, including the judiciary itself[536]; and non-material impacts may be understood as impacts that are indirect and impossible to quantify, such as changes in the complainants' sense of empowerment and agency.[537]

a. Material Impacts

In the course of the interviews it became evident that for all participants, including the case's lawyer from Tierra Digna, as well as university professors, material changes in the territory following the Atrato Ruling are incipient or inexistent. The structural conditions triggering the humanitarian and ecological crisis in Chocó are still not being effectively addressed by national and local government institutions; hence, the transformations needed to safeguard the rights of the communities and the river have not yet been materialized.[538] The three factors addressed in the previous section were recurrently reported as obstacles for the achievement of material changes during the interviews. For most participants it is clear that the ruling itself is not able to transform reality unless government authorities and local communities act upon the Court's orders and findings.

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[533] Open Society Foundations (n 455)

[534] This methodology has been developed by the Open Society Foundations. See Open Society Foundations (n 455)

[535] Ibid., at 43. 'Material impacts include direct changes as a result of the litigation, such as monetary restitution, compensation for harm, transfer of land, an order that perpetrators be prosecuted, or disclosure of information'.

[536] *Ibidem.*, 'Instrumental impacts may be understood as results that are indirect but quantifiable. Much as with the passage of a specific law on a specific date that may come years after a judgment is handed down, the judgment has an impact on the instrument of change.'

[537] Ibid., at 43-44. 'These could include changes in the complainants' sense of empowerment and agency; the behavior and attitudes of policymakers, teachers, or police officers toward complainants and the group or movement they represent; the degree of community cohesion; or the direction and contours of public discourse, including through the demonstrative power of the rule of law in action.'

[538] Interview with Abid Manuel Romaña, Coordinator FISCH and Guardian of the Atrato River, (Quibdó, 28 May 2019). 'We don't have answers from local and national authorities that allow the materialization of structural changes in the territory. The judgment is still seen as an opportunity, but transcendental changes have not been seen yet.'

However, community members recognize that to see the material impacts of the ruling will take up to a decade or more.[539] As established by the Court the actions that need to be taken to restore the situation in the Atrato are structural in nature. The term 'structural' is defined by the dictionary as 'relating to the arrangement of and relations between the parts or elements of a complex whole.'[540] This definition might be explanatory in relation to the time expectations for the material effects of the ruling to be realized. Arranging the relations between the actors and policy elements interacting in the complex context of the Atrato river is certainly a challenging undertaking. Just as in the Colombian scenario of sui generis transitional justice, in which transition to peace takes place when the war is still going on, in the Atrato case the transition to an ecocentric model of governance of natural resources and the fulfillment of the rights of human and non-human beings in the territory is crossed by the armed conflict, state neglect and strong economic and political interests that inevitably affect the communities' efforts to have their autonomy over their land and their life respected.

Nevertheless, as it will be further explained, the Atrato ruling laid bare this reality stripping it of its character of public secret[541] and provided local communities with crucial elements to resist and push for this transformation to take place. In the words of the Guardian Alexander Rodríguez 'there is no real change here yet, but we are fighting for it'[542] .

b. Instrumental Impacts

Instrumental impacts may be understood as results that are indirect but quantifiable, such as changes in policy, law or institutions.[543] In sum, results that are translated in instruments aimed at transforming the reality tackled in a in judicial decision. In the case of the Atrato Ruling one might affirm that instrumental changes have been mainly direct as they have been advanced by government institutions in direct compliance with the Court's orders.[544] The interviews

[539] Interview with Jeison Palacios Robledo, FISCH, member of the Technical Secretariat of the Commission of Guardians of the Atrato River (Quibdó, 30 May 2019).
[540] https://www.lexico.com/definition/structural
[541] Interview with Professor Lisneider Hinestroza Cuesta, Technological University of Chocó (Bogotá, 24 May 2019).
[542] Interview with Alexander Rodríguez Mena, COCOMACIA, Guardian of the Atrato River, (Quibdó, 29 May 2019).
[543] Open Society Foundations (n 455)
[544] Interestingly, the Colombian Constitutional Court's decision in the Atrato Ruling seems to be an exception to the rule regarding strategic litigation instrumental impacts: in its study on the impact of human rights strategic litigation OSF concludes that 'according to global experience captured in the Strategic Litigation Impacts Studies, these instrumental impacts are among the most difficult to achieve. This is in part because they are typically beyond the authority of the court to demand. Instead, they are the purview of entirely different branches of

exposed some of these impacts, by referring to the different action plans created by the Ministries of Environment and Sustainable Development, Defense, Health and Agriculture. Unfortunately, these impacts, as their name indicates, remain instrumental, due to the incipient progress regarding their implementation and progress.[545]

