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The justiciability of the Human Right to a Healthy Environment in the African and Inter-American system

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1 INTRODUCTION

1.1 Subject matter and research question

In recent years there has been an increasing inclination towards the protection of the environment in the international field. Environmental disasters have been tackled more and more by the rise of international environmental law, and together with it, slowly has emerged a vision of a link between human rights and the protection of the environment. Regardless of doctrinarian discrepancies on the actual existence of a human right to a healthy environment and how this should be dealt with, both the Inter-American and the African systems of human rights have explicitly recognized it. But is recognition really enough? It is argued that some of the main features of justiciability can be found in the explicit recognition of a right.[1] Consequently, in this thesis I will intend to demonstrate that, in the regional systems mentioned, the recognition of the human right to a healthy environment is still not fully justiciable in practice.

Thus, this work has a legal subject matter and it will aim to analyze the right to a healthy environment and its justiciability as a human right. More precisely, the research question is: is the human right to a healthy environment justiciable in the Inter-American and African systems and if so, to what extent?

1.2 Methodology, sources and thesis design

In addressing the subject matter, I will firstly go through the history and constitutive elements of the human right to a healthy environment and the meaning of justiciability of rights. To do so, I will utilize a legal research method and focus on primary sources such as treaties, conventions and declarations and secondary sources of law such as journal articles, and law reports of the Office of the High Commissioner on Human Rights (OHCHR), the Special Rapporteur on Human Rights and the Environment and the International Court of Justice (ICJ), among others. For the second part I will continue with a legal research method, but now based on the analytical and comprehensive study of the jurisprudence of the Inter-American Court of Human Rights, the African Court of Human and Peoples' Rights, the Inter-American

[1] For references see section 2.3.

Commission of Human Rights, the African Commission of Human Rights and resolutions adopted by these regional human rights mechanisms.

1.3 Relevance of the study

This study is relevant because in academic texts as well as in official documents presented by international organizations, there seems to be no clear agreement on whether the human right to a healthy environment is justiciable or not or to what extent is justiciable in itself, without the need of connection with other human rights.[2] The document introduces a different perspective, as it will have as a focus the two systems that have officially recognized the human right to a healthy environment, analyzing whether it is justiciable, particularly, in those regional systems and trying to show if recognition makes a difference with regard to justiciability.

Recognizing the human right to environment as a justiciable human right is relevant in the sense that justiciable rights can be examined by courts which may in turn provide an adequate settlement of disputes. It is also important to be able to establish a violation of this right by its own, without the need of proving connection with other human rights because this not only reinforces its relevance but also lowers the standard of proof for the claimants.

Finally, it is pertinent to highlight that, up to today, excluding the two regional systems mentioned, there is no general international binding treaty that fully recognizes a right to a healthy environment. This adds value to the studies aimed to enhance the significance of a justiciable human right to environment.

[2] For references see sections 2.1.2, 2.1.3 and 2.2.1

2 CHAPTER 1: THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT AND THE JUSTICIABILITY OF RIGHTS

2.1 Historical evolution of the Human Right to a Healthy Environment

2.1.1 The protection of the environment and the emergence of international environmental law

The extensive development of environmental law during the second half of the XX century slowly gave way for international agreements, treaties and resolutions to acknowledge the existence of a link between the environment and human rights in the international sphere. However, this link has not always been clear and there is still no consensus on whether a universal human right to a healthy environment actually exists.

International environmental law started developing before human rights law. The first international environmental agreements appeared in the early 1900s together with the evolution of public international law. The adoption of these treaties was, at the beginning, sporadic and their content was limited in scope, as they were bilateral and dealt only with specific environmental issues.[3] It was not until the creation of the UN when some broader treaties regarding the environment began to appear.

The basis for a broader concern of international environmental law was a resolution by the Economic and Social Council (ECOSOC) convening the 1949 United Nations Conference on Conservation and Utilization of Resources, which reflected the need for international action to properly manage and preserve natural resources.[4] The ECOSOC resolution settled the competence of the UN on environmental matters and led to the creation of the first and most important environmental treaties of the time. From then on, there has been a proliferation of agreements and instruments on environmental issues such as Statutes of the International Union for Conservation of Nature and Natural Resources (1948), the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (1969), Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter

[3] Philippe Sands & Jaqueline Peel, *Principles of International Environmental Law,* (4th edn, Cambridge University Press, 2018), 23.
[4] ibid, 26.

