

# EARTH LAW AND THE PROTECTION OF INTERNATIONAL WATERS: A PROPOSAL FOR THE ADOPTION OF A RIGHTS-BASED APPROACH TO HIGH SEAS GOVERNANCE

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**Abstract:** To date, the international legal system has been unsuccessful in addressing the increasing deterioration of marine ecosystems and the threats to biodiversity caused by environmental and climatic degeneration. Despite the proliferation of environmental regulations, their focus remains flawed: as highly anthropocentric in purpose, they address fragmented environmental problems, rather than their underlying cause. This memorandum proposes that an earth-centred system based on accepting the inherent rights of marine ecosystems is an additional solution to an increasingly urgent global problem, and makes several recommendations on how such a system can be adopted and implemented, from the multilateral expansion of existing legal concepts to the adoption of new instruments.

## 1 INTRODUCTION

Since 1972, 88 countries have created a constitutional right to a healthy environment and 65 others have adopted provisions that enshrine environmental protection in their constitution. Over 350 environmental courts and tribunals were created in over 50 countries.<sup>1</sup> However, the first-ever global UN report that analysed the efficiency of our prolific growth found that the implementation and enforcement of these laws remains a great challenge, and with widespread species and habitat loss continuing to increase, rapid action is needed at the foundation of the legal system in order to ensure the conservation and protection of Nature.<sup>2</sup>

Constituting more than 95% of the biosphere, the Ocean supports all life forms by generating oxygen and absorbing carbon dioxide, recycling nutrients and regulating global climate and temperature.<sup>3</sup> Overfishing, pollution, habitat loss, ocean sedimentation and climate change have, however, taken a toll on ocean health, leading to a diminished ability to sustain its life-giving cycles.<sup>4</sup> Approximately 57% of fish stocks are now fully exploited, with 30% being over-exploited. Illegal and unregulated fishing is responsible for 11-26 million tons of fish catches, and overfishing has been encouraged by governmental subsidies<sup>5</sup> of up to USD 35 billion every year, or about 20% of the value of fish caught at sea.<sup>6</sup> Globally, as much as 20% of the total fish catch is obtained illegally, and this is raised to 30% in western

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<sup>1</sup> UN Environment, *Dramatic growth in laws to protect the environment, but widespread failure to enforce, finds report*. Environmental Rights and Governance. (2019), <https://www.unenvironment.org/news-and-stories/press-release/dramatic-growth-laws-protect-environment-widespread-failure-enforce-finds-report?fbclid=IwAR2cybrZzEdOS4E9uCc4uQsSI3z03ADeSaDY2LhhXLNwv3yVb7vp90YxjRA> accessed 5 February 2019

<sup>2</sup> United Nations Environment Programme, *Environmental Rule of Law: First Global Report* (2019), [https://wedocs.unep.org/bitstream/handle/20.500.11822/27279/Environmental\\_rule\\_of\\_law.pdf?sequence=1&isAllowed=y](https://wedocs.unep.org/bitstream/handle/20.500.11822/27279/Environmental_rule_of_law.pdf?sequence=1&isAllowed=y) accessed 5 February 2019

<sup>3</sup> Kim Anh Thi Nguyen and others, 'Biodiversity, coastal protection and resource endowment: Policy options for improving ocean health' [2018] 40(1) *Journal of Policy Modeling* 243

<sup>4</sup> *ibid*

<sup>5</sup> *Ibid*

<sup>6</sup> Roger Martini, 'Many government subsidies lead to overfishing Here's a solution' (OECD, 28 February) <<https://www.oecd.org/agriculture/government-subsidies-overfishing/>> accessed 22 August 2019

and central regions of the Pacific Ocean.<sup>7</sup> This raises grave concerns on the long-term well-being of marine ecosystems in international waters.

Covering 72% of the Earth's surface, the waters and seabed beyond national jurisdictions, or the High Seas, are a fundamentally important part of Nature which stands at the forefront of environmental and climatic protection. Improvements in technology, however, are leading to an increasing demand for the exploitation of these areas, the result of which are threats to marine biodiversity and severe challenges to the natural balance of the High Seas ecosystems.<sup>8</sup> In an attempt to contribute to the conservation and protection of international waters and their biodiversity, this memorandum proposes the creation of rights for the High Seas, which would allow them to be represented as an interest-holder and party to decisions affecting their health, and therefore effectively conserved and protected. To that end, the shortcomings of the current system of High Seas governance will firstly be analysed, after which the Rights of Nature framework will be discussed. Finally, propositions or recommendations will be made through which this body of water would be able to enjoy effective and enforceable protection.