The involvement of the Ministry of Environment has been particularly emphasized by local communities. The creation of a working group exclusively dedicated to the implementation of the Ruling is seen as a great positive impact that involves a small but significative transformation of a national institution that brings it closer to the country's regional realities. As asserted by Jeison Palacios, member of the FISCH, the possibility to discuss the decisions to be taken in relation to their territory directly with the government serves to ensure that when action plans for the ruling's implementation will be generated the communities' vision of development will be taken into account'.[546] On the other hand, the transformation of the state development policy underpinned by the extractivism logic, that in the view of local communities is one of the main causes triggering the ecological disaster in the region, remains an instrumental change yet to be realized.

One of the most important instrumental impacts of the Atrato ruling was the creation of the Commissions of Guardians of the river. Despite its limitations and challenges, this governance model has enhanced the participation of local communities in spaces of policy decision-making. Following the positive ruling in the Atrato case, the communities swung into action, creating a collective body of guardians that could reach the whole region's territory. This impact can be linked to first, the decision of the Court to give inter comunis effects to the ruling[547]; and second, to the litigation process itself, due to the enormous articulation effort carried out by Tierra Digna to make Community Councils came to a common consensus around the protection of the Atrato, although it was not a peaceful issue.[548] To fulfil their role, the Guardians defined a communication strategy to present the ruling to all riverine communities using poems, rhymes, and art. Within this framework, they created the campaign called *'Todos Somos Guardianes del Atrato',* that has allowed them to reach broader audiences, including

government. The executive controls many policy decisions, for example, and the legislature controls legislation. This division helps explain why strategic human rights litigation is often so ineffective: the courts have no control over the branches of government responsible for implementing court orders.' Open Society Foundations (n 455) at 49.

[545] Comptroller General's Office, Audit Report, (n 496).

[546] Interview with Jeison Palacios Robledo, FISCH, member of the Technical Secretariat of the Commission of Guardians of the Atrato River (Quibdó, 30 May 2019);

[547] See (n 381)

[548] Gónzalez (n 467).

youngsters and children, national and international authorities and cooperation agencies as well as civil society organizations, and the academy. [549]

In relation to the latter, the Guardians highlighted the growing academic interest in the ruling and the reality of the people of Chocó as a gain for the communities. More eyes on the local reality of the Atrato region could not only exert pressure on the Colombian government to assume responsibility for the socio-environmental crisis besetting Chocó, but also strengthen the organization process of black and indigenous communities, adding strength to their struggle and stimulating transnational advocacy and collaboration around the Atrato River. The research project led by the University of Glasgow to support the communities in the implementation of the Atrato Ruling, for instance, has enabled the Guardians to present the ruling and the situation of the communities living along the River Atrato in international forums.[550]

The ruling has also had an institutional impact on the region's in Major Community Councils and civil organizations. The FISCH, for instance, has taken on the role of the Technical Secretariat of the River Guardians. Under its guidance, Atrato communities have not only formulated a proposal for the creation of a regional centre for productive development[551], but are also developing a biocultural protocol to facilitate the dialogue between their local vision of development and that of government institutions. The main objective of the protocol is to guide public policy decisions affecting the Atrato river and the communities inhabiting its basin.[552]

Furthermore, the monitoring mechanism established by the Court is fulfilling its mission through regular public reporting on the status of implementation of the ruling's orders, which may not only exert pressure on national and local governments, but also legitimize once more the struggle of local communities by reiterating the need for government authorities to commit themselves to the implementation of the ruling. Although local communities have not referred to it, it should be noted that, following the Atrato ruling, the Constitutional Court and the Supreme Court of Justice of Colombia have advanced exemplary jurisprudence on both the rights of nature and biocultural rights.[553] In addition, local governments in Colombia have

