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MASTER THESIS

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„The Solidification of the Right to a Healthy Environment before the Inter-American System of Human Rights“

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INTRODUCTION

Only in recent years the international community have recognized the protection of the environment as essential for a life of quality. While the process of internationalization of human rights occurred with the adoption of the Universal Declaration of Human Rights in 1948, the internationalization of the environmental protection happened only in 1972 with the adoption of the Stockholm Declaration of the United Nations Conference on the Human Environment. Antônio Augusto CANÇADO TRINDADE emphasizes the necessity of recognizing the relationship between human rights and environmental protection, as the protection of both affect the life of human beings.[1] The same way, Alan BOYLE explains:

> "Why should environmental protection be treated as a human rights issue? There are several possible answers. Most obviously, and in contrast to the rest of international environmental law, a human rights perspective directly addresses environmental impacts on the life, health, private life, and property of individual humans rather than on other states or the environment in general. It may serve to secure higher standards of environmental quality, based on the obligation of states to take measures to control pollution affecting health and private life."[2]

Together with the recognition that environment is an important part of guaranteeing human rights, the changes in the 20th Century led to an awareness to the environmental situation. At the time, it was not a matter of concern, but as it happened in the 20th Century with new technologies, it was a matter of celebration of human accomplishments.[3]

The concern with how the environment affects the life of individuals is appointed by the doctrine to have started in the 1930s. In this decade, the USA presented a complaint against Canada due to the damage caused to people and animals, in Washington, by transboundary pollution coming from a Smelter in the city of Trail, Canada. The arbitral

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[1] CANÇADO TRINDADE, Antônio Augusto. *Direitos Humanos e Meio Ambiente: Paralelo dos Sistemas de Proteção Internacional*. Porto Alegre: Sergio Antonio Fabris Editor, 1993. p. 23

[2] BOYLE, Alan. *Human Rights and the Environment: Where Next?* The European Journal of International Law, EJIL, Vol. 23 no. 3, 2012. Available at: http://www.ejil.org/pdfs/23/3/2296.pdf (accessed 01.08.2019) p. 613.

[3] TEIXEIRA, Gustavo de Faria Moreira. *O Greening no Sistema Interamericano de Direitos Humanos.* Curitiba: Juruá, 2011. p. 37.

sentence, from 1941, is considered the first formal manifestation of International Environmental Law.[4]

The environmental protection only evolved properly in the 1960s. Alexandre KISS and Dinah SHELTON propose that: "The present ecological era can be said to have begun at the end of the 1960s, after post-World War II reconstruction led to unprecedented global economic development. This development was unequal accentuating differences in wealth between countries of the Northern and Southern hemispheres as well as within countries."[5] The world, then, could clearly see the impacts of the uses of natural resources and how human health was affected. With a series of events, such as Rachel Carson's book "*The Silent Spring"* as well as ecological disasters, like *Torrey Canyon*, the world became aware of the relevance of protecting the environment.[6]

The intention of the first chapter of this Master Thesis is to demonstrate how the environmental protection developed in the 20th Century, from the arbitral award in the Trail Smelter Case in 1941 to the United Nations Declarations of Stockholm and Rio, respectively from 1972 and 1992.

Wishing to present how the Inter-American System of Human Rights has protected environment, the second chapter will briefly explain the Inter-American System, in order to present, in the third chapter, how the Inter-American Commission and Inter-American Court have dealt with environmental cases, therefore how the system has dealt with the right to a healthy environment.

The American Convention of Human Rights, also known as Pact of San José, signed in 22 November 1969, in San José, Costa Rica, established in article 33 the functioning of two competent organs: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The American Convention has the purpose of protecting essential human rights, but left out economic, social and cultural rights. Therefore, as one can imagine, environment is not mentioned in the document.

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[4] SOARES, Guido Fernando Silva. *Direito Internacional do Meio Ambiente: Emergência, Obrigações e Responsabilidades.* 2.ed. São Paulo: Atlas, 2003. p. 44.
[5] KISS, Alexandre; SHELTON, Dinah. The Development of International Environmental Law. In: __. *Guide to International Environmental Law.* Online Publication: Brill, 2007. Available at: https://doi.org/10.1163/ej.9781571053442.1-329.13 (accessed 18.07.2019) p. 33.
[6] Ibid, p. 34.

To help accomplish the goal of the American Convention, the Additional Protocol to the American Convention on Economic, Social and Cultural Rights was adopted in 14 November, in San Salvador, El Salvador. This Protocol, which is also known as Protocol of San Salvador, inserted in the list of protection of the American Convention a series of social rights, including the right to a healthy environment on article 11.

In addition to the Protocol, both the Inter-American Court and the Inter-American Commission of Human Rights have played a very important role in protecting the right to a healthy environment. In fact, even before the adoption of the Protocol, the Commission adopted in 1985 the Resolution 12/85[7], regarding the case of Yanomami v. Brazil, recognizing the violations of several rights of the Yanomami indigenous people. Through the recognition of breach of these rights, the Commission recognized indirectly the right to a healthy environment. Most of the cases presented in the Inter-American System involve indigenous communities. And the Commission and the Court decide mostly in favor of these peoples.

Another representation of how the Inter-American System is concerned with the environment, more precisely the right to a healthy environment, is the Advisory Opinion "OC-23/17",[8] published by the Inter-American Court on 23 February 2018. This groundbreaking advisory opinion classifies the right to a healthy environment as "a fundamental right for the existence of humankind".[9] Therefore, categorizing such right as autonomous.

The last chapter of this study will analyze the other regional systems on the matter of the right to a healthy environment, as well as compare them to the Inter-American protection. While the 1981 African Charter on Human and Peoples' Rights recognizes in article 24 the right to a satisfactory environment, the 1950 European Convention on Human Rights does not mention anything on the environment matter. However, the number of cases presented on the European System is bigger than the number on the African System and on the Inter-American System. Through the analysis of other substantive rights, especially right to life

[7] INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. *Resolution n. 12/85 – Case n. 7615, Brazil,* March 5, 1985.
[8] INTER-AMERICAN COURT OF HUMAN RIGHTS. *Opinión Consultiva OC-23/17 – Solicitada por la República de Colombia – November 15, 2017.*
[9] Ibid, para. 59. Free translation from Spanish. Original says: "um medio ambiente sano es un derecho fundamental para la existencia de la humanidad.".

and right to respect of private and family life, the European Court has decided on several environmental cases.

The goal of this work is to answer the question of how the right to a healthy environment was developed and how it became a certain thing in the regional human rights systems. The choice of the word "solidification" for the title was not random. Cambridge Dictionary defines "solidification" as "the act or process of becoming or making something become certain".[10] Therefore, the purpose of this study is to show that, independently of how this right is approached, it has now became certain and there is no doubt that somehow it needs protection, and so do other rights that have an inter-dependent relation with the right to a healthy environment.

[10] CAMBRIDGE DICTIONARY. *Solidification.* Available at: https://dictionary.cambridge.org/dictionary/english/solidification (accessed 18.07.2019)

1 THE DEVELOPMENT OF THE PROTECTION OF THE ENVIRONMENT

The beginning of the 20th Century was marked by new technologies, the growing of international trade, industrial production, the insertion of automobiles, transatlantics and the first airplanes in the daily life, and the idea that natural resources had to be controlled and calculated to serve as an object for the purposes of men.[11]

The first concerns with the environment, on the matter of law, only emerged in the middle of the 20th Century. There was already a certain attention to the cleaning of the waters and the preservation of the landscape; however, the laws in this regard were linked to the legal matter of neighborhoods and the devaluing of property. The same way, the laws when hunting and fishing were permitted are pointed as precedents of the environmental protection legislation, but they were still laws protecting individuals and not the environment, with a commercial essence.[12]

The need for an environmental protection started, in the middle of the 20th Century, at a national level. As catastrophes and emergency situations happened, and those would harm or threat to harm the population and the public health, the States would elaborate internal legislation to fix or to soften the effects caused by those situations. While people's health was not suffering those effects, the necessity for the creation of a regulation about environment was unseen.[13]

At an international level, it took even longer for the incidence of the environment matter. The regulations from the end of the 19th Century about legal regime over the Remo and Danube rivers were in regards of delimitation of States' sovereignty, or about free navigation. In the 20th Century, before World War I, the international conventions were utilitarian, that is, in order to promote the well-being of the individual. Their objective was to promote the preservation of the individuals and economic exploitation, so mainly they were about world trade in regards of certain animal species.[14] In this matter, stands out the Convention for the preservation of the fur seal and sea otter in the North Pacific Ocean and Bering Sea from 1883. This convention was signed by United States, Japan and Russia. It was replaced in 1911 as the adhesion of Great Britain was necessary and it disapproved the

[11] TEIXEIRA, Gustavo de Faria Moreira. *Supra note 3.* p. 37.
[12] SOARES, Guido Fernando Silva. *Supra note 4.* p. 39.
[13] Ibid, p. 40.
[14] Ibid, p. 40-43.

first version of the treaty.[15] The intention of the Convention was not the preservation of the species, but the regulation of the international luxury fur market.[16]

Similarly, the 1902 Paris Convention for the Protection of Birds Useful for the Agriculture had an economic interest and not the preservation of the birds *per se.*[17] This shows how the interest in the environment started by being constantly linked to an economic influence and to the protection and pleasing of the individuals, and not as a concern with the environment or the importance for the human rights to have a healthy environment.

1.1 TRAIL SMELTER CASE

The Trail Smelter cases is considered the first formal expression of the Environmental Law and the concern with the environment itself. This case served as a precedent for subsequent arbitration decisions.[18] The works of the private company Consolidated Mining and Smelting Co., also known as Cominco Smelter, from the city of Trail, in British Columbia, in Canada, created toxic clouds of carbon dioxide, that traveled due to the wind and climatic conditions to the state of Washington, in United States. This situation brought in question the sovereign equality of states.[19]

The damage caused in Steven's County, Washington, by the pollution coming from Canada was the reason for the American farmers to turn to their congressional representatives for help. As it seemed impossible for the Canadian company to appear in front of a court in Washington and the Steven's County's farmers did not want to bring their case to a court in Canada, the American government, in 1927, transformed a case between two private parties into an international dispute.[20]

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[15] UNIVERSITY OF OREGON – International Environmental Agreements (IEA) Database Project. *Convention for the preservation of the fur seal and sea otter in the North Pacific Ocean and Bering Sea*. Available at: https://iea.uoregon.edu/treaty-text/1897-fursealseaotternorthpacificoceanberingseaentxt (accessed 09.07.2019)
[16] TEIXEIRA, Gustavo de Faria Moreira. *Supra note 3.* p. 38.
[17] SOARES, Guido Fernando Silva. *Supra note 4.* p. 43.
[18] Ibid, p. 44.
[19] MILLER, Russel A.; BRATSPIES, Rebecca. *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration.* Washington & Lee Legal Studies Paper No. 2011-30, Cambridge University Press, 2006. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990519 (accessed 11.07.2019)
[20] KERKHOF, Martjin Van de. *The Trail Smelter Case Re-examined: Examining the Development of National Procedural Mechanisms to Resolve a Trail Smelter Type Dispute.* Utrecht Journal of International and European Law, v. 27, issue 73, p. 68-83. Available at: https://utrechtjournal.org/articles/abstract/10.5334/ujiel.ar/ (accessed 11.07.2019)

The United States' claim to Canada was an object of investigation of the International Joint Commission, which was established by the Boundary Waters Treaty of 1909. In 1931, the Commission recommended the payment of compensation of $350.000 (three hundred fifty thousand dollars) by Cominco Smelter for both the damages done and the ones that would still occur until January of 1932. Three years later, the States signed a Convention that established in Washington an Arbitral Tribunal. The activities of the Tribunal started on April 16th 1938 and were concluded in March 11th 1941.[21]

An important part of the decision states: "under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence".[22]

This case presented what turned out to be known as "Trail Smelter principles", which guided the construction of the Environmental Law. One principle defines that a State has to prevent transboundary harm, in which a State can use its own property as long as it does not harm another. The other principle instituted the condition of "the polluter pays", meaning that the State that caused the pollution and the damage in another State should pay compensation.[23] Since this decision, other arbitral decisions and environmental treaties have made use of these principles[24], so it is made clear the importance of the historical process to build what is known today as Environmental Law.

About the sovereignty issue, there was a confirmed restriction of Canada's sovereignty, as it was not possible for Canada to use its own territory the way it desired. From thereon, there was a need of consideration of the possible threats to the environment of other States. That means that the concept of absolute sovereignty was not definite anymore, at least for circumstances involving environment, pollution and harm to another State.[25]

The idea created by this case was later reinforced both in Stockholm Declaration of the Human Environment of 1972, in its Principle 21, and in Rio Declaration on Environment

[21] TEIXEIRA, Gustavo de Faria Moreira. *Supra note 3.* p. 40.
[22] UNITED NATIONS. *Reports of International Arbitral Awards: Trail Smelter Case (United States, Canada).* 16 April 1938 and 11 March 1941, v. III, p. 1905-1982. Available at: https://www.ilsa.org/Jessup/Jessup17/Batch%202/Trail%20smelter%20case%20(United%20States,%20Canada).pdf (accessed 11.07.2019)
[23] MILLER, Russel A.; BRATSPIES, Rebecca. *Supra note 19.*
[24] Id.
[25] TEIXEIRA, Gustavo de Faria Moreira. *Supra note 3.* p. 41.

and Development of 1992, in its Principle 2. These principles say: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." These two declarations will be discussed in the next topic.

1.2 UNIVERSAL DECLARATION OF HUMAN RIGHTS AND THE ENVIRONMENT

The Universal Declaration of Human Rights (from hereon UDHR) was adopted in December 10th of 1948 and made as a consequence of the World War II. Fearing to let the tragedies of the war happen again, the international community, with the recognition of the rights of individual and the creation of the United Nations, realized that the UN Charter needed a complement in order to guarantee human rights entirely.[26]

The Declaration affirms the universal ethic by establishing a consensus on universal values to be followed by states, while also being characterized by its breadth. It comprises a set of rights and faculties necessary for a human being to develop his or her physical, moral and intellectual personality. Moreover, it presents universality, that is, it is applicable to all persons, independently of country, religion, race or sex.[27]

Mainly, the UDHR intends to draw a world public order based in respecting human dignity. Already in its preamble, it consolidates the dignity inherent in all people. To the declaration, being a person is the single condition to have rights, which is clear characteristic of the universal quality of this document. Besides the universality, the UDHR also brings the indivisibility of rights. This characteristic can be seen as the declaration sets civil and political rights with economic, social and cultural rights.