## 2 RIGHTS OF NATURE FRAMEWORK

Around the world, various forms of government, from international bodies, to nations and small communities, are beginning to recognize that Nature has inherent rights to exist, regenerate its vital cycles, and be restored when damaged. This is in contrast to western legal systems that largely value and treat Nature as a resource and property, and does not give communities standing to protect Nature. As a result, environmental law still allows pollution and degradation, and citizens are unable to hold governments, industries or corporations accountable for harm done to the environment.

Though not exhaustive, the Rights of Nature in law allows for:

- i. Greater protection for the environment than otherwise afforded
- ii. Standing for the local community to defend Nature in the courts
- iii. Representation by human guardians in decisions and disputes
- iv. Precautionary decision-making
- v. Consideration of the rights of future generations
- vi. Conducting human activity within the natural capacity of the Earth to sustain it
- vii. Alignment with the human right to a healthy environment
- viii. The maintenance or increase in environmental health, rather than continued decline
- ix. The change in societal perspectives, resulting in a paradigm shift towards living in harmony with Nature

While this concept is ancient and has its roots in indigenous beliefs and customs, Nature has emerged as an entity with inalienable rights in over 20 jurisdictions worldwide, including Colombia, Bolivia, Ecuador, India, Mexico, New Zealand, the United States,

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<sup>7</sup> Reniel B Cabral and others, 'Rapid and lasting gains from solving illegal fishing' [2018] 2 Nature Ecology & Evolution 650

<sup>8</sup> Natalie C Ban and others, 'Systematic Conservation Planning: A Better Recipe for Managing the High Seas for Biodiversity Conservation and Sustainable Use'[2013] 7(1) Conservation Letters 41

Argentina, Brazil, Cameroon, Nepal and elsewhere.<sup>9</sup> This includes national law, constitutional amendments, treaty agreements and judicial decisions granting legal personhood to Nature as whole or declaring single and entire ecosystems as legal entities subject of rights. To date, these ecosystems include lakes, rivers, national parks, and mountain ranges (with all their connected parts).

Rights of Nature laws are emerging as a response to the pressures put on communities by the effects of environmental deterioration, from climate change to habitat and species loss. In fact, a 2016 UN report highlights that “intensified competition for natural resources in recent decades has led to multiple social and environmental conflicts all over the world.”<sup>10</sup> In a legal system without Rights of Nature, human interests will continue to outweigh that of the Nature in decisions and disputes, and we will continue to see degradation and conflict.

### 3 THE CURRENT SYSTEM OF HIGH SEAS GOVERNANCE

The High Seas have yet to receive such legal standing. Nevertheless, the adoption of the United Nations Convention on the Law of the Sea (UNCLOS)<sup>11</sup> remains an extraordinary achievement of the international community that codifies rules of customary international law of the sea and aims to protect high seas environments. However, while the shortcomings are not in the formulation of the instrument, it remains far too limited in scope, such that changes in scientific development, ecology and climate cannot be taken into account. Moreover, the legal and policy framework created by it is insufficient in dealing with the increasing dependency and growing human activities in the Ocean.<sup>12</sup>

UNCLOS does not provide how high seas “resources” should be protected, and remains silent on the issue of whether these resources should be considered as common heritage of mankind. This significant lacuna creates a back-lock in the UNCLOS framework.<sup>13</sup> However, the most significant deficiency under the UNCLOS system stems from its inherent anthropocentric outlook, which only allows for the High Seas to be seen as valuable in terms of the resources it provides- with a focus on human rights and access to the High Seas rather than responsibilities towards it. Anthropocentrism is at the foundation of this international legal instrument, and this significant historic burden still weighs on the efforts to halt the deterioration of the environment and combat climate change on a global scale.<sup>14</sup>

One important purpose of the UNCLOS framework is to allow for the High Seas to be open to all states for purposes of navigation, overflight, fishing and scientific research. Under Article 117, signatory states are obligated to cooperate for the “conservation of the living resources of the high seas.”<sup>15</sup> However, this provision does not define what conservation looks like, but rather because of the High Seas’ status as a resource, has allowed for and encouraged further and continuous exploitation. This is a grave limit imposed on the

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<sup>9</sup> Craig M. Kauffmann and Linda Sheehan, *The Rights of Nature: Guiding Our Responsibilities through Standards*. in Stephen J Turner (ed), *Environmental Rights: The Development of Standards* (CUP 2019) 342-3

<sup>10</sup> UNGA ‘Report of the Special Rapporteur on the Situation of Human Rights Defenders’ UN Doc A/71/281 (2016) 13.