[549] Tierra Digna (472) and Gutiérrez (n 471).
[550] University of Glasgow (n 474 and 475).
[551] Interview with Abid Manuel Romaña, Coordinator FISCH and Guardian of the Atrato River, (Quibdó, 28 May 2019).
[552] Interview with Viviana González, Tierra Digna (Bogotá, 24 May 2019).
[553] Colombian Supreme Court, ruling STC 4360 (2018) (n xx); Constitutional Court of Colombia, Ruling SU 133 (2017) at https://www.corteconstitucional.gov.co/relatoria/2017/SU133-17.htm;

granted rights to several ecosystems based on the Court's reasoning developed in the Atrato case.[554]

Paraphrasing legal scholar Christian De Vos noted, newly created institutions such as the Commission of Guardians and its attempts to promote their cause —even if sham, or underfunded, or created in good faith but politically weak—create additional avenues for advocacy.[555] In this sense the Atrato Ruling created new means to the end, namely, the restoration of the river and the protection of its rights and those of local communities.

c. Non- material Impacts

Non-material impacts of a judgment are usually the most difficult to identify; however, they might be the most consequential for the perception of justice of affected individuals or groups. At a fundamental level, court judgments can powerfully affirm factual narratives that have long been denied or concealed. Moreover, changes in complainants' understanding of their rights and their power might also be experienced.[556] As will be shown below, these and other powerful impacts linked to the Atrato ruling were affirmed by respondents in the course of the interviews.

The Atrato river is immersed in a unique reality, crossed by armed conflict, extractivism and state neglect. Thus, despite the groundbreaking nature of the Atrato ruling, local communities do not perceive it as a 'before and after' situation. The community recognizes that while the structural conditions that triggered the river's degradation have been partially addressed in the ruling, their transformation is not a matter of weeks or months, but perhaps decades.[557] Nevertheless, the ruling does not have a discouraging connotation. On the contrary, it has been perceived as a critical window for recovering the river and the communities' traditional ways of life.[558] Respondents frequently used words like "hope," "renewal," "empowerment," "legitimization" and "motivation," to describe litigation's impact on their individual and communal lives. Ingris Asprilla, Guardian of the river, referred to the hope brought by the

[554] Harmony with Nature Knowledge Network (n 73).
[555] Open Society Foundations (n 536) at 62.
[556] Ibid., at 61.
[557] Interview with Jeison Palacios Robledo, FISCH, member of the Technical Secretariat of the Commission of Guardians of the Atrato River (Quibdó, 30 May 2019)
[558] Also known as window of opportunity, a critical window is a short, often fleeting time period during which a rare and desired action can be taken. Once the window closes, the opportunity may never come again.

ruling by asserting, 'in this judgment we have a hope to recover our river again, and have a healthy life.'[559]

The ruling is also seen as a source of renewal in the organizational struggle of social processes in the region.[560] Not only has it had a positive impact on the participation of younger generations in these processes, but it has also allowed local leaders to appropriate the decision as a legal flagship in their struggle to defend their territory and the ways of life linked to it. Luz Enith Mosquera, member of the Technical Secretariat of the Commission of Guardians, affirmed that 'it used to be difficult to engage young people in organizational processes from an ethnic-rights approach, but following the Atrato Ruling, several cultural processes such as songs, prose and verses related to the river and the ruling itself have been created by community members with a large participation of children and youth.'[561] It also had an impact on the educational curriculum in Quibdó and other municipalities, where the ruling and the importance of the river's protection are now part of the student's lessons.[562] Furthermore, the ruling and the actions that community members are adopting towards its implementation has become a regular topic in traditional community integration spaces and the ruling is used in daily verbal discourse.[563] Even if the decision has not yet yielded material benefits on the ground, it is progressively becoming a central element of the Atrato peoples' narratives about their identity and struggle. The significance of this new element pervading their narratives lies on the fact that it is framed in terms of rights. The ruling has broadened the scope of rights available for these communities, not only legitimizing their cause, but also providing them with new legal tools that can be used as a site of struggle for the protection of their newly declared biocultural rights.

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[559] Interview with Ingris Katherine Asprilla, COCOMACIA, Guardian of the Atrato River, (Quibdó, 29 May 2019).