(IMO, London Convention 1972), The Nordic Environmental Protection Convention (1974), the Geneva Convention on Long-range Transboundary Air Pollution (1979), and others.

By 1970s, there was an emerging body of international environmental rules at regional and global levels. Nevertheless, these treaties were developing in a fragmented way, showing no cohesive international environmental strategy.[5] Only with the Stockholm Conference on June 1972, initiated more cohesive phase in international environmental law. The Conference drafted the Stockholm Declaration, which will be analyzed more deeply in section 2.1.2. The period continued with a proliferation of international organizations and the development of new sources of international environmental law such as the creation of the United Nations Environmental Programme (UNEP), which adopted the UNEP Draft Principles. The UNEP was created as a leading authority to set a global environmental agenda and to promote the "coherent implementation of the environmental dimension of sustainable development within the UN system" and it served as "an authoritative advocate for the global environment".[6] Further, the World Charter for Nature was signed in 1982. The emergence of these international instruments was in a way the result of a previous development of philosophical notions of ecology and environmentalism and the need to find a balance in the distorted relationship between humankind and nature.[7]

Another important input in the matter was the General Assembly's (GA) Resolution 44/228 of December 1989 that urged for the UN conference on Environment and Development (UNCED) to elaborate strategies to stop environmental degradation and promote "environmentally sound development".[8] The UNCED took place in Rio on June 1992 and it adopted the following non-binding documents: the Agenda 21, the Rio Declaration on Environment and Development, the Statement of Forest Principles, the United Nations Framework Convention on Climate Change and the United Nations Convention on Biological Diversity. The most renowned of these, the Rio Declaration, contained a series of compromises regarding environmental protection and economic development. However, this declaration put the human being in the center of the discussion, setting aside from a more ecological vision established previously in the UN World Charter.[9]

[5] ibid, 29.
[6] ibid, 49.
[7] Linda Hajjar Leib, *Human Rights and the Environment: Philosophical, Theoretical and Legal Perspectives* (Brill, 2011) 39
[8] UNGA Res 44/228 (22 December 1989) UN Doc A/Res/44/228.
[9] Hajjar Leib (n 5), 39-40.

In what it comes to jurisprudence, the International Court of Justice has, since 1990, dealt with a number of cases regarding the protection the environment. These cases have been mainly concerned with specific issues or principles of international environmental law such as transboundary environmental harm, obligation to carry out environmental impact assessments (EIA) or regulations regarding whaling, among others, including for the most part no mention or direct linkage with human rights (see for example Gabčíkovo–Nagymaros (Hungary v. Serbia), Certain Activities carried out by Nicaragua in the Nordern area (Costa Rica V. Nicaragua), Construction of a road in Costa Rica Along the San Juan River (Nicaragua v. Costa Rica), Pulp Mills case, "Legality of use of nuclear weapons" (Advisory Opinion) and Whaling in the Antarctic (Australia v. Japan - New Zealand intervening)).

International environmental law continues to develop, but taking a broad look, it is possible to note that there are a variety of agreements, conventions and official documents that have helped that nowadays we have a more coherent system of protection for the environment in international law. In sections 2.1.2 and 2.1.3 I will aim to explain the connection with this set of rules and human rights.

2.1.2 The recognition of a relationship between the protection of the environment and human rights at the universal level

Human rights law and environmental law followed for some time, separated processes at the universal level. The main international treaties on the environment - being these the Rio Declaration of 1992, the United Nations Framework Convention on Climate Change of 1994 and the Paris Agreement of 2016 - do not include any mention to human rights or to the relationship between these and environmental degradation, even though they enhance the concept of sustainable development and its nexus with environment and climate change.

The first time the link between human rights and the environment was mentioned in an international instrument was in the Stockholm Declaration. The declaration states in its principle 1 that "man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being (…)."[10] The document, thus, establishes a nexus between a good-quality environment and a life of dignity

[10] Declaration of the United Nations Conference on the Human Environment (adopted 15 December 1972) UNGA Res 2994 (Stockholm Declaration), principle 1.

and well-being, but it does so in a manner that is not explicit. The wording requires a second reading to fully realize that a connection between human rights and the environment is established in it.