<sup>11</sup> UN General Assembly, *Convention on the Law of the Sea*, 10 December 1982, available at: <https://www.refworld.org/docid/3dd8fd1b4.html> [accessed 14 July 2019]

<sup>12</sup> Daud Hassan and Saiful Karim, *International Marine Environmental Law and Policy* (Routledge 2019)

<sup>13</sup> *ibid*

<sup>14</sup> Daniel Bodansky and others, *International Environmental Law: Mapping the Field*. in Bodansky and others (eds), *The Oxford Handbook of International Environmental Law* (OUP 2008) 1-3

<sup>15</sup> UNCLOS Article 117

protection of high seas ecosystems, and the human nexus requirement is likely the main cause for the small number of victories so far in the international environmental legal framework. High seas marine environments are only protected as a result of existing limits created to prevent exploitation. A great example is the response of the international community to the threat posed by oil spills: the Civil Liability Convention of 1969 and the Oil Pollution Act of 1990<sup>16</sup> have created vast government bureaucracies that impose oil spill limits beyond which fines and other punitive measures are imposed. As a result, legal consequences arise only after the damage has already occurred.<sup>17</sup>

Additionally, the high level of control exercised by a state over international regulation allows countries to adopt short-term economic goals as a priority, to the detriment of the high seas environment, with little to no repercussions. Consequently, while the UNCLOS framework constitutes an important step in the achievement of a comprehensive framework of protection for international waters, it is unlikely to succeed, particularly due to its anthropocentric perspective. A Rights of Nature approach, on the other hand, would allow for the high seas to be protected from the acts of private entities, but also states themselves. Such a drastic shift in legislative scope is urgently needed because of the increasing pressures faced by global oceans and their ecosystems, which have resulted in and will continue to have grave impacts on climate change, habitat destruction, pollution, all of which gravely affect marine biodiversity.<sup>18</sup>

#### 4 ADOPTING A RIGHTS-BASED APPROACH TO HIGH SEAS GOVERNANCE

In the landmark case of *Sierra Club v Morton*, dissenting Justice Douglas went as far as to state that creating rights for Nature is the only way to ensure that all forms of life that nature represents will be protected before courts.<sup>19</sup> The United Nations, the IUCN and others have called for such an approach to conserving the Ocean.

- Since 2009, the UN General Assembly has adopted ten resolutions on Harmony with Nature, calling for and defining a new, non-anthropocentric relationship with Nature and inviting States to “advance a holistic conceptualization of sustainable development in its three dimensions [and] to identify different economic approaches that reflect the drivers and values of living in harmony with nature.”<sup>20</sup>
- The Inter-American Court of Human Rights, in Advisory Opinion Oc-23/17 of November 15, 2017, declared that the right to a healthy environment constitutes an autonomous right, stating “which unlike other rights, protects the components of the environment, such as forests, rivers, seas, and others, as legal interests in themselves, even in the absence of certainty or evidence of the risk to individuals.”<sup>21</sup>

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<sup>16</sup> 33 U.S.C. § 2701 (1994)

<sup>17</sup> Michael A de Gennaro, 'Oil Pollution Liability and Control under International Maritime Law: Market Incentives as an Alternative to Government Regulation' [2004] 37(1) *Vanderbilt Journal of Transnational Law* 267

<sup>18</sup> Casey C O'Hara and others, 'Mapping status and conservation of global at-risk marine biodiversity' [2019] *Conservation Letters* 1

<sup>19</sup> *Sierra Club v. Morton*, 405 U.S. 727, 752 (1972) (Douglas, J., dissenting)

<sup>20</sup> See, <http://www.harmonywithnatureun.org/>; United Nations RES/73/235.