[560] Interview with Viviana González, Lawyer, Tierra Digna (Bogotá, 24 May 2019)

[561] Interview with Viviana González, Lawyer, Tierra Digna (Bogotá, 24 May 2019); Interview with Ingris Katherine Asprilla, COCOMACIA, Guardian of the Atrato River, (Quibdó, 29 May 2019); Interview with Luz Enith Mosquera, member of the FISCH, (Quibdó, 31 May 2019); Tierra Digna, Coplas a la Sentencia del Río Atrato, at http://majestuosoatrato.tierradigna.org/coplas.html

[562] Interview with Jeison Palacios Robledo, FISCH, member of the Technical Secretariat of the Commission of Guardians of the Atrato River (Quibdó, 30 May 2019); Interview with Luz Enith Mosquera, member of the FISCH, (Quibdó, 31 May 2019).

[563] According to Jeison Palacios 'Every two months we hold community meetings, and since the ruling was issued it has always been discussed in the meetings to see what the communities are doing in relation to it'. Interview with Jeison Palacios Robledo, FISCH, member of the Technical Secretariat of the Commission of Guardians of the Atrato River (Quibdó, 30 May 2019).

The language used by the Court in the Atrato Ruling played a fundamental role in creating this hope.[564] While the ruling declared the responsibility of several government authorities and established measures of a structural nature, it did not used the notion of *'Estado de Cosas Incostitutional'*[565]. In González's view, the very nature of this legal category would have conveyed a bleak picture of the situation. Instead, the Court framed the case and its resolution within a proactive scenario in which, while acknowledging the responsibility of the State, local communities were also called to be co-responsible for the care and protection of their natural ecosystems.[566] According to Ingris Asprilla, Guardian of the river, the ruling 'has moved the communities to be proactive, and to generate hope and action, which has been a great gain.'[567]

Community leaders are aware of the fact that this empowerment does not take place in a vacuum and that this window of opportunity might be lost if the structural causes underpinning the socio-ecological crisis are not adequately addressed. They agree on the fact that the ruling itself does not have the power to transform the conditions that have caused the systematic violation of their rights; however, it has a powerful symbolic meaning for the Atrato communities. It has been an invitation to question the way in which they have been treating nature and especially the river. In this sense, the ruling represents a mirror for local communities to remember that their traditional practices are being transformed by external factors, i.e. armed conflict, the exploitation of natural resources, coca plantations among others, but also by actions of community members themselves, such as the continuous dumping of their waste in the river. This has allowed some communities to make an internal assessment and look for new strategies of change.[568]

In the words of José Americo Mosquera, 'the ruling won't change anything if there is not a shift in people's consciousness.' It seems that history has taught Atrato communities that the transformation of their Region must arise from their own convictions; they must 'carry the territory on their shoulders'.[569] Therefore, a great part of the expectations for the ruling to be fully implemented rely on the capacity of local communities to appropriate the notions

[564] Interview with Viviana González, Lawyer, Tierra Digna (Bogotá, 24 May 2019)
[565] See (n 142) above (Chapter II)
[566] Interview with Viviana González, Tierra Digna (Bogotá, 24 May 2019), referring to the reactions of the communities regarding the Court's decisions.
[567] Interview with Ingris Katherine Asprilla, COCOMACIA, Guardian of the Atrato River, (Quibdó, 29 May 2019).
[568] *Ibidem.*
[569] Interview with Alexander Rodríguez Mena, COCOMACIA, Guardian of the Atrato River, (Quibdó, 29 May 2019). *'todo lo que ocurre vine desde nuestra convicción. Llevamos le territorio a nuestras espaldas'*

embedded in the judgment, as it is they, along with the monitoring bodies designated by the Court, who are going to push for its effective implementation.[570]

These immaterial impacts might appear as futile or abstract victories for some; however, the Atrato Ruling must be analyzed within the framework of the longstanding struggle of the Indigenous and Afro-Colombian Peoples inhabiting the Atrato river basin and its tributaries. As asserted by José Americo Mosquera, the work of the black social movement in Chocó has changed the conditions in the territory for current and new generations to come. 'If there hadn't been law 70[571], there wouldn't be a single black man with an inch of land in Chocó, because foreign miners would have taken it away from our people. Black people would be living under a bridge or would simply not be.'[572] 'Simply not be', these three words conform such a powerful and telling sentence able to reflect the nuances of the context in which the Atrato Ruling was adjudicated. The material impacts envisioned in the Court's orders are certainly objectives that Atrato communities aim at achieving; nevertheless, the daily reality they face goes beyond the need to meet their basic needs, they are fighting to preserve life itself, ultimately to exist. Considering that the river and its surrounding areas are not only the means through which life is reproduced - food, water consumption - but also the spaces in which these communities have constructed and strengthened their communal relations and the basis of the strong social movement uniting them, to deprive them of access to these spaces implies a direct threat to the existence of their way of life.[573]