The human right to a healthy environment or the link between these two was not identified or mentioned in the international sphere for several years after, even though important regional and worldwide treaties were signed during the period. A first attempt in the matter was the 1989 the Convention concerning Indigenous and Tribal Peoples in Independent Countries of the International Labor Organization was signed. Even though not related strictly to the environment or to human rights, the convention was one of the first to mandate State parties to adopt measures to safeguard the environment and it did so by stating in article 4(1) that "special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labor, cultures and environment of the peoples concerned."[11]

Only by 1990 could we find a clearer mention to the link between environmental law and human rights in the international sphere, in GA Resolution 45/94, which holds in its preamble that "a better and healthier environment can help contribute to the full enjoyment of human rights by all."[12] The resolution also establishes a relationship between the right to life and the right to health by stating that "increasing environmental degradation could endanger the very basis of life"[13] and that "all individuals are entitled to live in an environment adequate for their health and well-being".[14] From then on, other resolutions by the GA or other UN institutions began to enhance this connection.

The proliferation of GA's resolutions in the matter was accompanied by the signature of other environmental treaties that in their preambles referred to human rights and the nexus between these and a healthy environment. One of these was the Aarhus Convention (signed in 1998), which holds that "adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself"[15] and that "every person has the right to live in an environment adequate to his or her health and well-being."[16]

[11] Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS (ILO-Convention169), art 4.1.
[12] UNGA Res 45/94 (14 December 1990) UN Doc A/Res/45/94, preamble.
[13] ibid.
[14] ibid.
[15] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 october 2001) 2168 UNTS 447 (Aarhus Convention), preamble.
[16] ibid.

Thus, the document goes in line with the GA Resolution 46/94 mentioned in the latter paragraph and it deepens it by establishing that the protection for the environment *is* (and not "can be") *essentia*l (and not only "contributive") for the enjoyment of human rights. The treaty also enhances the connection between the right to life and to health with a healthy environment, such as the resolution itself.

Following the international trend, in 2000, the International Covenant on Economic, Social and Cultural Rights (ICESCR) Committee released General Comment 14 on the Right to the Highest Standard of Health where it recognized the existence of a human right to environment, holding that "human rights include social, economic and cultural rights and the right to peace, a healthy environment and development (...)."[17] It is relevant to note that this the first time that an explicit mention is made on the right to a healthy environment as a human right. The comment further enhances the idea when articulating that a healthy environment is a factor that promotes conditions for the enjoyment of a healthy life.[18]

Some years later, the Human Rights Council (HRC) released a number of resolutions that referred to the relationship between human rights and environmental harm or climate change. In resolution 7/23 of 28th march 2008, the HRC showed its concern with the fact that climate change possessed "an immediate and far-reaching threat to people and communities around the world" and had "implications for the full enjoyment of human rights."[19] This resolution led to an analytical study on the relationship between climate change and human rights, contained in A/HRC/10/61 of January 2009. The study concluded that climate change had range implications for the enjoyment of human rights.[20] Similar conclusions were contained in resolution 10/04 of March 2009. The HRC also referred to the link between climate change and human rights in resolutions 16/11 (2011), 19/10 (2012), 25/21 (2014) and 28/11 (2015).

In 2011, the HRC released resolution A/HRC/RES/16/11 on Human Rights and the Environment, stressing that "environmental damage can have negative implications, both direct and indirect, for the effective enjoyment of human rights".[21] In resolution 19/10 of the

[17] CESCR 'General Comment 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)' (11 August 2000) UN Doc E/C.12/2000/4, preamble.
[18] ibid, para 4
[19] UNHRC, 'Resolution 7/23: Human Rights and Climate Change' (28 March 2008) Un Doc A/HRC/23, para 1.
[20] UNHRC, 'Resolution 10/61: Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights' (15 January 2009) UN Doc A/HRC/RES/10/61, para 62.
[21] UNHRC, 'Resolution 16/11: Human Rights and the Environment' (12 April 2011) UN Doc A/HRC/RES/16/11, para 16.