<sup>21</sup> Inter-American Court of Human Rights, Advisory Opinion requested by the Republic of Colombia, OC-23/17 (November 15, 2017) par. 62., available at Colombia, OC-23/17 [www.corteidh.or.cr/docs/opiniones/seriea\\_23\\_esp.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf)

- In 2012, the International Union for the Conservation of Nature (IUCN) passed Resolution 100, requiring the Rights of Nature to be a focal point in IUCN decision-making.<sup>22</sup>
- The International Food and Agriculture Organization (FAO) has stated that sustainable development of marine areas can only be achieved if ecosystem and fisheries management “converge towards a more holistic approach that balances both human well-being and ecological well-being.”<sup>23</sup>

Further support for a rights-based approach to High Seas governance lies in recent scientific and expert reports. Currently more than 99% of the high seas are unprotected. The global community has collectively agreed to protect 30% of the Ocean in the form of marine protected areas by 2030.<sup>24</sup> Yet, scientists advise that this target should be closer to 50%,<sup>25</sup> and the High Seas should be completely closed to fishing. By closing the High Seas to fishing, there is a potential for “large gains in fisheries profit (>100%), fisheries yields (>30%), and fish stock conservation (>150%).”<sup>26</sup>

The following section will put forward recommendations through which a rights-based framework can be implemented and enforced with respect to the High Seas.

## 5 RECOMMENDATIONS FOR THE ADOPTION OF A RIGHTS-BASED APPROACH TO HIGH SEAS GOVERNANCE

This section will put forward the following recommendations:

- 1) the creation of a guardianship framework for the legal representation of the High Seas;
- 2) the creation of a judicial body to oversee possible disputes;
- 3) the multilateral expansion of international law concepts and principles, which can be done through the reinterpretation of treaty terms;
- 4) the recognition of the intrinsic value of biodiversity or the expansion of the common heritage of mankind principle; and
- 5) the change in the perspective of the treaty currently under discussion.

However, before discussing possible methods for the creation of rights for the High Seas, it is important to highlight and establish recommendations in terms of the standard and scope of the legislative protection needed. In order to assess this, the previous Rights of

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<sup>22</sup> World Conservation Congress, Incorporation of the Rights of Nature as the organizational focal point in IUCN's decision making, WCC-2012-Res-100-EN (2012), available at: <http://bit.ly/RES100>.

<sup>23</sup> Fisheries Management-2. The Ecosystem Approach to Fisheries, Food and Agriculture Organization of the United Nations, 2003, available at: <http://www.fao.org/3/ay4470e.html>.

<sup>24</sup> 2011 Convention on Biological Diversity Aichi Targets, 193 countries have agreed.

<sup>25</sup> Jane Lubchenco et.al, Making waves: The science and politics of ocean protection, Science, Oct. 2015, Vol. 350, Issue 6259, pp. 382-38, DOI: 10.1126/science.aad5443; 'Effective coverage targets for ocean protection' by Bethan C. O'Leary, Marit Winther-Janson, John M. Bainbridge, Jemma Aitken, Julie P. Hawkins, Callum M. Roberts is published in *Conservation Letters*; E.O. Wilson, To Protect Marine Species, Half the Ocean to be Put in Marine Reserves, at

<https://eowilsonfoundation.org/to-protect-marine-species-e-o-wilson-calls-for-half-the-ocean-to-be-put-in-reserves/>; Nature Needs Half Initiative <https://natureneedshalf.org/science/>.

<sup>26</sup> Crow White and Christopher Costello, Close the High Seas to Fishing? PLOS Biology, 2014,

<https://doi.org/10.1371/journal.pbio.1001826>, at

<https://journals.plos.org/plosbiology/article?id=10.1371/journal.pbio.1001826>

Nature successes will be relied on, and particularly those of the United States, Ecuador and New Zealand. While they differ in their approaches, the three jurisdictions all provide legal standing and personality for Nature to be protected before national courts. These systems all have benefits and setbacks, particularly as they were all adopted as a response to differing domestic issues, but offer an important starting point in the analysis of rights for the High Seas.

In one approach, Nature as a whole is recognized as having inherent rights and the community is given legal standing to defend Nature, and in another approach, an ecosystem is taken out of the realm of property and recognized as a legal entity or person subject of rights. In such instances, guardians are chosen to represent the ecosystems interests, rather than the entire community. The New Zealand instrument is highly specific and provides an easily enforceable framework, while the American and Ecuadorian systems are much wider in scope and can be more easily triggered.