These two sets of rights – civil and political rights and economic, social and cultural rights – were established by the UDHR as it is seen as the interpretation for the UN Charter

[26] UNITED NATIONS. *Universal Declaration of Human Rights – History of the Document.* Available at: https://www.un.org/en/sections/universal-declaration/history-document/index.html (accessed 15.07.2019)
[27] PIOVESAN, Flávia. *Direitos Humanos e o Direito Constitucional Internacional.* 10.ed. São Paulo: Saraiva, 2009. p. 138-139.

regarding the terms "human rights and fundamental freedoms", which is mentioned on the Charter but not defined. Therefore, the Declaration set human rights in these two categories.[28]

Civil rights are the rights linked to the idea of the Liberal State and the capitalist economy, rights that relate to the French Revolution and the valorization of the individual before the State. Political rights represent the formation of democratic states in which their citizens are free to form political parties, to vote and to be voted, or even not to vote.[29]

Economic, social and cultural rights are defined as "those human rights relating to the workplace, social security, family life, participation in cultural life, and access to housing, food, water, health care and education."[30]

In this perspective, the human rights were born as a reaction to the excessive actions from the absolutist regime, as a way to control and to limit the State's power. The idea was to guide the actions of the States based on legality and fundamental rights. From there, comes the supremacy of civil and political rights and freedom.[31]

On a different note, the UDHR does not mention the right to a healthy environment. However, the Office of the UN High Commissioner for Human Rights describes the UDHR "in six cross-cutting themes", which are: dignity and justice, development, culture, gender, participation, and environment. Regarding the latter, it explains:

> "The environment is never specifically mentioned in the Universal Declaration of Human Rights, yet if you deliberately dump toxic waste in someone's community or disproportionately exploit their natural resources without adequate consultation and compensation, clearly you are abusing their rights. Over the past 60 years, as our recognition of environmental degradation has grown so has our understanding that changes in the environment can have a significant impact on our ability to enjoy our human rights. In no other area is it so clear that the actions of nations, communities, businesses and individuals can so dramatically affect the rights of others - because damaging the

[28] Ibid, p. 140.
[29] TEIXEIRA, Gustavo de Faria Moreira. *Supra note 3.* p. 51-52.
[30] UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS. *Frequently Asked Questions On Economic, Social and Cultural Rights – Fact Sheet n.33.* Available at: https://www.ohchr.org/Documents/Publications/FactSheet33en.pdf (accessed 16.07.2019)
[31] PIOVESAN, Flávia. *Supra note 27.* p. 141.

> environment can damage the rights of people, near and far, to a secure and healthy life."[32]

The connection between environment and human rights is clear when the Special Rapporteur on Human Rights and Environment declares the dependence of human beings on the environment and that for the fulfillment of human rights there must be a healthy environment.[33] Additionally, the Special Rapporteur on Human Rights and Environment, in its Annual Report of 2019 to the Human Rights Council, brought the influence of the UDHR on the right to a healthy environment. It presents the impact of air pollution on human's health, agriculture, biodiversity and ecosystems. Also, it relates the right to life and right to health, included in the UDHR, with the environment.[34] As the UDHR comprises the right to life, in its article 3, and includes the right to health on the right to a standard of living adequate, in its article 25, it is clear to see that, even though the Declaration does not mention the environment, it has an influence on it. It is also possible to see that the human rights protected by the UDHR depend on a healthy, clean and safe environment to be enjoyed completely.

1.3 THE GROWTH OF THE CONCERN WITH THE ENVIRONMENT IN THE 60S

Many authors consider the decade of the 1960s as the beginning of the international concern for environmental problems. Reasons for raising the world's awareness of the need to protect the environment include the possibility of destruction of large parts of the planet by the threat of the use of war devices, as 1960 is the peak of the Cold War, built by military use of nuclear energy. Also the occurrence of environmental catastrophes, such as accidents of large toxic cloud leaks or large oil spills at sea. The matter of the transboundary pollution, of international rivers and lakes, air pollution and the pollution of

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[32] UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS. *Universal Declaration of Human Rights in Six Cross-Cutting Themes.* Available at: https://www.ohchr.org/EN/UDHR/Pages/CrossCuttingThemes.aspx (accessed 16.07.2019)

[33] UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS. *Special Rapporteur on Human Rights and Environment.* Available at: https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SRenvironmentIndex.aspx (accessed 16.07.2019)

[34] UNITED NATIONS GENERAL ASSEMBLY, HUMAN RIGHTS COUNCIL. *Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment – Report of the Special Rapporteur*, A/HRC/40/55, 8 January 2019. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/002/54/PDF/G1900254.pdf?OpenElement (accessed 17.07.2019)

the ocean are also reasons for the belief that this decade was the emergence of the International Environmental Law.[35]

In the period of post-World War II, the world had to deal with environmental threats caused by the technological change and the expansion of the range of the economic activities, for example, the issue of supertankers to transport oil by sea created the concern over marine pollution in 1950s. And the use of nuclear energy caused the adoption of the "Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Underwater" in 1963.[36]

Alexandre KISS and Dinah SHELTON teach: "As the harm to the natural world and human health increasingly became evident, informed public opinion demanded action to protect he quantity and quality of the components of the environment. Scientific studies, as well as popular publications like Rachel Carson's book *The Silent Spring*, raised general awareness of dangers threatening the environment."[37]

This concern with the environment became part of ideologies and political parties, making many national legislatures adopt environmental laws. For that, it did not take long for international organizations to start taking action. Another point for the international movement was the occurrence of the first oil tanker disaster.[38] In 18th March 1967, the oil tanker Torrey Canyon shipwrecked off the western coast of England, spilling more than 100.000 tons of crude oil into the sea. The disaster left the beaches full of sludge and killed sea birds and marine mammals. In northern France, the damage was called "*marée noire"*, meaning "black tide".[39]

With that, the United Nations took action. By Resolution 2398 (XXIII), the General Assembly convened the World Conference on the Human Environment, that would be held in 1972 in Stockholm. Though the Resolution emphasized the changes in the relationship between and man and the need to take action regarding the environment, recognizing the danger of not being conscious about it, it still put the human being and economic reasons at the center of issue:

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[35] SOARES, Guido Fernando Silva. *Supra note 4*. p. 45-46.
[36] KISS, Alexandre; SHELTON, Dinah. *Supra note 5*. p. 33.
[37] Ibid, p. 34.
[38] Id.
[39] BELL, Bethan; CACCIOTTOLO, Mario. *Torrey Canyon Oil Spill: The Day the Sea Turned Black.* BBC News (England), 17 March 2017. Available at: https://www.bbc.com/news/uk-england-39223308 (accessed 18.07.2019)

> "The General Assembly, Noting that the relationship between man and his environment is undergoing profound changes in the wake of modern scientific and technological developments, Aware that these developments while offering unprecedented opportunities to change and shape the environment of man to meet his needs and aspirations, also involve grave dangers if not properly controlled, […] Concerned about the consequent effects on the condition of man, his physical, mental and social well-being, his dignity and his enjoyment of basic human rights, in developing as well as developed countries, Convinced that increased attention to the problems of the human environment is essential for sound economic and social development, […] Convinced of the need for intensified action at the national, regional and international level in order to limit and, where possible, eliminate the impairment of human environment and in order to protect and improve the natural surroundings in the interest of man, […] 1. Decides, in furtherance of the objectives set out above, to convene in 1972 a United Nations Conference on the Human Enviroment […]"[40]

On another note, the International Covenant on Economic, Social and Cultural Rights brought the idea of dependence between environment and human rights. The Covenant, adopted by the United Nations General Assembly in New York in 16th December 1966 by Resolution 2200A (XXI), states in its article 12 that for the "enjoyment of the highest attainable standard of physical and mental health" there is a need of "improvement of all aspects of environmental and industrial hygiene".

With the Cold War and the concern with the environment growing, several treaties were adopted in the 1960s besides the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Underwater already mentioned above. It is worth mentioning other treaties that show the new concern of the world regarding the environment, such as: the Outer Space Treaty, from 1967, adopted under the auspices of the United Nations, created the basis for international space law; and the 1968 Treaty on the Non-Proliferation of Nuclear Weapons, that was negotiated by the Commission on Disarmament, a United Nations organization.

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[40] UNITED NATIONS GENERAL ASSEMBLY, Resolution 2398 (XXIII). *Problems of the Human Environment.* 1733rd plenary meeting, 3 December 1968. Available at: https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/243/58/IMG/NR024358.pdf?OpenElement (accessed 19.07.2019)

Still in regards with the prohibition of nuclear weapons, this time in America Latina, it can be mentioned the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean, also known as Treaty of Tlatelolco, from 1968. In South America, the States of Argentina, Bolivia, Brazil, Paraguay and Uruguay signed the La Plata Basin Treaty in 1969. This treaty shows great relevance on the development of the environmental protection. It recognizes the importance of the preservation of the environment *per se*. It states in its preamble: "Persuaded that the joint action will allow the harmonious and balanced development as well as the optimal use of the great natural resources of the region and will ensure its preservation for future generations through the rational use of those resources; […] They decided to sign this Treaty […]".[41] This treaty can be considered modern for its time as it uses the term "future generations", which is a common term in the current International Environmental Law.

The movement at national, regional and international level to protect the environment, along with the new damages of air and water pollutions, and the worrying about the nuclear weapons, led to the preparations of the Stockholm Conference.

1.4 STOCKHOLM AND RIO DECLARATIONS

With the already mentioned Resolution 2398 (XXIII) convening the Stockholm Conference, intergovernmental organizations and national and international non-governmental organizations that had mandates concerning environmental problems started activities to prepare for this Conference. This preparation included the work that was already being made by the international community to hinder marine oil pollution, by establishing preventive measures and liability rules, and to conserve wild animals and their habitats. [42]

In the preparation, the UN Secretary-General recommended, in a background paper for the preparatory committee, that it draft a declaration on the issue of the preservation and

[41] COMITÉ INTERGUBERNAMENTAL COORDINADOR DE LOS PAÍSES DE LA CUENCA DEL PLATA (CIC). *El Tratado de La Cuenca del Plata*. Available at: https://cicplata.org/wp-content/uploads/2016/12/tratado-de-la-cuenca-del-plata.pdf (accessed 19.07.2019). Free translation from Spanish. Original says: "PERSUADIDOS de que la acción mancomunada permitirá el desarrollo armónico y equilibrado así como el óptimo aprovechamiento de los grandes recursos naturales de la región y asegurará su preservación para generaciones futuras a través de la utilización racional de esos recursos; [...] DECIDIERON suscribir el presente Tratado [...]".
[42] KISS, Alexandre; SHELTON, Dinah. *Supra note 5*. p. 34.

improvement of the human environment, regarding the rights and obligations of states and citizens.[43]

On the "Report of the Preparatory Committee for the United Nations Conference on the Human Environment"[44], paragraph 28 set an Intergovernmental Working Group, composed of all Members of the Preparatory Committee and other Member States that wished to participate. Recognizing the importance of the Declaration, the Intergovernmental Working Group had the goal of carefully preparing and drafting the document. The Committee reported that there was a unanimity regarding the characteristics the Declaration. It should be inspirational and concise, and easy for the general public to understand, so it could "serve as an effective instrument for education". Not unanimously, but most members of the Committee agreed that the Declaration should establish fundamental principles and broad goals and objectives. As it was stressed that the Declaration would not have a legally binding status, it was recognized that States needed to protect the environment with an internal legislation, additionally to an international cooperation. The Committee explicitly recognized the relationship between environment and development and stated that this relationship was essential to the declaration, thus necessary to refer to it in the document.[45]

Before the meeting, developing countries were skeptical about the idea of a global cooperation to protect the environment. The Conference, however, made sure to include developing countries as much as they could together with the developed countries.[46] General Assembly's Resolution 2849 (XXVI), adopted in 20th December 1971, stressed that: "each country has the right to formulate, in accordance with its own particular situation and in full enjoyment of its national sovereignty, its own national policies on the human environment, including criteria for the evaluation of projects"[47]. Nevertheless, developing countries, at the Conference, still feared that richer states would change to the

[43] SHELTON, Dinah. *Stockholm Declaration (1972) and Rio Declaration (1992).* 2008. Available at: https://opil-ouplaw-com.uaccess.univie.ac.at/view/10.1093/law:epil/9780199231690/law-9780199231690-e1608?rskey=yy9bTE&result=4&prd=EPIL (accessed 20.07.2019)

[44] UNITED NATIONS GENERAL ASSEMBLY. *Report of the Preparatory Committee for the United Nations Conference on the Human Environment.* A/CONF.48/PC/9, 26 February 1971. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N71/048/79/PDF/N7104879.pdf?OpenElement (accessed 20.07.2019)

[45] Ibid, para. 28-35.

[46] KISS, Alexandre; SHELTON, Dinah. *Supra note 5*. p. 34-35.

[47] UNITED NATIONS GENERAL ASSEMBLY. Resolution 2849 (XXVI). *Development and Environment.* 2026th plenary meeting, 20 December 1971. Available at: https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/328/65/IMG/NR032865.pdf?OpenElement (accessed 20.07.2019)

protection of the environment the purpose of foreign economic assistance and funds originally directed to development.[48]

In June 5th to 16th 1972, 6.000 representatives of intergovernmental organizations from 113 different states, about 1.500 journalists, 700 observers from 400 non-governmental organizations and invited individuals participated in the United Nations Conference on the Human Environment in Stockholm, Sweden.[49]

After many principles, out of the 17 first drafted, being contested, the Working Group brought a new preamble and 23 principles. During negotiations, which happened until the last day of the Conference, it was agreed on that the final text would have 21 principles from the second draft and other five ones, including one about nuclear weapons – the last principle to be adopted. Therefore, the Declaration of the United Nations Conference on Human Environment totalizes 26 principles.[50]

The preamble of the Declaration starts by affirming "man is both the creature and molder of his environment" and acknowledges that the man has the power of transforming the environment, however, both the natural and the man-made environments are necessary for the well-being of man and his human rights. As proposed by the Intergovernmental Working Group and Preparatory Committee, it recognizes the relationship between environment and development, stating that developing countries suffer with environmental problems mostly because of under-development. For that, it recommends that developing countries should work towards development, in order to give the population adequate food and clothing, shelter and education, health and sanitation, and within that, safeguard and improve the environment. To conclude the preamble, the Declaration demands the cooperation of individuals, communities, companies and governments, local and national, to achieve the environmental goal.[51]

According to Alexandre KISS and Dinah SHELTON, the principles, established in the second part of the Declaration, turn the ideas in the preamble into a basis for action.[52] The first principle defines the relationship between human rights and environment, referring to the fundamental rights to freedom, equality and an adequate condition of life. It states that

[48] KISS, Alexandre; SHELTON, Dinah. *Supra note 5.* p. 35.
[49] Ibid, p. 34.
[50] SHELTON, Dinah. *Supra note 43.*
[51] UNITED NATIONS. *Declaration of the United Nations Conference on the Human Environment.* Stockholm, 5 to 16 June 1972.
[52] KISS, Alexandre; SHELTON, Dinah. *Supra note 5.* p. 36.

man has the responsibility of protecting and improving the environment. Additionally, it condemns apartheid, racial segregation, discrimination, and any forms of oppression. Already in this first principle, the term "future generations" is used, showing the attention to, not only immediate damage and the present generation but also, the potential future effects of harming the environment, and the importance of preservation.