In this sense, the symbolic meaning of the ruling becomes a powerful tool that legitimizes the communities' vision by rendering illegitimate the actions (or omissions) of armed actors, corporations and government institutions trying to impose a development model that is terminating with the biodiversity of Chocó, including its human and non-human elements. It makes it more costly for these powerful actors to advance their visions due to the illegitimate character of their actions. The paradigm shift proposed by the Court in the Atrato Ruling is a long-term goal, which must be advanced within the present, but is marked both by the facts of the past and by the internal community forces that drive the construction of the future. In this respect, the sense of entitlement and empowerment becomes existential for local communities

[570] Interview with Viviana González, Lawyer, Tierra Digna (Bogotá, 24 May 2019)
[571] Law 70 of 1993, (n 235)
[572] Interview with Jose Americo Mosquera, COCOMOPOCA, Guardian of the Atrato River, (Quibdó, 31 May 2019).
[573] García Arboleda, Juan F. (n 430) at 43.

to continue their struggle for their river. In the long-term they hope to emerge victorious just as they did in the battle to have their collective lands titled.

The struggle of the Atrato communities for their biocultural rights and the rights of the Atrato river is not likely to end until a shift in the extractivism economic model takes place; however, just as law can be used as a tool of power it can also be a site for struggle and resistance. The determination on the part of the *Guardianes del Atrato,* and organisations locally is formidable, their hopes are high, and they are determined to not lose the critical window created by the Atrato Ruling. Conversely, government institutions seem to be reluctant to act effectively. Ultimately, the success of the joint management system created by the Court will depend on the ability of government institutions to see local Guardians as their peers, and to be open to embrace their world vision into the public policy making involving the Atrato Region. As asserted by Nixon Chamorro, Guardian of the River, 'the opportunity created by the ruling, must be understood as a constructive space, where technical and traditional knowledge engage in a dialogue to jointly rethink the future of our communities. The river needs it more than ever.'[574]

CONCLUSIONS

This research has first explored the discussion on the role of human rights in the mediation of the human-nature interface and looked at nascent rights-based approaches to environmental protection, such as the RoN and biocultural rights. Second, it has examined the way in which the Colombian Constitutional Court's decision in the Atrato Case managed to translate these innovative legal concepts into the Colombian legal system; finally, the way in which Atrato communities have incorporated those notions in their understanding of the complex socio-environmental crisis of the region has been assessed. This has been done by exploring the communities' opinions, perspectives, and expectations on the impacts, challenges, and possibilities related to the ruling and its novel way of addressing the structural problems besetting their *'aquatic'* territory.

[574] Interview with José Nixon Chamorro Caldera, Mesa Indígena del Chocó, Secretary of Development and Natural Resources of the Governor's Office of Chocó, Guardian of the Atrato River, (Quibdó, 30 May 2019).

It has been found that the proactive role of the reporting Constitutional Court judge - Jorge Iván Palacio- in the Atrato Case, along with the willingness of his team to visit the area and directly listen to the affected communities, led to a comprehensive ruling that, far from merely parroting global discourses on RoN, managed to create legal and institutional expressions that align with the Atrato People's cosmovision, within the context of domestic law and culture. Significantly, the Court not only drew on a large body of 'green' constitutional jurisprudence that had been progressively reframing core notions of law to include alternative narratives of biocultural protection, but also adopted a multidisciplinary approach by heavily relying on scientific reports on the state of the river and the health of riverine communities.

From the interviews conducted in the course of this research, it is possible to conclude that the Court's decision, including its orders and innovative implementation mechanisms, have been welcomed and owned by local communities as an opportunity to transform their reality, strengthen their organizational processes around the protection of biodiversity, and enter into a dialogue with government institutions in relation to the region's needs and future.