Local US laws that recognize the Rights of Nature<sup>27</sup> go beyond allowing it to exist or be restored, for it to be compensated or returned to its original state, in that they recognize Nature's right to flourish. Ecosystems are inevitably affected by human actions, and therefore determining where to set the threshold of standards has important implications for the protection afforded to marine ecosystems. Ecuador's constitution allows some human actions to fall outside the scope of violations of Nature's rights if the ecosystem will still be able to regenerate itself. This standard is minimal. By comparison, the right to flourish places the emphasis on ensuring well-being for the ecosystem rather than preventing permanent harm. Therefore, a more restrictive definition would need to be created for acceptable human impact, and therefore stricter standards,<sup>28</sup> that will allow for a much more efficient and long-term framework of protection.

The Ecuadorian constitution is, on the other hand, more expansive in its definition of Nature than the New Zealand legislation, which has well-defined boundaries and under which legal personality is only afforded to the Te Urewera National Park<sup>29</sup> and the Whanganui River.<sup>30</sup> In the context of the rights afforded to the High Seas, however, these approaches highlight that the protection provided should be specific rather than wide in scope. Due to issues such as the status of rocks, seabed resources, or water, and whether they are part of 'Nature' or not,<sup>31</sup> along with the uncertainty created by the lack of clear definitions, it becomes apparent that the framework of Rights for the High Seas would benefit most from an actor-specific approach, as adopted in the US and New Zealand. While the protection granted to marine ecosystems would be less flexible, it would have the benefits of a clear and more easily enforceable legal framework.

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<sup>27</sup> While the majority of legislation that affords rights to nature is made up of local ordinances, Lake Erie has been given legal standing to hold rights  
Jason Daley, 'Toledo, Ohio Just Granted Lake Erie the Same Legal Rights as People' (Smithsonian, 1 March )<<https://www.smithsonianmag.com/smart-news/toledo-ohio-just-granted-lake-erie-same-legal-rights-people-180971603/>> accessed 8 August 2019

<sup>28</sup> Kauffmann (n9) at 345-6

<sup>29</sup> Te Urewera Act 2014. <http://www.legislation.govt.nz/act/public/2014/0051/latest/DLM6183601.html#DLM6183888> (accessed May 27, 2019)

<sup>30</sup> Tutohu Whakatupua 2012 [http://www.wrmtb.co.nz/new\\_updates/TuutohuWhakatupuaFinalSigned.pdf](http://www.wrmtb.co.nz/new_updates/TuutohuWhakatupuaFinalSigned.pdf) (accessed May 27, 2019)

<sup>31</sup> Craig M Kauffmann and Pamela L Martin, 'Constructing Rights of Nature Norms in the US, Ecuador, and New Zealand' [2018] 18 Global Environmental Politics 48

The following recommendations will start from the premise that a guardianship framework is essential to the protection of the High Seas and its rights, as is the designation of one or more judicial bodies to see to the implementation of these rights. For the adoption of these rights to become possible, two different approaches will be suggested: the expansion of current legal principles and concepts, and the creation of a new system altogether. Differing options for these two approaches are suggested below.

### 1.1 THE ESTABLISHMENT OF A GUARDIANSHIP FRAMEWORK

The responsibility of protection will become weaker if distributed broadly: Ecuador allows all citizens to have legal standing, but this does not create a requirement of protection. As a result, it is recommended that the enforcement mechanism for the rights of the High Seas be based on a guardianship system, which would create an obligation on a specialized committee of persons legally mandated to advocate for the interests of the High Seas in decisions and disputes.<sup>32</sup> This proposition, initially made by Christopher D. Stone,<sup>33</sup> relies on the need for environmental actors to be legally represented and acknowledged as an independent legal party with valid and enforceable rights.<sup>34</sup> Guardians can be appointed from a restricted group, as are community representatives in the United States, or from within specific committees so designated, as is done in New Zealand.<sup>35</sup>

### 1.2 THE DESIGNATION OF A JUDICIAL BODY

In order to oversee the implementation of the rights for the High Seas and settle any disputes which may arise, an international court or tribunal will need to be designated. This can be done either through the expansion of existing courts' jurisdictions, such as the International Tribunal for the Law of the Sea (ITLOS), to settle disputes arising regarding the rights of the High Seas, or the creation of a new, specialized tribunal. Alternatively, human rights courts can be appropriate for such disputes, and are especially accessible for individuals or communities to bring actions.