KISS and SHELTON describe Principles 2 to 7 as the "ecological heart" of the Declaration.[53] Principle 2, for example, defines what the natural resources are. It includes not only air and water, but also land, flora and fauna, and samples of natural ecosystems. The Declaration pays attention again to both present and future generations. Principles 3 to 7 highlight the importance of using renewable and non-renewable resources in an adequate manner each, hindering toxic waste and what the environment cannot absorb, and preventing marine pollution. Principles 8 to 12 bring the economic matter and development in relation to the environment. It expresses how the environment influences the development, and how States must take into consideration their own development when adopting internal policies. Principles 13 to 15 also underline the importance of development planning. Principles 16 and 17 describe how the Government and national institutions should manage demographic policies and natural resources, in order to improve environmental quality. Principles 18-20 affirm the contribution of science and technology and the necessity of environmental education. The last part of the principles, from 21 to 26, gives attention to development of the international environmental law[54], bringing a basic norm for customary law, the need for cooperation from States, and taking into account developing countries.

After the Stockholm Declaration, there was a growth in the concern with the environment. In the 1970s both States with their national legislature and as an international community worked on protecting specific sectors of the environment, such as marine and fresh waters, wild plants and animals.[55] The Declaration had an impact on other areas of law. For example, on the Charter of Economic Rights and Duties of States, the protection of the environment is mentioned on article 30.[56]

[53] Id.
[54] Id.
[55] Id.
[56] SHELTON, Dinah. *Supra note 43.*

In addition, several customary law principles were adopted in relation to the environment after Stockholm. The UN Environmental Program (UNEP) adopted, in 1978, the "Principles of conduct in the field of environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States", developed by the Organization for Economic Cooperation and Development (OECD) based on Principle 21 of the Stockholm Declaration. Reaffirming Principle 21, these principles recognize "the sovereign right of states to exploit their own resources coupled with an obligation to ensure that the activities undertaken within the limits of their jurisdiction or under their control do not damage the environment in other states."[57]

Opposing the 70s approach, in the 1980s the States saw the new environmental problems emerge: long-range air pollution and the destruction of the ozone layer were problems that could not be identified before. That led to the adoption of the Convention the Protection of the Ozone Layer of in 1985 and its Protocol in 1987. The 80s was also marked by the catastrophe at Chernobyl in 26 April 1986. The reaction to that was fast, with the adoption of the Convention on Early Notification of a Nuclear Accident or Radiological Emergency and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, in 26 September 1986.[58]

In 1983, the World Commission on Environment and Development, also known as Brundtland Commission, a body outside the UN was created.[59] Its mandate was "to re-examine the critical environment and development issues and to formulate realistic proposals for dealing with them; to propose new forms of international cooperation on these issues that will influence policies and events in the direction of needed changes; and to raise the levels of understanding and commitment to action of individuals, voluntary organizations, businesses, institutes, and governments."[60]

This Commission gave meaning to "sustainable development", as development that embraces the present and future environment. The Brundtland Report guided the UN to

[57] KISS, Alexandre; SHELTON, Dinah. *Supra note 5*. p. 38.
[58] Ibid, p. 37-38.
[59] Ibid, p. 38-39.
[60] WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT. *Report of the World Commission on Environment and Development: Our Common Future.* Available at: https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf (accessed 22.07.2019)

convene a new Conference. This time in Rio de Janeiro, Brazil, in 1992, exact 20 years after Stockholm Conference.[61]

The name of 1992 Conference is the first point to show the different approach from the 1972 Conference. The meeting in Rio was called "United Nations Conference on Environment and Development". Another difference was the number of participants: 10.000 people represented 172 states, plus 1.400 non-governmental organizations were in the Rio Conference.

Among the five texts created in the Conference, there were the Declaration on Environment and Development and Agenda 21. The Declaration sets 27 principles and reiterates the 1972 Stockholm Declaration. The difference between the two declarations is that the newest one has a bigger interest on sustainable development, which is its main idea and foundation.[62]

The Rio Declaration in its principle 2 repeats Principle 21 of the Stockholm Declaration, affirming that States have sovereignty to manage their own resources, environment and development policies, and States have the responsibility regarding environmental damages caused to other States. The Declaration continues to focus on sustainable development, and Principle 10 establishes the right to public information, participation and remedy. The most important Principles in the Rio Declaration are Principle 15, establishing the precautionary approach, Principle 16, that has the idea of "the polluter pays", where the polluter should "bear the cost of pollution", and Principle 17, about environmental impact assessment. Other principles include the role of women and youth in environmental and development management, the importance of indigenous communities, the inter-dependence between peace, development and environmental protection, and the necessity of cooperation of States.[63]

Agenda 21, the other document adopted in Rio in 1992, is action plan. Therefore, it focus especially in national legislation. It is divided in four parts: socio economic dimensions; conservation and resource management for development; strengthening the role of major

[61] KISS, Alexandre; SHELTON, Dinah. *Supra note 5*. p. 39.
[62] Id.
[63] UNITED NATIONS. *The Rio Declaration on Environment and Developent.* Rio de Janeiro, 3 to 14 June 1992.

groups; and means of implementation.[64] Basically, the documents established the relationship between environmental protection and economic development.

After Rio, the matter of environmental law was taken into consideration in other fields of international law. For example, several trade agreements mention the environment: the Charter Establishing the World Trade Organization, from 1994, the Treaty Establishing the South African Development Community, from 1992, the Agreement on the North American Free Trade Area, from 1992, the European Energy Charter, from 1994, are just a few examples of many. The impact of Rio is clear, by seeing these agreements, also the concern from the field of human rights, humanitarian law, the concept of biosafety with the advances of biotechnology, and many other regulations regarding the issue of environmental protection and sustainable development.

2 THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS

2.1 THE ORGANIZATION OF THE AMERICAN STATES

In 1948, American states adopted the Charter of the American States, in Bogotá, Colombia, establishing the Organization of American States (OAS). This was the result of many other meetings, in which American states had the desire of creating a shared system of norms and institutions. The First Conference happened between October 1889 and April 1890, in Washington, USA, with the purpose of formulating a plan of arbitration and dispute settlement. The Conference that resulted in the adoption of the Charter was the Ninth one, in 1948, in Bogotá. Besides the Charter, the 21 participant states also adopted the American Treaty on Pacific Settlement, also known as Pact of Bogotá, and the American Declaration on the Rights and Duties of Man.[65]

The Charter of the American States establishes in its article 1 “an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence”, which is the goal to be achieved by States, and also establishes a relationship with the United Nations.[66] The

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[64] UNITED NATIONS. *Agenda 21*. Rio de Janeiro, 3 to 14 June 1992. Available at: https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf (accessed 22.07.2019)

[65] OAS. *About the OAS: Our History*. Available at: http://www.oas.org/en/about/our_history.asp (accessed 23.07.2019)

[66] OAS. *Charter of the American States.* Bogotá, 1948. http://www.oas.org/en/sla/dil/inter_american_treaties_A-41_charter_OAS.asp (accessed 23.07.2019)

organization is based on four main pillars: democracy, human rights, security and development.[67]

The Charter entered into force in 1951, and was amended by the Protocol of Buenos Aires, signed in 1967, and entered into force in 1970, by the Protocol of Cartagena de Indias, signed in 1985, entered into force in 1988, by the Protocol of Managua, signed in 1993, entered into force in 1996, and by the Protocol of Washington, signed in 1992 and entered into force in 1997.

Currently, 35 independent states of the Americas are part of the OAS, and 69 states, as well as the European Union, are permanent observers. The OAS constitutes the main political, juridical, and social governmental forum in the Americas.[68]

The OAS is composed by the General Assembly, The Meeting of Consultation of Ministers of Foreign Affairs, the Permanent Council, the Inter-American Council for Integral Development, the Inter-American Juridical Committee and the General Secretariat. It also establishes the creation of an Inter-American Commission on Human Rights on it article 106.[69]

2.2 THE 1969 AMERICAN CONVENTION ON HUMAN RIGHTS

Among the treaties that compose the Inter-American System of Human Rights and form a network for the protection and monitoring of human rights policies among the member states of the OAS, the most important ones are the American Declaration of the Rights and Duties of Man of 1948, which was adopted two months before the Universal Declaration of Human Rights, making it the world's first international human rights instrument, and the 1969 American Convention on Human Rights, also known as the Pact of San José, Costa Rica.[70]

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[67] OAS. *About the OAS: Who We Are.* Available at: http://www.oas.org/en/about/who_we_are.asp (accessed 23.07.2019)

[68] Id.

[69] OAS Charter (1948). Article 106: "There shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters. An inter-American convention on human rights shall determine the structure, competence, and procedure of this Commission, as well as those of other organs responsible for these matters."

[70] MAZZUOLI, Valério de Oliveira; TEIXEIRA, Gustavo de Faria Moreira. *O direito internacional do meio ambiente e o greening da Convenção Americana sobre Direitos Humanos* (International Environmental Law

The American Declaration of the Rights and Duties of Man represents the commitment of the American states to protect the human rights. Thus, it gave the basis for the adoption of the American Convention on Human Rights (ACHR).[71]

The ACHR was adopted in San José, Costa Rica, in 22 November 1969. However, it only entered into force in 18 July 1978, after the ratification of 11 states, which was a requirement. It is considered the principle document of the Inter-American System of Human Rights. Currently, out of the 34 states that signed the Convention, 25 have ratified it.[72]

The ACHR consolidated the Inter-American System[73], and it is considered an "inter-American code for human rights". It works in two ways: to promote and encourage advances on the national plan, and also to prevent from setbacks in the protection of rights.[74]

With the same approach as the European Convention on Human Rights, the American Convention brings the protection of civil and political rights such as the right to life, the right to personal liberty, the right to fair trial, the right to freedom of expression, and others. In addition to setting a series of civil and political rights to be protected, it also requires the creation of the Inter-American Court of Human Rights.[75] In its article 33, the ACHR establishes as competent organs to fulfill its goals the Inter-American Commission and the Inter-American Court of Human Rights.[76]

In the preamble, the American Convention expresses the intention of the States to "to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man" and recognizes the essential human rights, referring to the Universal Declaration of Human Rights.

To complement the Convention, in 17 November 1988, in San Salvador, El Salvador, it was adopted the Additional Protocol to the American Convention on Human Rights in the

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and the greening of the American Convention on Human Rights). https://www.sciencedirect.com/science/article/pii/S1870465413710419#fn0175 (accessed 24.07.2019)

[71] OAS. *Supra note 65.*

[72] TEIXEIRA, Gustavo de Faria Moreira. *Supra note 3.* p. 70-71.

[73] CONTRERAS-GARDUÑO, Diana. *The Inter-American System of Human Rights.* 6 January 2015. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2545091 (accessed 24.07.2019)

[74] PIOVESAN, Flávia. *Temas de Direitos Humanos.* 8.ed. São Paulo: Saraiva, 2015. p. 187.

[75] CONTRERAS-GARDUÑO, Diana. *Supra note 73.*

[76] OAS. *American Convention on Human Rights.* Costa Rica, 22 November 1969.

area of Economic, Social and Cultural Rights, also known as the Protocol of San Salvador, that came into force in 16 November 1999.

The preamble reaffirms the goal of having a "system of personal liberty and social justice based on respect for the essential rights of man" established in the preamble of the Convention, and recognizes the need for a consolidation of economic, social and cultural rights in the American continent. The Protocol adds other rights to the list presented by the Convention. Among those rights, are included: the right to just, equitable and satisfactory conditions of work (article 7), right to social security (article 9), right to health (article 10), right to a healthy environment (article 11), right to food (article 12), and right to education (article 13).[77]

2.3 THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

The Inter-American System of Human Rights was only an aspiration until ten years after the adoption of the American Declaration. Even though the OAS Charter stipulates the creation of the Inter-American Commission on Human Rights as one of the main organs of the OAS, this body did not exist until 1959.[78] The Commission was created by Resolution VIII of the Fifth Meeting of Consultation of Ministers of Foreign Affairs, adopted in Santiago, Chile.[79] Its works stated in 1960.

The OAS Charter sets the Inter-American Commission of Human Rights in article 106, which says that "[t]here shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters. An inter-American convention on human rights shall determine the structure, competence, and procedure of this Commission, as well as those of other organs responsible for these matters."