HRC this requested the independent expert on human rights and the environment to study the human rights obligations regarding the enjoyment of a safe, clean, healthy and sustainable environment. Consequently, the Special Rapporteur released 5 reports on the issue. In the Mapping Report relating human rights obligations relating to the environment, the Rapporteur concluded that human rights law included obligations relating to the environment.[22] In A/HRC/22/43 he also determined that the relationship between human rights and the environment was "firmly established" in the sense that "environmental degradation can and does adversely affect the enjoyment of a broad range of human rights".[23]

In what respects to human rights UN treaty system, only two treaties contemplate a mention to the environment, yet in a vague way: the ICESCR and the Convention on the Rights of the Child (CRC). The first one mandates for States to improve "all aspects of environmental and industrial hygiene."[24] The latter mandates States to combat diseases and malnutrition through a number of ways taking into consideration "the dangers and risks of environmental pollution."[25] However, these two committees have not dealt with cases regarding those articles. The complaints mechanism of the CRC is quite new and has not yet received petitions in this matter. The ICESCR Committee has received some communications on environmental issues, but only when these have affected other protected rights by the convention such as the right to an adequate standard of living or the right to life (see for example E/1986/3/Add.9 and E/1989/4/Add.12). The Committee also refers to the environment several times in General Comment (nº 14), establishing that the right to health extends to "underlying determinants of health such as (...) a healthy environment."[26]

The International Covenant on Civil and Political Rights (ICCPR) has also received some communications related to the environment that have been settled with references to the right to self-determination, right to life and right to private and family life, establishing once again no mention to the human right to environment (See for example Bordes and Temeharo v. France, Länsmal et al, v. Finland, EHP v. Canada, Bernard Ominayak and the Lubicon Band

[22] UNHRC, 'Resolution 25/93: Report of the Independent Expert John Knox on the issue of Human Rights obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, Mapping Report' (30 December 2013) Un Doc A/HRC/25/53, para 79.
[23] UNHRC, ibid, Preliminary Report, para 62.
[24] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), art 12.2.b.
[25] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC), art 24.2.c.
[26] CESCR (n 15), paras 11, 12.

v. Canada, Apirana Mahuika et al v. New Zealand). In the case of Poma Poma v. Peru, for example, the Committee endorsed the principle of "free informed and prior consent" in consultation processes and it established that the State had violated article 27 regarding the right of minorities to enjoy their culture as the concerned indigenous group had suffered substantial harm in their traditional farming activities due to a development project.[27]

On the other hand, some treaty committees have made recommendations regarding the environment or climate change, even though the right to a healthy environment is not mentioned in their main treaties. An example is the Committee on the Elimination of Discrimination Against Women (CEDAW), which unfolded recommendation nº 37 on Gender-related dimensions of disaster risk reduction in the context of climate change, recalling the principles of the convention that are to be applied in tackling climate.[28]

Likewise, the Office of the High Commissioner of Human Rights (OHCHR) on an Individual Report on the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), held that the convention contains substantial obligations such as the duty to develop specific policies to address environmental impact affecting indigenous peoples or the duty to conduct EIAs in relation to development activities on indigenous lands.[29] Some of these committees have also made references to the environment when issuing concluding observations towards a State, mostly setting a linkage between right to health and some risk categories, such as children and women.[30]

2.1.3 The recognition of a relationship between human rights and the environment at the regional levels

At the regional level, the first in recognizing the right to a healthy environment explicitly was the African Charter of Human and People's Rights (Banjul Charter), which entered into force in 1986. Some years later, the American Convention on Human Rights (ACHR) incorporated the human right to environment in the additional San Salvador Protocol on Economic, Social

[27] Communication N 1457/2006, *Angela Poma Poma v. Peru*, Merits' (UNHRC 2009) Un Doc CCPR/C/95/D/1457/2006, para 7.6.
[28] CEDAW, 'General Comment 37: The Gender-related Dimensions of Disaster Risk Reduction in the Context of Climate Change (7 February 2018) Un Doc CEDAW/C/GC/37.
[29] UNHCR (n 20) Report No. 3, 15-16.
[30] See for example UN Committee on the Elimination of Discrimination Against Women, Consideration of reports of States parties: Romania (2000), para. 123; Concluding Observations of the Committee on the Rights of the Child, twenty-fourth session: Jordan (2000), para. 50; and Report of the Committee on the Rights of the Child, fifty-fifth session (A/55/41) (2000), para. 1461.

and Cultural rights (San Salvador Protocol). A deeper analysis on the way the human right to environment is incorporated in the African and Inter-American system will be discussed later in this document, in chapters 3 and 4.