### 1.3 THE MULTILATERAL EXPANSION OF INTERNATIONAL LAW CONCEPTS AND PRINCIPLES

As an alternative to the creation of a new instrument, it is possible to reinterpret and expand terms and concepts in existing international legal instruments. The European Court of Human Rights applies such a principle, allowing its Convention to keep up with "present-day conditions" and be interpreted in "light of the progress of events and changes in habits of life."<sup>36</sup> This "living instrument" approach is also applied by domestic courts, through principles such as the always speaking statute interpretation, the living tree interpretation and the *Verfassungswandel* doctrine.<sup>37</sup> Such internal rules allow judicial bodies to adapt to conditions that were not anticipated and interpret rights more broadly. This flexibility can be taken advantage of, particularly given the urgency, in order to protect the High Seas.

One solution to achieving an effective framework of rights-based protection for the High Seas would be to use the rules of evolutionary interpretation, or the reinterpretation of

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<sup>32</sup> *ibid* at 51

<sup>33</sup> Christopher D. Stone, *Should Trees Have Standing? Law, Morality and the Environment* (3rd edn, OUP 2010)

<sup>34</sup> Adam Sowards, 'Should nature have standing to sue?' (High Country News, January 19) <<https://www.hcn.org/issues/47.1/should-nature-have-standing-to-sue>> accessed 26 January 2019

<sup>35</sup> Kauffmann (n31) at 51

<sup>36</sup> Eirik Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees* (OUP 2015) 131

<sup>37</sup> *Ibid* at 153-4

open-ended concepts in existing legal instruments. Such an approach would allow for normative instruments with an open-textured content to be adapted and reinterpreted using interpretation rules found in article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT).<sup>38</sup> While an ecocentric, nature-focused reading to the instrument in question would be necessary, it is not required for evolutionary interpretation to rely on recognized factual or normative developments which could have an important role at the time of the application of the treaty.<sup>39</sup> Therefore, in this context, the relevant stage of articulation would rely on the creation of an innovative concept and a new line of argumentation.<sup>40</sup> For example, the European Court of Human Rights uses the rules of interpretation governed by the VCLT, but it has developed a more substantive internal set of interpretation principles which functions alongside the Vienna Convention.<sup>41</sup> This allows the Court to read into and expand its limited set of rights, so as to be able to lay the foundation of a possible right to a safe and legal abortion<sup>42</sup> or protect the rights of minorities.<sup>43</sup>

### 3.3.1 THE RECOGNITION OF THE INTRINSIC VALUE OF BIODIVERSITY

For example, we could expand upon the obligation put forth in Article 192 of UNCLOS, which provides for states to protect and preserve the marine environment. The lack of specificity in this provision allows for its interpretation in a way which could allow the High Seas to be protected from the perspective of its inherent ecological integrity and capacity. In practice, this would create obligations on states to preserve the High Seas for its intrinsic worth, including biodiversity<sup>44</sup> independent from the needs and utility of humanity.<sup>45</sup> A first step was taken through the adoption of the Convention on Biological Diversity,<sup>46</sup> which connects biodiversity to Nature as a whole, and stresses the importance of all the fundamental parts of ecosystems, from “plant, animal and micro-organism communities” to their “non-living environment acting as a functional unit” both of which are equally necessary for biological diversity to be maintained.<sup>47</sup> The inclusion of the requirement to maintain the non-living environment needed by ecosystems to remain in balance brings a bold and promising avenue for the achievement of an independent legal status for the High Seas and its right to biodiversity.<sup>48</sup>

### 3.3.2 THE EXPANSION OF THE COMMON HERITAGE OF MANKIND PRINCIPLE

Another recommendation is to reinterpret our understanding of the common heritage of mankind principle as it relates to the High Seas. This principle was originally put forward

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<sup>38</sup> United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331

<sup>39</sup> Vito de Lucia, 'Ocean Commons, Law of the Sea and Rights for the Sea' [2019] XXXII(1) Canadian Journal of Law & Jurisprudence 11

<sup>40</sup> *ibid*

<sup>41</sup> Masa Marochini, 'The Interpretation of the European Convention on Human Rights' [2014] 51(1) Zbornik radova Pravnog fakulteta u Splitu 66

<sup>42</sup> Chiara Consentino, 'Safe and Legal Abortion: An Emerging Human Right? The Long-lasting Dispute with State Sovereignty in ECHR Jurisprudence' [2015] 15(1) Human Rights Law Review

<sup>43</sup> European Center for Minority Issues, Mechanisms for the Implementation of Minority Rights (Council of Europe Publishing 2004) 93-4

<sup>44</sup> Te Urewera Act 2014, Public Act 2014 No 51, Date of assent 27 July 2014, available at: <http://www.legislation.govt.nz/act/public/2014/0051/latest/DLM6183601.html>.