The adoption of the American Convention on Human Rights in 1969 made the Inter-American System of Human Rights even stronger, by defining the functioning and

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[77] OAS. *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.* San Salvador, 17 November 1988.
[78] CONTRERAS-GARDUÑO, Diana. *Supra note 73.*
[79] OAS. Resolution VIII. *Human Rights.* Fifth Meeting of Consultation of Ministers of Foreign Affairs, Santiago, 13 July 1959. Available at: https://www.oas.org/consejo/MEETINGS%20OF%20CONSULTATION/Actas/Acta%205.pdf (accessed 25.07.2019)

objective of the Inter-American Commission a competent organ to accomplish the goals and interests of the Inter-American System, as required by the Charter of the OAS.[80]

The Commission is made of seven members, which are elected for four years and can only be reelected once. These members are elected by the General Assembly of the OAS, from a list proposed by the Government of the Member States.[81] The Commission, headquartered in Washington, is the main organ of the OAS, however, it is autonomous, because its members act independently and with impartiality, not representing their State of origin.[82]

Articles 34 to 51 of the ACHR establish the working of the Commission, that, in addition, has its own statute. This statute was approved by Resolution n. 447, adopted by the General Assembly of the OAS in its Ninth Regular Session, in La Paz, Bolivia, in October 1979.[83] With article 106 of the ACHR and Resolution n. 447, the OAS Member States recognize the Commission as an organ of the OAS. However, nine Member States have not ratified the Convention and do not recognize the jurisdiction of the Inter-American Court of Human Rights, thus the Commission has ambivalent role, working as a general organ and also as a procedural organ of the OAS.[84]

In relation to the States that have not ratified the American Convention and that have not recognized the jurisdiction of the Inter-American Court of Human Rights, the Commission works as a general organ. This means it shall publish to the General Assembly of OAS information in its Annual Report about the acting of such States regarding the accomplishment of the human rights policies. Regarding the Member-States of the American Convention that have recognized the contentious competence of the Court, the Commission acts as a procedural organ, as it forwards cases of violations of the rights listed in the Convention to the Inter-American Court.[85] In that way, the Commission could act as a filter between the petitioner and the Court.[86]

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[80] ACCIOLY, Hildebrando; SILVA, G.E. do Nascimento e; CASELLA, Paulo Borba. *Manual de Direito Internacional Público*. 22.ed. São Paulo: Saraiva, 2016. p. 475
[81] American Convention on Human Rights (1969), articles 34, 36 and 37.
[82] RAMOS, André de Carvalho. *Curso de Direitos Humanos*. 3.ed. São Paulo: Saraiva, 2016. p. 337.
[83] OAS GENERAL ASSEMBLY. Resolution n. 447. *Statute of the Inter-American Commission on Human Rights*. Ninth Regular Session, La Paz, October 1979. Available at: https://www.oas.org/36ag/english/doc_referencia/Estatuto_CIDH.pdf (accessed 25.07.2019)
[84] TEIXEIRA, Gustavo de Faria Moreira. *Supra note 3*. p. 78.
[85] MAZZUOLI, Valerio de Oliveira et al. *Supra note 70*.
[86] CONTRERAS-GARDUÑO, Diana. *Supra note 73*.

The structure of the Inter-American Commission is defined by both its Statute and the American Convention. In the ACHR, from article 34 to 37, and in the Statute, from article 2 to article 7, it is established that the Commission shall have seven members, with great knowledge in the field of human rights, and the OAS General Assembly elect these seven members from a list of candidates proposed by the Member States. The term is four years and it is possible to be reelected only once.

According to article 41 of the American Convention, the function of the Commission is "to promote respect for and defense of human rights. In the exercise of its mandate, it shall have the following functions and powers: a) to develop an awareness of human rights among the peoples of America; b) to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights; c) to prepare such studies or reports as it considers advisable in the performance of its duties; d) to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights; e) to respond, through the General Secretariat of the Organization of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request; f) to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention; and g) to submit an annual report to the General Assembly of the Organization of American States".

The American Convention on Human Rights institutes that the Commission can receive petitions lodged by any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization.[87] The procedure for an individual petition is considered to be of mandatory adherence and the inter-states procedure is optional.[88]

The Inter-American Commission will analyze the admissibility of the claim and merits of the victim's petition. The requirements for the claim to be admitted are established in article 46 of the ACHR. For the petition to be admitted, the requirements of exhaustion of

[87] American Convention on Human Rights (1969), article 44.
[88] RAMOS, André de Carvalho. *Supra note 82*. p. 337.

the domestic remedies, the maximum period of six months since the date of the alleged violation and the inexistence of another pending international proceeding need to be fulfilled.[89] The exhaustion of local resources and the period of six months are not applicable when the domestic legislation does not accomplish due process of law for the protection of rights; the party alleging violation of his/her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or there has been unwarranted delay in rendering a final judgment.[90]

Another factor for the admissibility of the petitions is the individualization of the victims. That means the petition must contain the victim's name, nationality, profession, address and signature, even if the victim does not to reveal his or her identity, which then should be expressed.[91] The petition also needs to say which Member State of the OAS supposedly violated the right or rights of the ACHR. In the Inter-American System, only states can be considered violators of human rights, even being a clear fact that not only states can violate these rights.[92]

The States can take to the Commission cases of human rights violations committed by other Member States, which is named communications in article 45(1) in ACHR. However, while the individual petitions clause is not optional, the competence of the Commission to receive and examine communications depend on the State's ratification of the clause.[93] Only Argentina, Chile, Colombia, Costa Rica, Ecuador, Jamaica, Nicaragua, Peru, Uruguay and Venezuela recognize this competence of the Commission.

If a petition is found inadmissible, there is no right of remedy to the victim. However, the Court will analyze the case if a Member State, that has recognized the jurisdiction of the Court, lodge the petition. Yet the states have never used this prerogative against a violating state. If the Commission verifies the violation of human rights and the state has not repaired the damage, the Commission will submit the case to the Court.[94]

The Commission can also grant precautionary measures. "Precautionary measures perform two functions related to protecting the fundamental rights enshrined in the rules of the inter-American system: they are "precautionary" in the sense of preserving a legal

[89] American Convention on Human Rights (1969), article 46(1).
[90] Ibid, article 46(2).
[91] Ibid, article 46(1,d).
[92] TEIXEIRA, Gustavo de Faria Moreira. *Supra note 3.* p. 83.
[93] American Convention on Human Rights (1969), article 45(1).
[94] ACCIOLY, Hildebrando et al. *Supra note 80.* p. 495.

situation, or the subject of a petition, on which the Commission is to exercise its jurisdiction, and "protective" in the sense of preserving the exercise of human rights. As long as the basic requirements of gravity and urgency are met, the mechanism affords protection against irreparable harm to the beneficiary as a legal person under international human rights law. The irreparability requirement applies to circumstances in which the alleged victim cannot be compensated monetarily for his or her loss, or when it is impossible to restore the exercise of a violated right or indemnify the victims for the consequences of the violations that might be committed."[95]

Being one of the main organs of the Inter-American System and having an ambivalent role, as a procedural organ and a consultative organ, the Inter-American Commission on Human Rights has been effective in promoting and defending human rights. It is noted that 50% of the cases submitted to the Commission are related to violation against socially vulnerable groups, such as indigenous people, women and children.[96]

2.4 THE INTER-AMERICAN COURT OF HUMAN RIGHTS

When the American Convention on Human Rights entered into force in 1978, the Inter-American Court of Human Rights was born. The Court is headquartered in San José, in Costa Rica, and it is the only independent judicial organ of the Inter-American System of Human Rights.[97] Its effective functioning started in 1980, when it issued its first advisory opinion. Its first sentence was issued only in 1987.[98]

Its function is established from article 52 to 69 in the AHCR. Article 52 states that:

> "1. The Court shall consist of seven judges, nationals of the member states of the Organization, elected in an individual capacity from among jurists of the highest moral authority and of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions in conformity with the law of the state of which they are nationals or of the state that proposes them as candidates.

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[95] OAS. *Reform Process 2012 – Consultation on Module II: Precautionary Measures.* https://www.oas.org/en/iachr/consultation/2_measures.asp (accessed 26.07.2019)
[96] PIOVESAN, Flávia. *Supra note 74* p. 102-103.
[97] CONTRERAS-GARDUÑO, Diana. *Supra note 73.*
[98] TEIXEIRA, Gustavo de Faria Moreira. *Supra note 3.* p. 90.

2. No two judges may be nationals of the same state."

The judges are elected, in secret ballot in the General Assembly of the OAS, in terms of six years, by majority of votes of the Member-States of the American Convention.[99]

The Court has both advisory and contentious competences. In use of its jurisdictional function, the Court declares the truth of the facts in a specific case, while the advisory function responds to questions whose answers are necessary to interpret the Convention.[100] The contentious competence of the Court is limited to the States that recognize the Court's jurisdiction. The recognition of this jurisdiction is made by specific declaration, as appointed by article 62 of the American Convention of 1969. The decision of the Court is binding and mandatory, having the State to comply with it immediately.[101] The consultative function is automatically accepted by the State when it ratifies the American Convention.[102]

Only the States (that have recognized the jurisdiction of the Court) and the Commission can submit a case against States to the Court[103], therefore individuals depend on the Commission or another State for their claim to get to the Court. The Court does not judge cases against individual, the passive legitimacy always belongs to the States. So the Court decides on the international responsibility of the State by human rights violation.[104] According to article 58 of the ACHR, the Commission must be present in all cases before the Court.

In the advisory jurisdiction, the Court can give its opinion by the request of any of the members of the OAS, part or not to the Convention, in relation the interpretation of the Convention or any other treaty about the protection of human rights. The Court can also issue its opinion on the compatibility of domestic legislation in regards to the international instruments.[105]

According to Antônio Augusto CANÇADO TRINDADE, the strengthening of the procedural capacity of individuals in proceedings under the American Convention on

[99] American Convention on Human Rights (1969), article 53(1).
[100] CANÇADO TRINDADE, Antônio Augusto; VENTURA ROBLES, Manuel E. *El Futuro de La Corte Interamericana de Derechos Humanos.* Costa Rica: UNHCR/ACNUR, 2003. p. 114. Available at: http://www.corteidh.or.cr/sitios/libros/todos/docs/futuro-corteidh.pdf (accessed 27.07.2019)
[101] PIOVESAN, Flávia. *Supra note 74.* p. 105.
[102] TEIXEIRA, Gustavo de Faria Moreira. *Supra note 3.* p. 91.
[103] American Convention on Human Rights (1969), article 61.
[104] RAMOS, André de Carvalho. *Supra note 82.* p. 341-342.
[105] PIOVESAN, Flávia. *Supra note 74.* p. 104.

Human Rights is being gradually achieved in different ways, in the exercise of both contentious and advisory functions of the Inter-American Court of Human Rights, along with protective measures.[106]

The Court is not a permanent tribunal and its working happens in ordinary and extraordinary session. Extraordinary sessions shall be invoked by the president or by solicitation of the majority of judges. Five judges is the quorum for the deliberation of the Court and the decisions are taken by the majority of judges present in session.

In case that the Court finds that there has been a violation of a right, it needs to assure that the victim enjoys the right that was breached. Plus, if the Court finds appropriate, it can grant fair compensation to be paid to the victim. In cases under the Court's jurisdiction of extreme gravity and urgency, it can take precautionary measures to avoid irreparable damages.[107] The State must comply with the precautionary measures and inform the Court periodically.[108]

The procedure before the Court can be abbreviated in three situations: friendly solution, withdrawal by the victims or recognition of the demand (total or partial). However, with the relevance of the rights at stake, the Court needs to guarantee the inalienability of human rights. Therefore, even if there is a friendly solution, a withdrawal by the victim or a recognition of the demand, the Court can decided to continue to judge the case.[109] The decision of the Court cannot be appealed and it is definitive. In case of divergence about the meaning or the extent of the decision, the part or the Commission can appeal or request interpretation.[110]

If a State does not comply with a judgment, the Court must report it to General Assembly of OAS, and make the plausible recommendations.[111] However, the General Assembly does not take a lot of action adopting sanctions or coercive measures in order to oblige the State to follow the Court's judgment.[112]

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[106] CANÇADO TRINDADE, Antônio Augusto; VENTURA ROBLES, Manuel E. *Supra note 100*. p. 74.
[107] American Convention on Human Rights (1969), article 63.
[108] RAMOS, André de Carvalho. *Supra note 82*. p. 344-345.
[109] RAMOS, André de Carvalho. *Supra note 82*. p. 346.
[110] American Convention on Human Rights (1969), article 67.
[111] Ibid, article 65.
[112] TEIXEIRA, Gustavo de Faria Moreira. *Supra note 3*. p. 94.

3 THE RIGHT TO A HEALTHY ENVIRONMENT BEFORE THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS

3.1 THE AMERICAN CONVENTION ON HUMAN RIGHTS AND THE RIGHT TO A HEALTHY ENVIRONMENT

The American Convention does not bring in its text any economic, social or cultural right, so obviously there is no mention of sustainable development neither environmental law.[113]

The only mention to development on the ACHR has a more economic tone. Article 26 presents "progressive development". It says: "The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires". The application of this article by the Court is especially geared towards socially vulnerable groups, such as indigenous people.[114]

The environmental protection and the assurance of the right to a healthy environment happen in an indirect way. This indirect mechanism of protection occur due to the possibility of three concepts analyzed by Alan BOYLE: first, the protection of civil and political rights can be extended to the environmental protection, in regards to information, judicial remedies and political processes. Second, to make the right to a healthy and decent environment an economic and social right. And third, to treat environmental quality as a collective or solidarity right. However, all these approaches have been contested. The first one due to being anthropocentric, the second by leaving the environmental protection vulnerable to tradeoffs against other rights, such as economic development, and the third due to several human rights lawyers not believing in the recognition of the third generation of rights.[115]

Nevertheless, the Report of the Secretary-General of the OAS, from 4 April 2002, presented two cases in which the Inter-American System of Human Rights acted in order

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[113] MAZZUOLI, Valerio de Oliveira et al. *Supra note 70.*
[114] PIOVESAN, Flávia. *Supra note 74.* p. 189.
[115] BOYLE, Alan. *Human Rights or Environmental Rights? A Reassessment.* Fordham Environmental Law Review, vol. 18, n. 3, 2006. p. 471-472. Available at: https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1634&context=elr (accessed 29.07.2019)

to protect the environment by what is called Reflex Pathway Technique. The first is Resolution 12/85, of the case 7.615 involving the Yanomami people v. Brazil. In this, the Commission found that the construction of a road that passed in the middle of the Yanomami's territory was causing the violation of rights to life, liberty, personal security, to the preservation of health and to well-being, among others. And the second case is the Mayagna Awas Tingni Community v. Nicaragua, in which the Court understood that the fact that Nicaragua did not demarcate the territory of the indigenous community violated the rights to private property and judicial protection. There are other cases that the Court protected the environment through guaranteeing civil and political rights: Yakye Axa v. Paraguay, Sawhoyamaxa v. Paraguay, and Saramaka v. Suriname.[116]

Another right that has been related to the environmental protection is the right to property, present in article 21 of the ACHR, especially in relation to indigenous communities. The indigenous' right to property was defined by the Inter-American Commission on Human Rights in the Maya Indigenous Communities of the Toledo District v. Belize, in which the Commission expressed that indigenous peoples have a particular relationship with their land and natural resources, and that these are essential for their survival.[117]

In many cases, it is possible to see that the Inter-American System of Human Rights protects the environment by establishing a relation between the right to property and other fundamental rights, such as the right to life, to dignity, to personal integrity etc.[118]

As the American Convention of 1969 does not mention the environment, the Inter-American System of Human Rights had to go through the process of "greening" of the Convention. That it, it had to start protecting rights connected to the environment.[119]

For that, came into force in 1988 the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights – also known as "Protocol of San Salvador".