The European Union (EU) has also awarded some level of protection to the environment through human rights. In the year 2000 the Charter of Fundamental Rights of the European Union (CFR) was signed, though it was not enforceable until de signature of the Treaty of Lisbon on December 2009. The CDF states in article 37 that "a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development."[31] Thus, the article does not refer to a human right to environment but to a direct protection of the environment in connection with the principle of sustainable development. The Court of Justice of the European Union (CJEU) has dealt with only few cases and opinions related strictly to article 37, most of which involve the issue of the protection of the environment making no reference to fundamental rights or to a human right to environment.[32] However, in some cases the CJEU recognizes a link between human health and the protection of the environment in light of article 37.[33]

In the system of human rights of the EU, for its part, even though there no official recognition of the human right to environment in the European Convention on Human Rights (ECHR), the European Court of Human Rights (ECtHR) has dealt with some cases linked to environmental issues. The way of doing so has varied over time, but in sum, it has given rise to views that the ECtHR somehow recognizes the existence of a human right to a healthy environment.[34] At first, the cases related to environmental issues were considered incompatible rationae materiae with the convention because this one did not include a right to nature preservation or to a healthy environment. In the upcoming years, however, the ECtHR seemed more willing to deal with environmental issues, but only when other rights of the convention were affected. In the Lopez-Ostra case for example, the Court confirmed that environmental pollution, even when not severe, could affect individuals' well-being and

[31] Charter of Fundamental Rights of the European Union (adopted 18 December 2000, entered into force 1 December 2009) OJC (CFR), art 37.
[32] See for example the Judgments of the European Court of Justice: C-444/15, C-195/12 and C-416/10.
[33] See for example C-343/09 para. 52.
[34] Malgosia Fitzmaurice and Jill Marshall, 'The Human Right to a Clean Environment - Phantom or Reality: The European Court of Human Rights and English Courts Perspective on Balancing Rights in Environmental Cases' (2007) 76(2 and 3) Nordic J Int'l L 103, pag 113.

private and family life.[35] Nonetheless, even though willing to deal with cases that contain an environmental aspect, the ECtHR has been clear in that environmental issues are relevant only when related to some of the Convention's rights and not as an independent right to a healthy environment.[36]

In the ASEAN Human Rights Declaration, the human right to a healthy environment is contemplated when referring to the right to an adequate standard of living in article 28, which holds that "Every person has the right to an adequate standard of living for himself or herself and his or her family including: (…) "f. The right to a safe, clean and sustainable environment."[37] The Declaration also stresses that "the right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations."[38] In addition, the Declaration mandates States to adopt programs aimed at "the creation of conditions including the protection and sustainability of the environment for the peoples of ASEAN to enjoy all human rights."[39] However, despite the various mentions to the environment and even the inclusion of the right to a healthy environment, the Asian system counts with no effective mechanism of complaints, which makes the inclusion of this right decorative in practice.

Finally, in the Arab Charter on Human Rights, there is neither a literal nor an implied mention to the right to a healthy environment or to sustainable development.

2.2 Essential elements of the human right to a healthy environment

2.2.1 Brief recapitulation on the doctrinarian evolution of the Human Right to a Healthy Environment

After the birth of environmental law, the relationship between this and human rights began to develop throughout the years. By 1990 the discussions focused mainly on where environmental matters belonged. In this sense, a first group of theorists believed that they belonged within the human rights category, while a second group believed that human rights were subsumed in environmental law owing to the fact that human rights would have been

[35] ibid, 114-115.
[36] ibid, 131.
[37] ASEAN Human Rights Declaration (adopted 18 November 2012), art 28.
[38] ibid, art 35.
[39] ibid, art 36.

part of a larger, more complex global ecosystem.[40] More recently, a third group recognized that although both systems are different and work separately, overlapping could occur and it would be possible to protect one or the other through one of these systems.[41]
This latter vision also held that it would be possible to contribute to environmental protection using a human rights approach or vice versa. In order to do so there would alternatives such as: (a) to deal with environmental issues claiming some of the already existent human rights, such as right to life, right to health or right to family and private life or; (b) the creation of a set of environmental rights or even the creation of a specific right to a healthy environment.[42] Contrarily, some authors believed that the theories linking human rights and the environment or the protection of environment through human rights were not convincing and that the right to a healthy environment would not have derived from human rights at all.[43]