Nevertheless, the fact that the Court inclined for the defense of the Atrato communities' vision, does not mean that it has triumphed in society and in the way the rule of law is conceived and lived.[575] Indeed, community leaders recognize that the transformation of the reality of Chocó will not occur over night, as it requires addressing complex challenges that involve not only advancing the ruling's implementation in a context of war, but also a structural reconfiguration of the centralized way in which natural resources are currently governed in Colombia. In the view of local communities, two main elements are required for the Atrato Ruling to be effectively implemented: a shift in the awareness of local communities about the deep and powerful meaning of the ruling - including the communities' responsibility as stewards of the natural environment; and the willingness and commitment of state institutions to not only respect, value and recognize the Atrato People's alternative visions of the world, but to incorporate them in relevant policy decisions. The lack of financial resources added to the large extension of the river basin, has made it difficult for the Guardians of the river to advance the former. Moreover, lack of political will and entrenched economic interests means that the implementation of the ruling is far from certain.

[575] García & Hernández (n 309) at 157.

Against this background, local communities assert that material impacts following the Atrato Ruling are inexistent or incipient. Nevertheless, they forcefully emphasize that the Court has provided them with a new language of resistance to continue their longstanding struggle to have their rights and the rights of the Atrato river protected. To some extent, the ruling has afforded local communities with the tools to make it more costly for powerful actors to dismantle their rights, their life, and their dignity; it has opened new opportunities of participation in the political and technical spheres in which the decisions that mark the course of their own realities are made; and it has positively impacted the internal organizational processes of the social movements that propelled the Court's decision in the first place.

Furthermore, the Atrato Ruling has become a central element of the Atrato peoples' narratives about their identity and struggle, which has created a feeling of hope among community members and has moved them to be proactive around the ruling's implementation. Most importantly, the ruling is understood and experienced by local communities within the narrative of their past. A past that is heavily marked by a history of colonization, slavery, and discrimination; thus, a past -and present- that has directly threatened their individual and communal existence. Along these lines, the symbolic meaning of the ruling becomes extremely powerful as it legitimates the communities cause by rendering illegitimate that of external actors interested in advancing their economic interests at the expense of human and non-human life in Chocó.

Certainly, the ultimate aspiration of local communities is that the instrumental and non-material impacts of the Atrato Ruling can be translated into material transformations; however, as the Atrato Case demonstrates, the effectiveness of judicial interventions does not depend solely on the actions of legal operators. These transformations require the deployment of other concurrent processes that can be stimulated, but not completely advanced, through structural rulings or the formal adjudication of rights to nature.[576] In this sense, the role of civil society, academy, and government institutions results fundamental. The ruling has provided national and international audiences with a comprehensive picture of both the situation of Afro-Colombian and Indigenous communities inhabiting the Atrato basin, and of the Colombian institutional framework and its failures in addressing that situation. 'The oversight and engagement locally, nationally and internationally, if coordinated, can add considerable weight

[576] Beltrán, Andrés M. (2016), *El amparo estructural de los derechos*. Diss. Universidad Autónoma de Madrid, at https://repositorio.uam.es/handle/10486/676669, at 263.

to the possibility of implementation of what is one of the most important judicial decisions globally to uphold the rights of nature.'[577]

It must be emphasized that the Atrato Ruling, as well as the decisions creating rights and new water governance models for the Whanganui, Ganges, and Yamuna rivers, were driven by pressure from social movements that genuinely reflect the experiences, aspirations, and perspectives of subaltern communities, who have historically struggled to protect their ethnic and cultural identities and the water on which they depend for life.[578] The fact that these decisions have considered the protection of nature in connection to the values and ethics underpinned by these communities, at least in the Atrato Case, had a significant impact on the sense of responsibility of local communities in relation to the ruling's implementation. It was not perceived as a set of alien concepts imposed by a national court, but as the recognition of their cultural values and thus, a powerful invitation to own and advanced the decision. Moreover, the structural and dialogic nature of the orders imparted by the Court, supported by the strong Afro-Colombian and Indigenous social movements in the Region, are more likely to make an important contribution to overcoming the institutional blockages contributing to the serious rights violations took before the court.