In its preamble, the Protocol highlights "the close relationship that exists between economic, social and cultural rights, and civil and political rights, in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity

[116] TEIXEIRA, Gustavo de Faria Moreira. *Supra note 3.* p. 113-114.
[117] Ibid, p. 126.
[118] Ibid, p. 127.
[119] MAZZUOLI, Valerio de Oliveira et al. *Supra note 70.*

of the human person, for which reason both require permanent protection and promotion if they are to be fully realized, and the violation of some rights in favor of the realization of others can never be justified".

The right to a healthy environment is one of the rights added to list of protection by the Protocol. Article 11 says: "1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation, and improvement of the environment."

The access to the inter-American system of cases concerning the "right to a healthy environment" and the guarantee of economic, social and cultural rights is regulated by article 19 (1) of the Protocol of San Salvador, which establishes a mechanism for sending reports to the OAS by the member states on these matters, by saying: "Pursuant to the provisions of this article and the corresponding rules to be formulated for this purpose by the General Assembly of the Organization of American States, the States Parties to this Protocol undertake to submit periodic reports on the progressive measures they have taken to ensure due respect for the rights set forth in this Protocol."

However, article 19 (6) establishes limitations to the system of monitoring by initial petitions, by imposing that only cases established in article 8 (a) (trade union organization) and article 13 (access to education) can be submitted to the Commission or to the Court. Such limitations, though, do not imply the non-protection of the other articles of the Protocol of San Salvador. It occurs that the rights not mentioned in art. 19 (6) to be brought before the Commission or the Court, should be linked to the need to protect the trade union organization, access to education or other rights contained in the American Declaration of Rights and Duties and/or the American Convention on Human Rights. The Inter-American Court, in many cases, has protected direct or indirectly the rights contained in the American Declaration of Rights and Duties or in the American Convention.[120]

[120] TEIXEIRA, Gustavo de Faria Moreira. *Supra note 3*. p. 130-131.

3.2 THE PROTECTION OF THE ENVIRONMENT BY THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

3.2.1 Yanomami v. Brazil

In December of 1980, Tim Coulter (Executive Director, Indian Law Resource Center); Edward J. Lehman (Executive Director, American Anthropological Association), Barbara Bentley (Director, Survival International), Shelton H. Davis (Director, Anthropology Resource Center), Groge Krumbhaar (Acting President, Survival International, U.S.A.), and other persons presented to the Inter-American Commission on Human Rights a petition alleging violations of the human rights of the Yanomami Indians.[121]

This was the first case in the matter of environmental law to be analyzed by the Commission, even before the Protocol of San Salvador from 1988.

The Yanomami are an indigenous group that live in the States of Amazonas and Roraima, Brazil. Even though the Brazilian Constitution guarantees the right of the Indians to their territory, in the 60s, the government of Brazil approved a plan of exploitation of the vast natural resources in and development of the Amazon region. In 1973, a construction of a highway that would pass through the territory of the Yanomami begun. In addition, during the 1970s, rich mineral deposits were discovered in the territories of the Yanomami.

With all this, mining companies and independent prospectors were attracted to the area. The consequence was the displacement of many Indians and the physical and psychological impact for them. The situation introduced prostitution among the women, and caused many deaths due to epidemics of influenza, tuberculosis, measles, venereal diseases and others.[122] The high number of deaths due to the diseases combined with the lack of action by the Brazilian Government would lead to the ethnical extinction of the Yanomami people.[123]

The petitioners alleged the existence of the violation of specific rights appointed by the American Declaration of the Rights and Duties of Man: right to life, liberty and personal securitu (article I), right to equality before the law (article II), right to religious freedom and worship (article III), right to the preservation of health and to well-being (article XI),

[121] Yanomami v. Brazil. *Supra note 7*.
[122] Id.
[123] TEIXEIRA, Gustavo de Faria Moreira. *Supra note 3*. p. 169.

right to education (article XII), right to recognition of juridical personality and of civil rights (article XVII), and right to property (article XXIII).[124]

After the considerations, the Commission adopted Resolution n. 12/85, concluding the failure of the Government of Brazil to take timely and effective measures in behalf of the Yanomami people, and recommended "a) That the Government of Brazil continue to take preventive and curative health measures to protect the lives and health of Indians exposed to infectious or contagious diseases; b) That the Government of Brazil, through the FUNAI[125] and in conformity with its laws, proceed to set and demarcate the boundaries of the Yanomami Park, in the manner that the FUNAI proposed to the inter ministerial working group on September 12, 1984; c) That the programs of education, medical protection, and social integration of the Yanomamis be carried out in consultation with the indigenous population affected and with the advisory service of competent scientific, medical, and anthropological personnel; and d) That the Government of Brazil inform the Commission of the measures taken to implement these recommendations."[126]

This resolution set a precedent, that recognized the relation between the right to life, to health, to freedom, and to safety with the environmental issue. Additionally, it evidenced that other vulnerable groups like the Yanomami could rely on the Inter-American System of Human Rights.[127]

3.2.2 Mercedes Julia Huenteao Beroiza et al v. Chile

The implementation of the Ralco Hydroelectric Plant Project by Empresa Nacional de Electricidad S.A. (ENDESA) led to the lodging of a petition to the Inter-American Commission on Human Rights, in December of 2002, by the representatives of the Department of Human Rights and Indigenous Studies of Arcis University and of the Center for International Environmental Law. They alleged violation by the state of Chile of rights to life, to humane treatment, to fair trial, to freedom of conscience and religion, of the family, to property and to judicial protection protected by the American Convention on Human Rights[128] against Mercedes Julia Huenteao Beroiza, Rosario Huenteao Beroiza,

[124] Yanomani v. Brazil. *Supra note 7.* Background, para. 1.
[125] FUNAI is the abbreviation of National Indian Foundation in Portuguese.
[126] Yanomani v. Brazil. *Supra note 7.* The Inter-American Commission on Human Rights Resolves, para. 3.
[127] MAZZUOLI, Valerio de Oliveira et al. *Supra note 70.*
[128] American Convention on Human Rights (1969). Articles 4, 5, 8, 12, 17, 21 and 25.

Nicolaza Quintremán Calpan, Berta Quintremán Calpan, and Aurelia Marihuan Mora – members of the Mapuche Pehuenche people. They requested precautionary measures, in order to prevent irreparable damage to the victims' rights.[129]

The construction of the hydroelectric dam was subject to the approval of the *Comisión Nacional de Medio Ambiente* – CONAMA (in English National Environment Commission), and it was accompanied by protests.[130] According to CONAMA, the relocation of the community could only happen with the consent of those affected by it. The construction, however, continued.[131]

The Commission granted precautionary measures as requested, in 2003, asking for the state to "Refrain from taking any steps that might alter the *status quo* in the matter, until the organs of the inter-American system of human rights have adopted a final decision on the case, in particular, avoiding or suspending any judicial or administrative action that entails eviction of the petitioners from their ancestral lands."[132]

However, during the proceeding, the State sent the Commission a document signed by both parties entitled "Framework Agreement between the State of Chile and the Petitioning Mapuche Pehuenche Families of the Upper Bío Bío for a Proposed Friendly Settlement". The community gave its land to the State, which in return gave the community land in same quality, established a scholarship for the families and strengthened the domestic legislation to protect in the future indigenous people, and inform and consult the communities. Receiving the Friendly Settlement, the Commission reaffirmed the possibility of this mechanism is in articles 48 and 49 of the American Convention of 1969. The Commission recognized, while concluding, the efforts of the parties to reach a friendly settlement.[133]

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[129] INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. *Report n. 30/04 – Petition 4671/02 – Friendly Settlement – Mercedes Julia Huenteao Beroiza et al – Chile*, March 11 2004.
[130] TEIXEIRA, Gustavo de Faria Moreira. *Supra note 3.* p. 175.
[131] Mercedes Julia Huenteao Beroiza et al v. Chile. *Supra note 129.* Paras. 24 and 25.
[132] Ibid, para 15.
[133] TEIXEIRA, Gustavo de Faria Moreira. *Supra note 3.* p. 180-181.

3.2.3 Oscar González Anchurayco and members of the Community of San Mateo v Peru

On February 28 of 2003, the Inter-American Commission on Human Rights received a petition from the National Coordinator of Communities of Peru Affected by Mining (*Coordinadora Nacional de Comunidades del Perú Afectadas por la Minería*— CONACAMI), alleging violation of the fundamental individual and collective rights of the members of the Community of San Mateo de Huanchor due to the environmental pollution produced by a field of toxic waste sludge next to the community, stating that the state of Peru was responsible.[134]

The petitioners argued that Peru was violating the rights to life, to humane treatment, to personal liberty, to fair trial, to privacy, to freedom of association, of the family, of the child, to property, to freedom of movement and residence, to participate in government, to equal protection, to judicial protection and progressive development.[135]

Studies conducted in the area that the community lived concluded that the arsenic, lead, and cadmium in the deposits generated a high risk of exposure for the communities of the zone, that environmental pollution was affecting the health of the dwellers of the communities, and that children were suffering from very high levels of lead concentration in their blood. The Commission's report said:

> "The Environmental Health Department of the Ministry of Health (hereinafter DIGESA) conducted two assessments in the year 2000, an environmental assessment and another on the health of the population in the area adjacent to the Mayoc sludge field in San Mateo Huanchor. The first assessment concluded that the cumulative power and chronic effect of arsenic, lead, and cadmium in the sludge field of the Lizandro Proaño S.A. mining company, constituted a high risk of exposure of the people living in Mayoc and Daza and demonstrated that the Rímac River running alongside the town is polluted by

[134] INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. *Report n. 69/04 – Petition 504/03 – Admissibility – Community of San Mateo de Huanchor and its Members – Peru, October 15, 2004.*
[135] Ibid, para 2.

> arsenic and lead and that these concentrations in the crops exceed risk limits."[136]

Therefore, in August 2004, the Commission granted precautionary measures in favor of Oscar González and his community. The Commission requested the state of Peru to implement a health assistance and care program for the population, particularly for children, to identify the persons who might have been affected by the consequences of pollution and provide the relevant medical care; and to begin transferring the deposits in accordance with the best technical conditions as determined by the relevant environmental impact study.[137]

Though the case of Oscar González Anchurayco and members of the Community of San Mateo v Peru did not constitute formal jurisprudence, it set a precedent for other similar cases.

3.2.4 Maya Indigenous Communities of the Toledo District v. Belize

The Indian Law Resource Center and the Toledo Maya Cultural Council presented a petition to the Commission on August 7, 1998, claiming that the State of Belize was responsible for violation of rights of the Mopan and Ke'kchi Maya People of the Toledo District of Southern Belize.[138]

The petitioners alleged that the State of Belize violated rights of the American Declaration of the Rights and Duties of Man: right to life, liberty and personal security (article I), to equality before law (article II), to religious freedom and worship (article III), to family and to protection thereof (article VI), to preservation of health and to well-being (article XI), to fair trial (article XVIII), to vote and to participate in government (article XX) and to property (article XXIII). The reason for the allegations was that the State had granted logging and oil concessions in the lands that the Maya people occupied.[139]

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[136] Ibid, para. 21.
[137] INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. *Annual Report of the Inter-American Commission on Human Rights 2004 – Chapter III, para 44.*
[138] INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. *Report n. 40/04 – Case 12.053 – Maya Indigenous Communities of the Toledo District – Belize, October 12, 2004.*
[139] Ibid, para. 2.

This action of the State did not involve consultation of the Maya people and caused severe environmental harm, threatening the subsistence of the Maya people.[140]

> "In support of their arguments, the Petitioners provide examples of environmental damage caused and threatened by the concessions granted to Toledo Atlantic International, Ltd. and Atlantic Industries, Ltd. They claim, for example, that the Atlantic International, Ltd. concession explicitly allows clear-cutting for eventual conversion of the forest to commercial agricultural lands and that the Government contemplates converting all of the land in this concession to agricultural use."[141]

The Commission recognized that the State in fact violated right to property, by not taking adequate measures to recognize the indigenous property right to the lands, and also by granting logging and oil concessions in the area occupied by the Maya people.[142] Therefore, the Commission recommended the state of Belize to adopt in its domestic law measures to delimit, demarcate and title the territory of the Maya people, with their consultation, and to repair the environmental damage resulting from the logging concessions granted by the State.[143]

3.2.5 Community of La Oroya v. Peru

Differently from the previous cases, on December 27, 2006, the Inter-American Commission received a petition that did not involve an indigenous community. The petitioners were the Inter-American Association for Environmental Defense (AIDA), the Center for Human Rights and Environment (CEDHA), and Earthjustice and they were acting on behalf of the people of the Community of La Oroya. They claimed that Peru was responsible for the violation of the rights in Articles 4 (right to life), 5 (right to humane treatment), 11 (right to privacy), 13 (freedom of thought and expression), 8 (right to a fair trial), and 25 (right to judicial protection) of the American Convention on Human Rights.[144]

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[140] Ibid, para. 27.
[141] Ibid, para 32.
[142] Ibid, para 193-194.
[143] Ibid, para 197 (1, 2, 3).
[144] INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. *Report n. 76/09 – Petition 1473-06 – Admissibility – Community of La Oroya – Pery, August 5, 2009.*

An environmental contamination in La Oroya, a community located in the Peruvian Andes, caused by the metallurgical complex operating there, run by the State until 1997, when it was purchased by the United States firm Doe Run has caused a series of violations of the rights of the alleged victims.[145]

When the petition was filed in 2006, La Oroya was one of the ten most contaminated cities in the world. Blood tests were conducted and the results demonstrated that the population, especially children and pregnant women, was strongly contaminated by high levels of lead, arsenic and cadmium. The lead levels were above the permitted standard and directly linked to the activity of the metallurgical complex.[146]

The State of Peru argued that until the complex was sold, they took several measures to help to reduce the level of contamination and that the petitioners did not specify what actions of the State allegedly violated the rights of the community. In addition, due to precautionary measures granted by the Commission in 2006, the State institute medical diagnostic studies to treat the diseases related to the pollution.[147]

The Commission held that "the alleged deaths and/or health problems of alleged victims resulting from actions and omissions by the State in the face of environmental pollution generated by the metallurgical complex operating at La Oroya, if proven, could represent violations of the rights enshrined in Articles 4 and 5 of the American Convention […]".[148]

Precautionary measures have been granted again in 2009. Also, the Inter-American Commission on Human Rights declared the petition admissible, and would initiate proceedings on the merits.[149] However, in regards of the damages to the environment and to the health of the people of La Oroya, the case has not been resolved.