Focusing more on the content, there was another group that decided to place the human right to environment in a different category as to third generation rights (solidarity rights), such as right to peace.[44] In this sense, other views defined the human right to environment as a mixture between civil and political rights and social, economic and cultural rights.[45]

Nowadays, however, some authors believe that the theoretical discussions on where and how environmental issues and human rights connect have little use and that the focus should be placed on how to provide citizens with real tool to fight environmental degradation. The focus is therefore placed on procedural environmental rights such as the ones contained in the Aarhus Convention and on how to provide people with useful tools to defend themselves when affected by environmental degradation.[46]

2.2.2 Scope and content of Human Right to a Healthy Environment

To deepen in the content and meaning of the human HRHE, it is legit to discuss its naming. Agreements and resolutions refer to this right by using different terms, such as “healthy”,

[40] Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23(3) EJIL< https://doi.org/10.1093/ejil/chs054 > accessed 11 May 2019, pag 634.
[41] Dinah Shelton, 'Human Rights, Environmental Rights, and the Right to Environment' (1991) 28(1) Stan J Int'l L 103 pags 104-105.
[42] ibid.
[43] Fitzmaurice & Marshall (n 29), 104.
[44] ibid, 105.
[45] ibid, 106.
[46] ibid.

“clean”, “decent” and “safe”. The African Charter on Human Rights, for instance, refers to "a satisfactory environment."[47] The American Convention on Human Rights protects the right to a "healthy environment".[48] The Vienna Convention for the protection of Ozone Layer enhances the protection of human health and the environment.[49] The Special Rapporteur on human rights and the environment refers to "a safe, clean, healthy and sustainable environment".[50]

Alternatively, the different naming of the HRHE can provide with information on what is lying behind its meaning for the ones using it. “Right to a clean environment”, for example, is a more neutral concept, in the sense that is not related to humans affected by environmental degradation but to an objective parameter.[51] On the other hand, “right to a healthy environment” sounds a bit different: Health is related to living creatures. The right to a healthy environment would be therefore a more anthropocentric term focused on whether the environment allows people to enjoy a healthy life.[52] Something similar could be said about the “right to a decent environment”(decent for whom?) or to a “safe environment” (safe for whom?) being all these qualifications that rely on the human being, together with the concept of sustainable development. Since the majority of the descriptors are related to human health, safeness or quality of life, one could hold that the human right to environment's main focus it is not to protect the environment in itself or other living creatures, but the human being solely instead.

In this document I will use the term “right to a healthy environment” not only because it is repeatedly used by academics and the one that has been included in the naming of the right by the Special Rapporteur on human rights and the environment,[53] but also because it provides with a more integral view, concerned with the whole ecosystem, thus incorporating people and the living beings that inhabit it. This naming is also "broad enough to all other adjectives

[47] African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (Banjul Charter), art 24.
[48] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (entered into force 16 November 1999) (Protocol of San Salvador) OAS Treaty Series No 69 (1988), art 11.
[49] Vienna Convention for the Protection of the Ozone Layer (adopted 22 March 1985, entered into force 22 September 1988) 1513 UNTS 293, preamble.
[50] UNHCR (n 20), 1.
[51] Dinah Shelton, 'Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized' (2006) 35(1) Denv J Int'l L & Pol'y 129, pag 131.
[52] ibid.
[53] UNHCR (n 20), paras 74-80.

used in connection to the environment and specific enough to describe the quality of a right to environment"[54], as Hajjar emphasizes.

The HRHE has been defined as a "third generation right" or as a "solidarity right".[55] A different view has argued that it involves both substantial rights and procedural environmental rights (such us the ones contained in the Aarhus Convention)[56]. However, there have been some positions claiming for the need of defining the HRHE as a substantial right as already existing rights and procedural environmental rights would be limited in scope and effect.[57] Some authors even consider that procedural environmental rights should not be acknowledged within the human right to environment, as these would be derivative rights.[58] Taking this stance, this study focuses mainly on substantial environmental rights. Aiming to the right itself provides with a "cleaner" analysis of it.