<sup>45</sup> de Lucia (n39) 11

<sup>46</sup> 1760 UNTS 79; 31 ILM 818 (1992)

<sup>47</sup> Elena Blanco and Jona Razzaque, Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives (Edward Elgar Publishing 2011) 367

<sup>48</sup> de Lucia (n39) at 11-12

by the Maltese delegation to the General Assembly as a means to protect areas beyond domestic jurisdictions from exploitation or appropriation by a single state or corporation. These areas were to be held in trust as the common heritage of humanity for the benefit of humanity as a whole, for both present and future generations. While initially limited to the seabed and ocean floor, it has been expanded to cover the Moon and other celestial bodies, as well as Antarctica, so that the use of these areas can only be governed and managed by an international authority and the benefits equitably shared by the international community. The scope and expansive nature of this principle remains uncertain, particularly with respect to the High Seas, which are not currently considered to be part of the common heritage of mankind.<sup>49</sup>

Therefore, the common heritage of mankind principle is a highly controversial, ambiguous and limited concept. It is, however, undergoing a constant evolution, and it is seen as a “living concept.”<sup>50</sup> As a result, we could expand this concept to include the High Seas. The High Seas would then be held in trust and not able to be owned or exploited by one state. This concept is synonymous with designating the High Seas as a legal entity, where the ecosystem is similarly no longer owned as property and a resource, guardians are designated to ensure the ecosystems interests are represented and rights are not violated, including the maintenance of its vital cycles into the future.

Additionally, by incorporating the Rights of Nature into this principle, its fundamental focus would shift: it would become a common heritage of the Earth principle, with humans no longer playing the dominant role.<sup>51</sup> Such an approach would require the High Seas to be healthy and thriving into the future for the benefit and continued use by not only humans, but the entire Earth community. The recognition of the High Seas as the common heritage of the Earth, would not only bring a significantly higher level of protection, but it could signal a change in the perception of humanity’s responsibilities towards the natural world, which would ultimately allow for humans to live in harmony with Nature.<sup>52</sup>

#### 1.4 THE ADOPTION OF NEW INTERNATIONAL LEGISLATIVE INSTRUMENTS

The ideal approach in terms of strength and enforceability would be to adopt a new legislative instrument. Particularly as rights for the High Seas would go against the interests of powerful economic actors, there is a need for this recognition to be supported by universally enforceable and well-enshrined provisions. This is also made apparent by the far stronger evolution of the Ecuadorian Rights of Nature framework, enshrined in its constitution, than that in the United States, which is limited to local laws.<sup>53</sup> Following this constitutional change, there have been over 30 judicial cases in the name of Nature in Ecuador, which have resulted in a significant increase in awareness and biodiversity protection, not only directly by protecting the rights of sharks, jaguars or shrimp, but also indirectly through the estoppel of illegal mining activities.<sup>54</sup> It is, therefore, of vital

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<sup>49</sup> Kemal Balsar, *The Concept of Common Heritage of Mankind in International Law* (Martinus Nijhoff 1998) ix-xxi

<sup>50</sup> Keyuan Zou, *Global Commons and the Law of the Sea: An Introduction*. in Keyuan Zou (ed), *Global Commons and the Law of the Sea* (Brill Nijhoff 2018) 1

<sup>51</sup> Cameron La Follette and Chris Maser, *Sustainability and the Rights of Nature: An Introduction* (CRC Press 2017) 84

<sup>52</sup> *ibid*

<sup>53</sup> Kaufmann (n31) at 50-1

<sup>54</sup> Appendix to Craig Kauffman and Pam Martin, "Testing Ecuador's Rights of Nature: Why Some Lawsuits Succeed and Others Fail," Presented at the International Studies Association Annual Convention, Atlanta, GA, March 18, 2016.

importance for the rights of the High Seas to be created through a primary instrument of law at the international level, such as a treaty or a convention with a corresponding judicial mechanism.