[145] Ibid, para. 2.
[146] SPIELER, Paula. *La Oroya Case: the Relationship between Envrionmental Degradation and Human Rights Violation.* http://www.corteidh.or.cr/tablas/r25885.pdf (accessed 28.07.2019)
[147] La Oroya v. Peru. *Supra note 144*. para. 36-38.
[148] Ibid, para. 74.
[149] Ibid, para. 77.

3.3 CASES IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS

3.3.1 Mayagna (Sumo) Awas Tingni Community v. Nicaragua

The case of the Mayagna Awas Tingni Community v. Nicaragua was the first case of an environmental issue brought by the Inter-American Commission on Human Rights to the Inter-American Court.

On October 2, 1995, Jaime Castillo Felipe, on behalf of the community, lodged a petition to the Inter-American Commission, requesting precautionary measures as the State of Nicaragua was about to grant Sol del Caribe S.A. (SOLCARSA) a concession to commence logging on communal lands of the Awas Tingni people.[150] In 1997, the Commission requested the State to suspend the concession in form of precautionary measures. The actions by the state, however, continued.[151]

The Commission recognized that the State had not complied with its obligations violating Articles 1, 2 and 21 of the American Convention. Therefore, the Commission recommended that Nicaragua should create a system to demarcate the Awas Tingni territory. Such system should be acceptable to the indigenous communities.[152]

In June of 1998, the Inter-American Commission filed before the Court a lawsuit against the state of Nicaragua alleging that it violated articles 1 (Obligation to Respect Rights), 2 (Domestic Legal Effects), 21 (Right to Property), and 25 (Right to Judicial Protection) of the American Convention on Human Rights, in view of the fact that Nicaragua has not demarcated the communal lands of the Awas Tingni Community, nor has the State adopted effective measures to ensure the property rights of the Community to its ancestral lands and natural resources.[153]

Through the analysis of the evidences and facts, the Court understood that:

> "Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous

[150] INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua – Judgment of August 31, 2001.* para. 6.
[151] Ibid, paras. 16-20.
[152] Ibid, para. 27.
[153] Ibid, para 1 and 29.

> communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations."[154]

Therefore, this case expanded the protection given by art. 21 of the American Convention of 1969, not only given the protection to the right to property per se, but also to the communal property of indigenous people.[155]

By seven votes to one, the court found that the state had violated the right to judicial protection and the right to property, and that the state must invest as reparation for immaterial damages in 12 months the amount of US$50,000 for the benefit of the Awas Tingni Community.[156]

Unanimously, the Court decided that the state must adopt in its domestic law measures to create effective mechanism for delimitation, demarcation and titling of the property of indigenous communities, and that the state must submit a report on measures taken to comply with the judgment every six months.[157]

3.3.2 Yakye Axa Indigenous Community v. Paraguay

On March 17, 2003 the Inter-American Commission on Human Rights filed before the Inter-American Court an application against the State of Paraguay, due to the violation of Articles 4 (Right to Life); 8 (Right to Fair Trial); 21 (Right to Property) and 25 (Judicial Protection) of the American Convention, in combination with the obligations set forth in Articles 1(1) (Obligation to Respect Rights) and 2 (Domestic Legal Effects) of the American Convention, to the detriment of the Yakye Axa Indigenous Community of the Enxet-Lengua People.

> "The Commission alleged that the State has not ensured the ancestral property rights of the Yakye Axa Indigenous Community and its members, because said Community's land claim has been processed since 1993 but no satisfactory solution has been attained. According to the Commission in its application, this has made it impossible for the Community and its members to own and possess

[154] Ibid, para 149.
[155] RAMOS, André de Carvalho. *Supra note 82*. p. 349.
[156] Mayagna (Sumo) Awas Tingni Community v. Nicaragua. *Supra note 150.* para. 173.
[157] Id.

> their territory, and has kept it in a vulnerable situation in terms of food, medical and public health care, constantly threatening the survival of the members of the Community and of the latter as such."[158]

The Court found that the Yakye Axa people did not only have an adequate condition of life due to the fact that they did not have total access to their land and natural resources. As members of the community had been displaced, the access to food was difficult, because the cultivation and their traditional forms of subsistence, like hunting, fishing and gathering, were not appropriate in the new place they were settled. In addition, the right to health was also impacted by the lack of clean water.[159]

The Court, unanimously, declared that the state had violated the right to life of the Community and that the state must identify the traditional territory of the members of the Yakye Axa community and adopt measures to guarantee the right to property to the community.[160]

In this case, the Court applied the progressive development, in art. 26 of the American Convention, together with the right to cultural identity, health, education and culture, and the right to a healthy environment, based on the San Salvador Protocol.[161]

3.3.3 Kichwa Indigenous People of Sarayaku v. Ecuador

This case was brought by the Inter-American Commission to the Court in April of 2010 and it concerns the granting by the State of a permit to a private oil company to carry out oil exploration and exploitation activities in the territory of the Kichwa Indigenous People of Sarayaku in the 1990s.[162]

The Commission linked the violation of the right to life with the failure by the State to guarantee the right to property. Ecuador allowed explosives to be buried in the Sarayaku territoty, which caused a permanent situation of danger, thus threatening the life of the

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[158] INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case of the Yakye Axa Indigenous Community v. Paraguay – Judgment of June 17, 2005.* para. 2
[159] Ibid, para. 164-167.
[160] Ibid, 242.
[161] PIOVESAN, Flávia. *Supra note 74.* p. 189.
[162] INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador – Judgment of June 27, 2012.*

community. In addition, the Commission stated that the oil company entered the territory with no consultation of the Kichwa people.[163]

In the considerations by the Court, Ecuador was considered to have violated the rights to consultation, to indigenous communal property, and to cultural identity, and responsible for jeopardizing the rights to life and personal integrity. The Court, in 2012, ordered unanimously that the state must adopt measures of consultation of the Sarayaku people in a prior, adequate and effective manner in the event that it seeks to carry out activities in their territories.[164]

Being one of the most recent cases involving indigenous people, this case brings an important strengthening of the interpretation by the Court to other cases, in order to reach the consultation of indigenous communities.[165]

3.3.4 Xurucu Indigenous People and its members v. Brazil

The most recent case decided by the Inter-American Court of Human Rights on the matter of right to a healthy environment and indigenous communities is the case of Xurucu Indigenous People and its members v. Brazil.[166]

According to the Commission, the case refers to the alleged violation of the right to collective property and to the personal integrity of the Xucuru Indigenous People as a result of: (i) the alleged delay of more than 16 years between 1989 and 2005 in the administrative process of recognition, titling, demarcation and delimitation of their ancestral lands and territories; and ii) the alleged delay in the total disintegration of these lands and territories, so that said indigenous people could peacefully exercise this right.[167]

The Commission stressed that indigenous territory is a form of property, and it is not recognized through the State, but in a traditional way of use and possession of the land. The demarcation is the procedure through which it is given legal certainty to the indigenous communal land, being a way to prevent conflicts.[168]

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[163] Ibid, para 233-234.
[164] Ibid, para. 341.
[165] RAMOS, André de Carvalho. *Supra note 82.* p. 354.
[166] INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case of Xurucu Indigenous People and its Members v. Brazil – Judgment of February 5, 2018.*
[167] Ibid, para. 1.
[168] Ibid, para. 94-95.

Brazil was considered to have violated the rights to communal property and judicial protection, and was sentenced by the Court in 2018 to guarantee in an immediate and effective way the right to communal property of the Xurucu People, in a way that they would not suffer from invasion, interference or damage by third parties or agents of the State.[169]

3.3.5 Claude Reyes and others v. Chile

Similar to the Inter-American Commission, the Inter-American Court has decided upon one case that does not involve indigenous communities.

In 2005, the Commission filed the complaint in order for the Court to declare that the State is responsible for the violation of the rights to freedom of thought and expression (article 13 of ACHR) and to right to judicial (article 25 of ACHR).[170] As this case was about the access to public information regarding the environmental impact of a project, the Court analyzed indirectly the right to a healthy environment.[171]

According to the Commission, the State of Chile refused to give information regarding a project of deforestation to three Chilean citizens – Marcel Claude Reyes, Sebastián Cox Urrejola y Arturo Longton Guerrero – that believed the project could cause severe damage to the environment.[172]

In its defense, the State said that the citizens asked for information to the Foreign Investment Committee, however who possesses such information was the National Environmental Commission. In addition, the National Environmental Commission considered that the asked information was reserved, not being able to publish it.[173]

The Court considered this situation to involve the right to freedom of expression, as "according to the protection granted by the American Convention, the right to freedom of thought and expression includes "not only the right and freedom to express one's own

[169] Ibid, para. 220.
[170] INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case of Claude Reyes and others v. Chile – Judgment of September 19, 2006.* para. 2.
[171] RAMOS, André de Carvalho. *Supra note 82.* p. 350.
[172] Claude Reyes v. Chile. *Supra note 170.* para. 3.
[173] Ibid, para. 60.

thoughts, but also the right and freedom to seek, receive and impart information and ideas of all kinds."[174]

The Court also related article 13 of the American Convention – freedom of thought and expression – to Principle 10 of the Rio Declaration[175], which states:

> "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

The Court declared, unanimously, that the State violated the right to freedom of thought and expression and decided, also unanimously, that the state should in six months provide the information requested by the victims.[176]

3.4 THE ADVISORY OPINION "OC-23/17"

In March 14 of 2016, Colombia requested an opinion from the Inter-American Court of Human Rights, on its advisory competence, regarding the obligations of the States to protect the rights to life and to personal integrity in relation to the environment.

The issue that Colombia requested the Court to answer was in what way should the Pact of San José be interpreted when there is a risk that the construction and use of the new major infrastructure projects might seriously affect the marine environment in the Wider Caribbean Region and, consequently, the essential human habitat for the full enjoyment and exercise of the rights of the inhabitants of the coasts and / or islands of a State Party to

[174] Ibid, para 76.
[175] Ibid, para. 81.
[176] Ibid, para 174.

the Pact, in light of the environmental norms enshrined in treaties and in the customary international law applicable between the respective States.[177]

This request was motivated by Colombia's wish for more certainty regarding offshore activities in Caribbean Sea, due to concerns about potential environmental degradation from its neighbors new infrastructure projects, for example Nicaragua's construction of an inter-oceanic canal and offshore drilling after the International Court of Justice had redrawn the two states' boundaries.[178]

Colombia explained its original request is "related to the serious degradation of the marine and human environment in the Wider Caribbean Region that may result from the actions and/or omissions of the coastal States of the Caribbean Sea in the framework of the construction of new major works Infrastructure."[179]

On February 7 of 2018, the Inter-American Court of Human Rights issued an Advisory Opinion – *Opinión Consultiva OC-23/17*, concerning the state obligations in relation to the environment within the framework of the protection and guarantee of rights to life and personal integrity.

The requesting state limited the issue to the jurisdictional area established by the 1984 Convention for the Protection and Development of the Wider Caribbean Region – The Cartagena Convention, and that is "Region of the Great Caribbean". However, the Court indicated that, in the general interest of its advisory opinions, it is not appropriate to limit the scope to specific States. The issues raised in the request transcend the interest of the States Parties to the Cartagena Convention and are important for all the States. Furthermore, taking into account the relevance of the environment in its entirety for the protection of human rights, the Court does not consider it appropriate to limit its response to the marine environment. Therefore, in this Opinion, the Court would decide on the state

[177] Advisory Opinion OC-23/17. *Supra note 8.*
[178] BANDA, Maria L. *Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights.* https://www.asil.org/insights/volume/22/issue/6/inter-american-court-human-rights-advisory-opinion-environment-and-human#_edn5 (accessed 29.07.2019)
[179] Advisory Opinion OC-23/17. *Supra note 8.* Para. 2. Free translation from Spanish. Original says: "esta solicitud de opinión consultiva está relacionada con la grave degradación del entorno marino y humano en la Región del Gran Caribe que puede resultar de las acciones y/o omisiones de los Estados ribereños del Mar Caribe en el marco de la construcción de nuevas grandes obras de infraestructura."

obligations in environmental matters that are more closely related to the protection of human rights.[180]

The Court recognized that the right to a healthy environment is an autonomous right[181]. Regarding environmental degradation, the Inter-American Systems had already dealt with the issue due to the impact on other human rights, since the American Convention does not mention the environment. However, in its advisory opinion, the Court includes the right to a healthy environment in article 26 of the 1969 Convention, that states progressive development:[182]

> "This right must also be considered included among the economic, social and cultural rights protected by Article 26 of the American Convention, because under said norm those rights derived from economic, social and education, science and education norms are protected. culture contained in the OAS Charter, in the American Declaration on the Rights and Duties of Man (to the extent that the latter "contains and defines those essential human rights to which the Charter refers") and those derived from an interpretation of the Convention in accordance with the criteria established in article 29 of the Convention."[183]

The inclusion of the right to a healthy environment to article 26 opens possibilities to new categories of claims in the Inter-American System of Human Rights. The possible ways to seek remedy so far in the System had been in relation to other rights affected by environmental issues, but with this inclusion, the right to a healthy environment protects the environment per se.[184]

The court reaffirmed that the right to life is fundamental in the American Convention, since the realization of other rights depends on its safeguard. In virtue of this, the States have the obligation to guarantee the creation of the conditions that are required for their

[180] Ibid, Para. 35.
[181] Ibid, para. 62 and 63.
[182] Ibid, para. 57.
[183] Id. Free translation from Spanish. Original says: "este derecho también debe considerarse incluido entre los derechos económicos, sociales y culturales protegidos por el articulo 26 de la Convención Americana, debido a que bajo dicha norma se encuentran protegidos aquellos derechos que se derivan de las normas económicas, sociales y sobre educación, ciencia y cultura contenidas en la Carta de la OEA , en la Declaración Americana sobre Derechos y Deberes del Hombre (en la medida en que ésta última "contiene y define aquellos derechos humanos esenciales a los que la Carta se refiere") y los que se deriven de una interpretación de la Convención acorde con los criterios establecidos en el artículo 29 de la misma".
[184] BANDA, Maria L. *Supra note 178.*

full enjoyment and exercise.[185] The Court emphasized that there are conditions for a dignified life. These conditions include the access and quality of water, food and health. Likewise, the Court included the protection of the environment as a condition for a dignified life.[186]

In addition, in the specific case of indigenous and tribal communities, the Court has ruled on the obligation to protect their ancestral territories due to the connection they have with their cultural identity, a fundamental human right of a collective nature that must be respected in a multicultural, pluralistic and democratic society.[187] And also, the Court recognized that certain projects or interventions in the environment can represent a risk to the life and personal integrity of people. Therefore, the Court considered pertinent to jointly develop the state obligations regarding the rights to life and personal integrity, which may result from affectations caused by damage to the environment.[188]

In the opinion, the Court stated very clearly the precautionary principle should guide the actions of the States, with reference to the Rio Declaration.[189] It defines:

> "Notwithstanding the foregoing, the general obligation to guarantee the rights to life and personal integrity implies that States must act diligently to prevent effects on these rights. Also, when interpreting the Convention as requested in this case, the "best angle" for the protection of the person must always be sought. Therefore, this Court understands that States must act in accordance with the precautionary principle, for the purpose of protecting the right to life and personal integrity, in cases where there are plausible indicators that an activity could cause serious and irreversible damage to the environment. environment, even in the absence of scientific certainty. Therefore, States must act with due caution to prevent possible harm. Indeed, in the context of the protection of the rights to life and personal integrity, the Court considers that States must act in accordance with the precautionary principle, and therefore,

[185] Advisory Opinion OC-23/17. *Supra note 8.* Para. 108.
[186] Ibid, para. 110.
[187] Ibid, para. 113.
[188] Ibid, para. 114.
[189] Ibid, para. 175-180.