This might be an important lesson for future RoN implementations. Alternative sustainable development discourses are fundamentally opposed to the current global modern logic underlying the governance of natural resources - including the economic interests of modern states and multinational corporations -, therefore, trusting that RoN will be fulfilled without involving local communities is more likely to reduce the possibilities of successful implementation. Instead, by centering those new legal rights on the relationship between people and nature, the possibility to achieve the larger goal of transforming our relationship with nature to one of mutual respect, rather than exploitation, might be potentialized.

However, it should be noted that for RoN to effectively address not only the protection of nature, but also problems motivated by economic and cultural factors, their implementation cannot solely depend on local communities, as this would place a huge burden on them that adds to the existing challenges they are already facing. New responsibilities for local

[577] ABC Colombia (n 476)
[578] *Ibidem.*

communities as guardians of natural ecosystems should not only not be underestimated but clearly established and financially supported. Moreover, the responsibility of States to guarantee the conditions for these communities to fulfill this task must be emphasized.

Certainly, broadening the category of rights both for rivers and local communities that have an intrinsic interdependent relationship with their territory, provides new legal tools and languages of resistance for grass-root movements and might amplify their voices in policy decision making scenarios. Nevertheless, attention should be also placed on the wider picture in which these realities are immersed. This implies the recognition that, ultimately, what is at stake in these cases is a contend for the governance of natural resources, one that threatens the very existence of local communities themselves. Hence, the protection of biodiversity must aim at protecting both local communities and the ecosystems they inhabit, without neglecting one of the two. To this purpose, courts, legislators and policy makers must get involved with and listen to the needs and complexities faced by the communities of contested hydro-social territories when designing plans or orders addressed to protect both human rights and the environment.

There is an impellent need to further indagate the way in which new collaborative water governance models are being implemented around the world and the impact that new ecological rights-based approaches are having on local communities. From the findings of this research, a further exploration of the concept of biocultural rights in connection to RoN in different cultural and political settings would have an immense potential to devise new holistic ways to address the current socio-ecological challenges facing rural, indigenous and afro-descendent communities the world over.

A cultural shift aimed at halting or preventing future ecological damage and, consequently, the destruction of the world's biocultural heritage, is a responsibility of humanity as a whole. This responsibility necessarily implies being open to embracing new ways of understanding the world and the value of life in all its forms. We all depend on natural ecosystems to be alive, however, there are some contexts in which this fact becomes particularly controversial as different world views and values assigned to a given territory collide. The delegitimization of the actions of those who pretend to master and destroy the "other" - whether nature or human groups- in these contested settings, may at first seem merely formal, but it subtly and powerfully creates sites of struggle and resistance that allow for the continuation of life and efforts to have a more just, humane, and ecologically sustainable world. It is up to us to make

use, advance, and develop these new tools to contribute to the transformation of the unjust socio-environmental realities besetting our beloved planet Earth.

APPENDICES

a. Interviews Information

Interviewee	Organization/Title*	Date and place
Lisneider Hinestroza Cuesta	Associate Law Professor at Technological University of Chocó	24 May 2019
Juan Felipe García Arboleda	Associate Law Professor at Universidad Javeriana	4 June 2019
Ingris Katherine Asprilla,	Guardian of the Atrato River and member of COCOMACIA	29 May 2019
Alexander Rodríguez Mena	Guardian of the Atrato River and member of COCOMACIA	29 May 2019
Abid Manuel Romaña	Guardian of the Atrato River and Coordinator of FISCH	28 May 2019
José Americo Mosquera	Guardian of the Atrato River and member of COCOMOPOCA	31 May 2019
Jeison Palacios	Member of the Technical Secretariat of the Commission of Guardians of the Atrato River at FISCH	30 May 2019
José Nixon Chamorro Caldera	Guardian of the Atrato River, member of Mesa Indígena del Chocó and Secretary of Development and Natural Resources of the Governor's Office of Chocó.	30 May 2019
Luz Enith Mosquera	Member of the Technical Secretariat of the Commission of Guardians of the Atrato River at FISCH	31 May 2019
Felipe Clavijo-Ospina	Former law clerk at the Constitutional Court of Colombia involved in the drafting of the Atrato Ruling	23 May 2019
Viviana González	Lawyer at Tierra Digna	24 May 2019
Juana Hoffman	Coordinator of the Network for Environmental Justice in Colombia and lawyer at AIDA (Interamerican Association Environmental Defense)	23 May 2019
Group interview	Municipality of Tanguí, Chocó	29 May 2019

*This information reports the positions held by the interviewees at the time of the interview.

b. List of Legislation and Institutional Documentation

Bolivia

Act 071 of 2010 – Ley de Derechos de la Madre Tierra (Act of Mother Earth's Rights).