#### 1.4.1 THE CHANGE IN PERSPECTIVE OF THE INTERNATIONAL TREATY UNDER NEGOTIATIONS

The adoption of a new international treaty that will protect marine environments by conferring them rights is a key issue, particularly given the current discussions on the Internationally Legally Binding Instrument (ILBI) on conservation and sustainable use of marine diversity.<sup>55</sup> While the adoption of an international legal instrument is a lengthy and highly complex process, it would ultimately provide the strongest framework of enforceability for the conservation of the high seas.

What is required is not a fundamental change in the content and nature of the treaty, but a shift in its perspective: from the indirect protection of the High Seas as a resource to its establishment as a legal entity with enforceable rights under international law. It has been argued that the granting of one legal right is sufficient to achieve international legal personhood,<sup>56</sup> which is of fundamental importance to the long-term and effective conservation of marine areas. Once the right to exist is granted to marine areas, they would gain international legal personality and be able to act as a participant in international law.<sup>57</sup> International legal personality is a highly fluid notion, which means that, outside of law-making capacity, marine ecosystems could gain the status of self-standing international actors, as opposed to legal objects, or property.

#### 1.4.2 THE ADOPTION OF INFORMATIONAL MECHANISMS

Informational mechanisms can also play a role in realizing a rights-based approach to the new treaty. For example, reflexive regulation is a legislative approach which allows self-regulation and co-regulation by regulated actors. Using this approach, States' roles change from actively legislating to prompting firms and corporations to take compliance more seriously, particularly by facilitating the participation of non-state actors in regulatory regimes.<sup>58</sup> This may be an important tool that would allow, particularly through the creation of economic incentives, actors on the market that profit from 'resources' from the High Seas and the deep seabed to regulate their own standards or what they consider responsible behaviour. Self-regulation would allow firms and companies to support rights for the High Seas while ensuring consumers, through various certifications, that these ecosystems are protected in a direct and sustainable manner. Governments could choose to support the process by only buying into products certified to have complied with the rights of the high seas ecosystems.

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Derechos de la Naturaleza, "Casos en Ecuador" <https://www.derechosdelanaturaleza.org.ec/casos-en-ecuador/> (2019) accessed August 8, 2019

<sup>55</sup> David Freestone, 'The Limits of Sectoral and Regional Efforts to Designate High Seas Marine Protected Areas' [2018] 112(1) AJIL Unbound 129

<sup>56</sup> Visa A.J. Kurki, Why Things Can Hold Rights: Reconceptualizing the Legal Person. in Visa A.J. Kurki and Tomasz Pietrzykowski (eds), *Legal Personhood: Animals, Artificial Intelligence and the Unborn* (Springer 2017) 71

<sup>57</sup> Roland Portmann, *Legal Personality in International Law* (CUP 2010) 3

<sup>58</sup> Alan Bogg and Tonia Novitz, *Voices at Work: Continuity and Change in the Common Law World* (OUP 2014)

Such initiatives have had a significant impact, particularly in regard to the sustainable seafood movement. Dolphin-safe ecolabels dominate the canned tuna market, and opened the way for a plethora of seafood eco-labels and buying guides. This not only allows consumers to make more informed choices, but suppliers are able to establish economically viable environmentally-conscious practices which respond to these choices.<sup>59</sup> The creation of such certifications would not only help raise awareness in consumers about the protection of marine ecosystems' rights, but also open the way for private entities and individuals to participate in the restoration of high seas ecosystems and the protection of marine biodiversity.

## 6 CONCLUSION

In conclusion, this memorandum has shown that despite the proliferation of international legal instruments aimed at protecting the environment, the current system has not proven efficient. As a result, a fundamental shift is necessary in the perception of environmental legislation, from seeing the High Seas as property to be protected indirectly by legislation, to seeing the High Seas as a legal entity subject of rights which, either through guardians or especially appointed bodies of experts, its interests would be protected directly in competent international courts and tribunals.

The recommendations made stem from the need to put an end to the anthropocentric nature of environmental regulation, with the creation of rights for the high seas being an essential step toward the preservation of the Ocean. Only by placing the High Seas at the centre of the international legal system, and the treaty designed to protect its biodiversity, will the Seas be effectively conserved and protected, for not only itself but humanity as well.

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<sup>59</sup> Melissa Vogt, *Sustainability Certification Schemes in the Agricultural and Natural Resources Sectors* (Routledge 2019)