> even in the absence of scientific certainty, they must adopt the measures that are "effective" to prevent serious or irreversible damage."[190]

The Court has shown through the advisory opinion how progressive it can be when it comes to the environment, as well as it is when deciding cases that involve this matter. And more importantly, it declared no doubt when relating the environment to human rights. This advisory opinion determines how strong the inter-dependence between these rights is.

4 THE PROTECTION OF THE ENVIRONMENT IN OTHER REGIONAL SYSTEMS

4.1 THE EUROPEAN SYSTEM OF HUMAN RIGHTS

The European Convention on Human Rights (ECHR), as the American Convention on Human Rights, does not have a provision on the right to a healthy environment. That can be attributed to the fact that the European Convention has been adopted in 1950, that is, before the main discussions about environmental protection had happened.[191] Since the 1970s, the proposals to include the right to a healthy environment on the list of rights to be protected in the European System have been rejected. However, it has gone through a process of "greening" of the human rights, as the Inter-American System of Human Rights has. Through the protection of the rights to life, private life, health, water and property, the European Court has been able to protect the environment.[192]

The first case the European Court of Human Rights dealt in relation to the environment was Powel and Rayner, in 1990.[193] Richard John Powell and Michael Anthony Rayner wished to receive compensation due to the violation of their rights to an effective remedy

[190] Ibid, para 180. Free translation from Spanish. Original says: "Sin perjuicio de lo anterior, la obligación general de garantizar los derechos a la vida y a la integridad personal implica que los Estados deben actuar diligentemente para prevenir afectaciones a estos derechos. Asimismo, al interpretar la Convención como ha sido solicitado en este caso, debe siempre buscarse el "mejor ángulo" para la protección de la persona. Por tanto, esta Corte entiende que, los Estados deben actuar conforme al principio de precaución, a efectos de la protección del derecho a la vida y a la integridad personal, en casos donde haya indicadores plausibles que una actividad podría acarrear daños graves e irreversibles al medio ambiente, aún en ausencia de certeza científica. Por tanto, los Estados deben actuar con la debida cautela para prevenir el posible daño. En efecto, en el contexto de la protección de los derechos a la vida y a la integridad personal, la Corte considera que los Estados deben actuar conforme al principio de precaución, por lo cual, aún en ausencia de certeza científica, deben adoptar las medidas que sean "eficaces" para prevenir un daño grave o irreversible."

[191] BOYLE, Alan. *Supra note 2*. p. 614

[192] TEIXEIRA, Gustavo de Faria Moreira. *Supra note 3*. p. 108.

[193] Id.

(article 13 of the ECHR), to respect of private and family life (article 8 of ECHR) and right to property (article 1 of Protocol n.1), because of noise pollution from Heathrow Airport. The Court, however, considered that the British authorities took the necessary measures to reduce the impact to the citizens of the airport's noises, and those measures were sufficient.[194]

After this case, the European Court and Commission stressed that in the future environmental cases could be analyzed through the Reflex Pathway Technique, which happens also in the Inter-American System when protecting the environment. This led to the case of López Ostra v. Spain.[195]

In this case, Gregoria López Ostra, a citizen of Lorca, Spain, alleged that the treatment of liquid and solid waste released gas fumes that caused health problems to many people living in Lorca. This time, the Court held that the pollution in Lorca violated article 8 as well as article 3 that states the prohibition of degrading treatment, affecting the well-being of the population.[196]

Also under article 8, Ruth Hatton argued against UK that her health and her family's had been affected by aircraft activity in Heathrow Airport during nights, causing her and her family sleep interruptions.[197] Though the Court reiterated the statement from López Ostra v. Spain, it decided similarly to Powell and Rayner v. UK. The Grand Chamber held that the measures taken by the government to reduce noises' impacts on citizens were sufficient, as it follows:

> "116. The case concerns the way in which the applicants were affected by the implementation in 1993 of the new scheme for regulating night flights at Heathrow. The 1993 Scheme was latest in the series of restrictions on night flights which began at Heathrow in 1962 and replaced the previous five-year 1988 Scheme. Its aims included, according to the 1993 Consultation Paper, both protection of local communities from excessive night noise, and taking account of the wider economic implications. […]

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[194] EUROPEAN COURT OF HUMAN RIGHTS. *Case of Powell and Rayner v. The United Kingdom – Application no.9310/81 – Judgment*, Chamber, 21 February 1990.
[195] TEIXEIRA, Gustavo de Faria Moreira. *Supra note 3*. p. 109.
[196] EUROPEAN COURT OF HUMAN RIGHTS. *Case of López Ostra v. Spain – Application no. 16798/90 – Judgment*, Chamber, 9 December 1994. para. 51.
[197] EUROPEAN COURT OF HUMAN RIGHTS. *Case of Hatton and others v. The United Kingdom – Application no. 36022/97 – Judgment*, Grand Chamber, 8 July 2003.

> 117. The 1993 Scheme accepted the conclusions of the 1992 sleep study that for the large majority of people living near airports there was no risk of substantial sleep disturbance due to aircraft noise and that only a small percentage of individuals (some 2 to 3%) were more sensitive than others. On this basis, disturbances caused by aircraft noise were regarded as negligible in relation to overall normal disturbance rates. The 1992 sleep study continued to be relied upon by the government in their 1998/99 review of the regulations for night flights, when it was acknowledged that further research was necessary, in particular as regards sleep prevention, and a number of further studies on the subject were commissioned.
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> 118. The Court has no doubt that the implementation of the 1993 Scheme was susceptible of adversely affecting the quality of the applicants' private life and the scope for their enjoying the amenities of their respective homes, and thus their rights protected by Article 8 of the Convention. […]"[198]

In Taskin v. Turkey, Turkish nationals alleged breach of their right to life and right to respect their private life due to the operating permits for a gold mine. Authorized by the government, the company responsible utilized big quantities of cyanide in procedures, threatening the health of the population in Ovacik, Turkey.[199] The applicants also alleged the decision-making process in Turkey violated articles 2 and 8 of the European Convention. Although article 8 does not require any specific procedure, the decision-making must be fair and the interest of those involved need to be considered and given proper importance when in contrast with economic development.[200] The Court held in agreement with the applicants recognizing the breach of articles 2 and 8.

It is possible to see in the cases above that, besides article 8, violations of article 2 are also alleged in environmental cases. However, in regards to the right to life, the Court is not so protective in environmental matters. For example, in L.C.B. v. UK, the applicant attributed her leukemia diagnosis to her father's participation in nuclear tests of the British

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[198] Ibid, para. 116-118.
[199] EUROPEAN COURT OF HUMAN RIGHTS. *Case of Taskin and others v. Turkey – Application no. 46117/99 – Judgment*, Third Section, 10 November 2004.
[200] BOYLE, Alan. *Supra note 2*. p. 624.

government. She blamed the British authorities for not warning that this represented a threat to her health.[201]

The Manual on Human Rights and the Environment, adopted by the European Council, in 2005, establishes that "the extent of the obligations of public authorities depends on factors such as harmfulness of dangerous activities and foreseeability of the risks to life".[202] Therefore, in L.C.B. v. UK, the Court considered that the government could not foresee the risk to life at that time, therefore could not have taken any action.

Falling into the Manual's concept to consider breach of right to life, the case of Öneryildiz v. Turkey deals with a methane explosion in a municipal rubbish tip in Ümraniye, in Istanbul that caused the death of the applicants' close relatives and the destruction of their property. The applicants allege the national authorities were responsible for these consequences of the explosion. Considering the harmfulness of the dangerous activity, the Court found there was breach of article 2, as well as articles 8 and 13 of the ECHR and article 1 of Protocol n.1.[203] The Court's decision expresses the principles established in the Manual on Human Rights and the Environment:

> "(a) The right to life is protected under Article 2 of the Convention. This Article does not solely concern deaths resulting directly from the actions of the agents of a State, but also lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction. This means that public authorities have a duty to take steps to guarantee the rights of the Convention even when they are threatened by other (private) persons or activities that are not directly connected with the State.
>
> […]
>
> (d) In the first place, public authorities may be required to take measures to prevent infringements of the right to life as a result of dangerous activities or natural disasters. […]"[204]

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[201] EUROPEAN COURT OF HUMAN RIGHTS. *Case of L.C.B. v. The United Kingdom (14/1997/798/1001) – Judgment*, 9 June 1998.
[202] COUNCIL OF EUROPE. *Manual on Human Rights and the Environment.* 2005. p. 36. Available at: https://www.echr.coe.int/LibraryDocs/DH_DEV_Manual_Environment_Eng.pdf (accessed 11.08.2019)
[203] EUROPEAN COURT OF HUMAN RIGHTS. *Case of Öneryildiz v. Turkey – Application no. 48939/99 – Judgment*, Grand Chamber, 30 November 2004.
[204] COUNCIL OF EUROPE. *Supra note 202.* p. 18.

One can see that, even though the proposals to adopt officially a right to a healthy environment in the European System have been rejected, the European Court has been protecting the right to a healthy environment indirectly. Through the Reflex Pathway Technique, the greening of the European Convention of Human Rights has been effective. The rejection of the proposals, however, contrast with the adoption of article 11 of the Protocol of San Salvador, in the Inter-American System of Human Rights, and article 24 of the African Charter on Human and People's Rights, but the number of environmental cases lodged in the European System is notably bigger than in the Inter-American System and the African System.

4.2 THE AFRICAN SYSTEM OF HUMAN RIGHTS

In the African System of Human Rights, the right to a healthy environment has been already recognized in the African Charter on Human and Peoples' Rights, adopted in 1981. Article 24 says "All people shall have the right to a general and satisfactory environment favourable to their development".[205]

As the Inter-American and the European System, the African Human Rights System has dealt with a few environmental cases. Similar to the Inter-American System, some of these cases involve indigenous communities. The most relevant and known case regarding environmental protection in the African System is the "Ogoni Case".[206] It involves the ilitary government of Nigeria, the Shell Petroleum Development Corporation (SPDC) and the indigenous Ogoni People.

In 1996, the Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR), two non-governmental organizations, lodged a communication to the African Commission on Human and Peoples' Rights. They alleged that the Ogoni People had several human rights violated, including the non-discriminatory enjoyment of rights (article 2), right to life (article 4), right to property (article 14), right to health (article 16), family rights (article 18), right of peoples to freely dispose of their

[205] ORGANIZATION OF AFRICAN UNION. *African Charter on Human and Peoples' Rights.* 1 June 1981.
[206] AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS. *Communication 155/96 Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria.* ("Ogoni Case"), 30th Ordinary Session, 13 to 27 October 2001.

wealth and natural resources (article 21), and right of peoples to a satisfactory environment (article 24).[207]

The complaint said that operations by the Nigerian National Petroleum Company (NNCP), thus involving the Nigerian military government, and the Shell Corporation, a majority shareholder, caused environmental degradation and health problems to the Ogoni People. These operations included the exploitation of oil reserves in Ogoniland.[208] The petitioners alleged that "the Nigerian Government has condoned and facilitated these violations by placing the legal and military powers of the state at the disposal of the oil companies."[209] The Nigerian government, as well as not proving information to the Ogoni People on the harmfulness of the operations, also did not ensure safety guard measures nor monitoring of these activities.[210] In addition, the communication claimed that the community was not consulted before the operations and many Ogoni villages had been attacked and destroyed by Nigerian security forces, which caused several members of the community to be homeless, allegation to which the Nigerian government admitted.[211] The Ogoni people have not only lost their homes, but also their fields, animals, farmlands and rivers. This situation "has created malnutrition and starvation among certain Ogoni communities".[212]

In the Niger Delta, in the area of Nigeria, there have been around 221 oil spills per year, according to the proper Shell Oil Company, in its operational area. The biggest problems resulting from these oil spills are the water pollution and the degradation of agricultural land, which leads to economic and social consequences. Another problem caused by this kind of activity is gas flare. The flaring of gas, that is produced together with oil, releases gases into the atmosphere, which causes acid rain. The consequences of gas flaring are basically the same as the ones caused by oil spilling.[213]

As for the admissibility in this case, the requirement of exhaustion of local remedies was not met. However, the Commission considered that measures taken by the military government at that time did not allow the people in Nigeria to have appropriate domestic

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[207] COOMANS, Fons. *The Ogoni Case before the African Commission on Human and Peoples' Rights.* The International and Comparative Law Quarterly, vol. 52, no. 3, 2003. p. 749. Available at: www.jstor.org/stable/3663335 (accessed 12.08.2019)
[208] Ogoni Case. *Supra note 206.* paras. 1-2.
[209] Ibid, para. 3.
[210] Ibid, para. 4.
[211] Ibid, paras. 5-8.
[212] Ibid, para. 9.
[213] EBEKU, Kaniye. *The Right to a Satisfactory Environment and the African Commission.* African Human Rights Law Journal, 2003. Available at: http://www.corteidh.or.cr/tablas/R21584.pdf (accessed 12.08.2019)

remedies. Therefore, it did not require the literal "exhaustion of local remedies" and considered the communication admissible.[214]

On the merits, the Commission recognized the obligation of the State to guarantee the enjoyment of all fundamental rights, including the provision of effective remedies.[215] Additionally, the Commission recognized the importance of the attitude of the non-governmental organizations, by thanking them for taking the case to the Commission.[216]

In regards with the right to a healthy environment, which is the main issue here, the Commission explicitly linked such right to economic and social rights, stating the environment affects the quality of life of people.[217] It also pointed out that States acquire obligations to guarantee this right: "The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources […]".[218] And in this case, clearly the state was contributing to the damages to the environment and the Ogoni People.