Colombia

Constitutional Court Accord 02/2015 [https://www.corteconstitucional.gov.co/inicio/Reforma%20Reglamento-19.pdf] accessed 06 June 2020

Constitución Política de Colombia (hereinafter “CP”, “Colombian Constitutional Charter” or “Colombian Constitution”).

Colombian Constitutional Court, Auto (Writ) 273/2013 - Application for invalidity Judgement T143/2007

Colombian Ombudsman's Office, Defensoría del Pueblo, Report “Humanitarian Crisis in Chocó: Diagnosis, Evaluation and Actions of the Colombian Ombudsman” 2014, (Col. Ombudsman, Humanitarian Crisis in Chocó 2014), available on [https://www.defensoria.gov.co/public/pdf/crisisHumanitariaChoco.pdf] accessed 20 August 2019

Colombian Ombudsman's Office, Defensoría del Pueblo, “Minería de Hecho en Colombia” 2010, available on http://www2.congreso.gob.pe/sicr/cendocbib/con4_uibd.nsf/F11B784C597AC0F005257A310058CA31/%24FILE/La-miner%C3%ADa-de-hecho-en- Colombia.pdf] accessed 20 August 2019

Decree 2591 of 19 November 1991 (hereinafter “Decree 2591/1991”) - Whereby the Tutela action is regulated pursuant to Art. 86 of the Constitution.

Law 70 of 27 August 1993 (hereinafter “Law 70 of 1993”) – Whereby the transitory Art. 55 CP is regulated.

Ecuador

Constitución de la República del Ecuador (Constitution of the Republic of Ecuador) (adopted 28 September 2008 entered into force 20 October 2008. Asamblea Nacional Constituyente de Ecuador de 2007-2008 (National Constituing Assembly of Ecuador).

India

The Constitution of India, 1950

New Zealand

“Te Urewera” Act 51 of 27 July 2014 (entered into force 28 July 2014).

“Te Awa Tupua (Whanganui River Claims Settlement)” Act 7 of 20 March 2017 (entered into force 21 March 2017).

International

Act 1037 of 25 July 2006 (hereinafter “Act 1037/2006”) – Whereby the Convention for the Safeguarding of the Intangible Cultural Heritage, adopted by the XXXII General Meeting of UNESCO celebrated in Paris and ending on 17 October 2003, signed in Paris on 3 November 2003, is approved.

American Declaration on the Rights of Indigenous Peoples (adopted 15 June 2016) OAS.

Convention 169 on Indigenous and Tribal Peoples (7 June 1989 entered into force 1991) International Labor Organization (ILO Conv. 169).

Convention on Biological Diversity (signed 5 June 1992 entered into force 29 December 1993) UNCED (Biodiversity Conv. or CBD).

Declaration of the United Nations Conference on the Human Environment (adopted 16 June 1972) United Nations Conference on the Human Environment (Stockholm Decl.).

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) UNGA Res 2200A XXI (ICESCR).

Minamata Convention on Mercury (signed 10 October 2013 entered into force 16 August 2017) Intergovernmental Negotiating Committee on Mercury – Conference of Plenipotentiaries (Minamata Conv.).

Resolution on the Human Right to Water and Sanitation (adopted 28 July 2010) UNGA (Res. 64/292).

The Right to Food (adopted 16 April 2004) UNCHR E/CN.4/RES/2004/19 (Res. 2004/19).

The Rio Declaration on Environment and Development (adopted 5 June 1992 entered into force 29 December 1993) UNCED (Rio Decl.).

Rome Declaration on World Food Security (adopted 13-17 November 1996) World Food Summit (Rome Decl. WFS).

United Nations Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) UNGA (UNDRIP).

Universal Declaration on the Eradication of Hunger and Malnutrition (adopted 16 November 1974) UNGA (UDEHM).

Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security (adopted November 2004) FAO Council (2004 FAO VG).

World Declaration and Plan of Action for Nutrition (adopted December 1992) International Conference on Nutrition (WDN).

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