Besides approaching the matter through the African Charter, the Commission also refers to the International Covenant on Economic, Social and Cultural Rights from 1996, to which Nigeria is a party, that establishes in article 12 the necessity of "improvement of all aspects of environmental and industrial hygiene", as mentioned before.[219]

As the Inter-American and the European Systems, when deciding about environmental cases, recognize the many rights that have an inter-dependence with the right to a healthy environment, the African Commission acted similarly. Apart from finding that Nigeria violated Article 24 of the African Charter, the right to a satisfactory environment, the Commission recognized the violation of the other substantive rights: non-discriminatory enjoyment of rights, right to life, right to property, right to health, family rights and right of peoples to freely dispose of their wealth and natural resources, as alleged in the

[214] COOMANS, Fons. *Supra note 207*. p. 752.
[215] Ogoni Case. *Supra note 206.* paras. 45-47.
[216] Ibid, para. 49.
[217] Ibid, para. 51.
[218] Ibid, para. 52.
[219] Id.

communication.[220] In addition, the Commission recognized through these rights that implicitly the right to food was also violated.[221] Together all these rights form the dignity of individuals. Therefore, the lack of concern or protection of the environment results in violations of not only the right to healthy environment, but also other fundamental rights. Representing, thus, the importance of a decent and safe environment to secure human rights.

Involving the environment and indigenous communities, the African Commission on Human and Peoples' Rights has received a few cases. In 2010, Nigeria was once again alleged as the responsible for violations of the right to a healthy environment and other human rights. This time the Socio-Economic Rights and Accountability Project (SERAP) brought the complaint against Nigeria[222] due to the failure of the state to take action regarding a pipeline explosion that caused deaths, injuries and environmental degradation of the Awori Community. However, the Commission found the complaint inadmissible, for the non-exhaustion of domestic remedies.[223]

Another case that did not move forward is AFTRADEMOP and Global Welfare Association (on behalf of the Moko-Oh Indigenous Peoples of Cameroon) v. Cameroon[224]. Alleging violation of several human rights in the African Charter, including the right to a healthy environment, the Commission found the communication admissible. However, when asked to present observations on merits, the complainants did not respond and the communication was struck out due to "lack of diligent prosecution". The inial allegation was that the Moko-Oh Indigenous People had been oppressed by a migrant tribe in the north of Cameroon.[225]

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[220] Ibid, Holding.
[221] Ibid, paras. 64-65.
[222] AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS. *Communication 338/07 Socio-Economic Rights and Accountability Project (SERAP) v. the Federal Republic of Nigeria*, 48th Ordinary Session, 21 November 2010.
[223] OPEN SOCIETY JUSTICE INITIATIVE. *Decisions of the African Commission on Human and Peoples' Rights, 2010-2014.* September 2015. p. 4. Available at: https://www.justiceinitiative.org/uploads/9a38bc11-1fdd-44b4-96e9-46b9f6263b99/case-digests-achpr-20151014.pdf (accessed 14.08.2019)
[224] AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS. *Communication 336/07 AFTRADEMOP and Global Welfare Association (On Behalf of the Moko-Oh Indigenous Peoples of Cameroon) v. Cameroon*, 13th Extraordinary Session, 18 October 2013.
[225] OPEN SOCIETY JUSTICE INITIATIVE. *Supra note 223.* p. 27.

On a different note, in 2013, the Commission found the complaint by the Front for Liberation of the State of Cabinda against Angola[226] admissible and decided on merits, but did not find breaches of the alleged articles (rights to property, equality, self-determination, free disposal of wealth and natural resources, economic, social and cultural development and satisfactory environment). The complaint alleged that the state of Angola took over the resources of Cabinda, which led the People of Cabinda to suffer from unemployment, poverty, and problems regarding health and education. The Commission held that there was lack of evidence to support the allegations.[227]

It is possible to see that the African Commission on Human and Peoples' Rights is restrictive in regards to recognizing the violation of Article 24 of the African Charter. There are other examples of cases alleging violation of the mentioned right but not having it recognized by the Commission. In Kevin Mgwanga Gunme et al v. Cameroon[228], from 2009, and The Nubian Community in Kenya v. The Republic of Kenya[229], from 2016, the Commission recognized breach of several fundamental rights, but not the right to a satisfactory environment.

[226] AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS. *Communication 328/06 Frente para a Libertação do Estado de Cabinda v. Angola*, 54th Ordinary Session, 5 November 2013.
[227] OPEN SOCIETY JUSTICE INITIATIVE. *Supra note 223.* p. 22.
[228] AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS. *Communication 266/03 Kevin Mgwanga Gunme et al v. Cameroon*, 45th Ordinary Session, 27 May 2009.
[229] AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS. *Communication 317/06 The Nubian Community in Kenya v. The Republic of Kenya*, 17th Extraordinary Session, 30 May 2016.

CONCLUSION

Given the above study, it is noticeable that the development of the environmental protection has been relatively slow. Though it is not possible to determine exactly when the International Environmental Law has started to emerge, a few points in history show how slowly the environmental protection was built.

Are examples: the international economic trade agreements that involved the environment, such as the Convention for the preservation of the fur seal and sea otter in the North Pacific Ocean and Bering Sea from 1883 and the Paris Convention for the Protection of Birds Useful for Agriculture from 1902, the domestic legislatures created due to emergency situations in the middle of the 20th Century, the arbitral award of the Trail Smelter Case in 1941, and the increase of the commotion over the environment in the 1960s.

The adoption in 1972 of the Stockholm Declaration of the United Nations Conference on the Human Environment, however,u is a clear mark of the consolidation of the awareness towards the protection of the environment.

The Stockholm Declaration, alongside with the Rio Declaration on Environment and Development from 1992, still gives an anthropocentric view to the environment matter. The name of the Stockholm Declaration "Human Environment" represent that, as well as Principle 1 of the Rio Declaration proclaiming that "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature".

However, the importance of these declarations to the environmental protection cannot be dismissed. Both represent the possibility of including environmental issues in the concerns of states, international organizations and court decisions around the world.

The Inter-American Commission on Human Rights has showed this concern and how the environment impacts on human life even before the official recognition of the right to a healthy environment by the 1988 Additional Protocol to the American Convention on Human Rights of 1969 – the Protocol of San Salvador. In the case of Yanomami v. Brazil from 1985, the Commission set an important precedent for future cases. Resolution 12/85 recognizes the need for protection of other vulnerable groups like the Yanomami community, and considers the inter-dependence between human rights and the environment.

The Inter-American System of Human Rights has been giving effective protection to the right to a healthy environment through the Reflex Pathway Technique, of article 19(6) of the Protocol. Therefore, even though the Protocol does not permit direct access to the System in regards to the right to a healthy environment, the indirect protection to such rights has been adequate.

In addition, the approach by both the Inter-American Commission and Court has shown an emphatic link between the right to a healthy environment and other rights. For example, in the case of Oscar González Anchurayco and the members of community of San Mateo v. Peru, the Commission took into consideration the impact on the right to life (article 4 of the ACHR) due to the conditions of the environment the community was living in. Another example is the case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua, in which there is the recognition of the right to property (article 21 of the ACHR) specifically of indigenous people. And even regarding procedural rights, as in Claude Reyes and others v. Chile, in which the Court recognized the right to access to information, as proposed by Principle 10 of the Rio Declaration.

The Inter-American Court has shown its progressiveness not only through decisions of cases, but also through Advisory Opinion "OC-23/17", published in 2018. In this, the Court declared the right to a healthy environment an autonomous fundamental right and recognized that for other human rights to be fulfilled, they depend on the non-violation of the right to a healthy environment. With that, the Court builds an hierarchy of rights and puts the right to a healthy environment above other rights.

Therefore, this Advisory Opinion could set a new kind of impact on future decisions in the Inter-American System of Human Rights, and even serve as an example to the rest of the world.

The European System of Human Rights, in fact, has not yet recognized the right to a healthy environment. The decisions of the European Court regarding environmental issues occur through the analysis of other rights of the 1950 European Convention on Human Rights.

The majority of cases are decided under article 2 (right to life) and article 8 (right to respect of private and family life). Articles 3 (prohibition of degrading treatment), 6 (right

to a fair trial) and 10 (freedom of expression) of the ECHR and article 1 of Protocol n. 1 (right to property) have also been factors for the Court decide in environmental cases.

In contrast, the African Human Rights System has recognized the right to a satisfactory environment in article 24 of the African Charter on Human and Peoples' Rights adopted in 1981. However, the African Court seems restrictive in recognizing breach of article 24. In environmental cases, the Court recognizes violation of other rights, such as right to life and the right to dispose of their wealth and natural resources.

Therefore, it can be considered that each of the systems deals with the environment in different ways, but somehow, direct or indirectly, the awareness towards environmental protection exists. That can be attributed also to the fact that each region presents a different environment context. Nonetheless, the rights affected by environmental problems are being taken into consideration and protected.

In conclusion, the environmental protection is not yet fully developed. It seems that, as the world and the nature keep changing, the International Environmental Law needs to continue to develop as well. From the economic agreements involving the environment in the 20th Century to the recent Advisory Opinion from the Inter-American Court of Human Rights published in 2018, one can see that from time to time new issues regarding the environment need to be approached. That can be seen clearly on how the Conference in Stockholm approached the "human environment" *per se* and in Rio, the matter of "sustainable development" was introduced at the center of the discussion.

However, given this study, it is possible to realize that the right to a healthy environment is a certain thing. Directly or indirectly, linking it to other human rights or approaching the right itself, the right to a healthy environment has been consolidated.

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ABSTRACT

This Master Thesis focus on the recognition and consolidation of the right to a healthy environment before the Inter-American System of Human Rights. It analyzes how the environmental protection became an issue discussed on the platforms of International Law and how it relates to the protection of Human Rights. The development of the environmental protection is built since the Trail Smelter Case until the adoption of Stockholm and Rio Declarations. This work presents a brief explanation of the Inter-American System of Human Rights, and covers the strengthening of the American Convention on Human Rights of 1969 by the adoption of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, also known as Protocol of San Salvador, in 1988. The Protocol was responsible for adding among other human rights to be protected in the Inter-American System, the right to a healthy environment. In addition, it analyzes cases from the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights involving the protection of the environment, especially regarding indigenous communities. The study regarding these cases addresses the connection between the right to a healthy environment with other human rights, wishing to demonstrate the dependence between them. The thesis considers and studies the groundbreaking Advisory Opinion "OC-23/17" issued by the Inter-American Court of Human Rights in 2018, where it recognizes the right to a healthy environment as an autonomous fundamental right. Further, the work presents the protection of the environment in the European and African human rights systems, to compare them to the Inter-American one. The goal of this Master Thesis is to demonstrate the importance of protecting the environment and the necessity of recognizing the right to a healthy environment to guarantee a life of dignity and well-being.

Keywords: environmental protection; right to a healthy environment; environmental justice; sustainable development; human rights; inter-American system of human rights

KURZZUSAMMENFASSUNG

Diese Masterarbeit fokussiert auf die Anerkennung und Konsolidierung des Rechts auf eine Gesunde Umwelt im Interamerikanischen Menschenrechtssystems. Die Arbeit analysiert, wie der Umweltschutz zu einer breit diskutierten Frage auf den Ebenen des Internationalen Rechts geworden ist und wie er mit dem Schutz des Menschenrechts verbunden ist. Die Entwicklung des Umweltschutzes wird seit dem Verfahren der Trail Gießerei bis zur Aufnahme der Stockholm- und Rioerklärungen dargestellt, und diese Arbeit liefert eine kurze Erläuterung des Interamerikanischen Menschenrechtssystems und die Verstärkung des Amerikanischen Menschenrechtsabkommens aus dem Jahr 1969, nach der Aufnahme des Beisatzprotokolls zum Amerikanischen Menschenrechtsabkommen im Bereich der Wirtschaftlichen, Sozialen und Kulturellen Rechte, auch als San Salvador-Protokoll bekannt, aus dem Jahr 1988. Dieses Protokoll hat den Beitrag geleistet, das Recht auf eine Gesunde Umwelt zu den den anderen zu schützenden Menschenrechten der Interamerikanischen Protokolls zu ergänzen. Außerdem analysiert es Verfahren des Interamerikanischen Menschenrechtsausschusses und des Interamerikanischen Menschenrechtsgerichts im Bereich des Umweltschutzes, insbesondere in Verbindung mit indigenen Gemeinden. Die Erforschung dieser Verfahren diskutiert die Verbindung zwischen dem Recht auf eine Gesunde Umwelt und anderen Menschenrechten mit der

Absicht, den Zusammenhang zwischen ihnen ans Licht zu bringen. Diese Arbeit betrachtet und analysiert den innovierenden Bericht “OC-23/17” des Interamerikanischen Menschenrechtsgerichts aus dem Jahr 2018, in dem das Gericht das Recht auf eine Gesunde Umwelt als automones Grundrecht anerkannt wird. Diese Arbeit spricht auch den Umweltschutz nach den europäischen und afrikanischen Menschenrechtssystemen an, um sie mit dem interamerikanischen System zu vergleichen. Diese Masterarbeit setzt sich das Ziel, die Bedeutung des Umweltschutzes und die Notwendigkeit darzustellen, das Recht auf eine Gesunde Umwelt anzuerkennen, um ein würdiges Leben und das Wohlbefinden zu gewährleisten.

Schlüsselbegriffe: Umweltschutz; Recht auf eine Gesunde Umwelt; Umweltjustiz; nachhaltige Entwicklung; Menschenrechte; interamerikanisches Menschenrechtssystem