Nevertheless the categorization by some as the HRHE being a "solidarity right", it can be defined under the traditional theory of fundamental rights which, following the Shue model, stresses that both civil and political rights and economic, social and cultural rights contain at least four level of duties: a duty to respect, a duty to protect and a duty to promote and to fulfill, forming these a combination of negative (an obligation not-do) and positive duties (an obligation to do).[59] Some human rights organisms have abided by the definition of level of duties. As it will be analyzed in section 3.3.1, the African Commission on Human Rights did so in the Ogoni case. On the other hand, it has been argued that within the fundamental right's theory area, the courts should focus in the aims of the written law and in the law itself, such as for example, the law contained in constitutions or multilateral treaties.[60]

Thus, according to the theory of fundamental rights, the HRHE usually involves a number of duties for the State: first, to refrain from acting in a way that harms the environment and its inhabitants; second, to protect its citizens from detriment of the environment caused by third parties; and finally, to take the necessary measures to improve and preserve a healthy

[54] Hajjar Leib (n 5), 91.
[55] Morne Van Der Linde & Lirette Louw, 'Considering the Interpretation and Implementation of Article 24 of the African Charter on Human and Peoples' Rights in Light of the SERAC Communication' (2003) 3(1) Afr Hum Rts LJ 167, pag 174.
[56] ibid.
[57] Hajjar Leib (n 5), 88.
[58] ibid, 135.
[59] Asbjørn Eide, *Economic, Social and Cultural Rights As Human Rights: A textbook* (Asbjørn Eide, Catarina Krause and Allan Rosas eds, Martinus Nijhoff Publishers, 1995), 21-40.
[60] Janneke Gerards and Hanneke Senden, 'The Structure of Fundamental Rights and the European Court of Human Rights' (2009) 7(4) Int'l J Const L 619, pag 624.

environment and address related problems.[61] The latter would include conservation and "an environmentally sound management of the environment as well as an attempt at improving the natural environment".[62]

Alternatively, Leib classify substantive environmental rights in categories, and places the right to a clean environment as one of them, establishing its relation with the "protection of the environment and its vital components - like water, air and soil- from toxins and pollutants".[63] According to Leib, the main threat to the environment would then be the industrial projects and the beneficiaries of this right would be the individual or a community, which would be entitled to a "healthy" environment. Moreover, this HRHE would entitle individuals or a community to an economic right to local resources and to economic benefits from developmental projects.[64]

The HRHE could also be defined by negation. In that respect, it would not involve a right to a zero-polluted environment, but to an appropriate degree of protection necessary for the enjoyment of other human rights.[65] Similarly, others have defined the HRHE as the right not to be exposed to contaminants harmful for human health. [66]Thus, this right would be violated when land/soil, water or air were polluted in a way that future generations would suffer disruption in their quality of life.[67]

If we take into account the common elements present in these definitions, the central factor of the HRHE would be the obligation placed upon States to: (a) protect the environment as well as its components and the living beings that inhabit it from degradation caused by third parties and; (b) to prevent the causing of this degradation by the State itself or other actors. If placed in the level of duties model, the HRHE would then impose at least the following obligations on the States: (i) An obligation of respect, or of not to take part in acts that interfere with a healthy environment (an environment that is healthy for the living beings inhabiting it); (ii) An obligation to protect or to impede third actors from jeopardizing the people's enjoyment of a healthy environment and; (iii) An obligation to fulfill, or to take an active role in all the

[61] Sisay Alemahu Yeshanew, *The Justiciability of Economic, Social and Cultural Rights in the African Regional Human Rights System: Theories, Laws, Practices and Prospects* (Åbo Akademi University Press, 2011), 269.
[62] Van Der Linde & Louw (n 50), 175.
[63] Hajjar Leib (n 5) 136, 140.
[64] ibid, 154.
[65] Hajjar Leib (n 5), 92.
[66] ibid, 92.
[67] ibid, 93.

necessary measures to assure that people have in practice access to a healthy environment. These obligations are subject to vary depending on the wording of the right in the different official documents or conventions.

2.3 The justiciability of rights and the human right to a healthy environment

The term "justiciability" can be interpreted and defined in different senses. It emerged mostly with economic, social and cultural rights as discussions where held on whether it was possible to bring these rights up to court and claim for action or redress when they were infringed.[68] Indeed some courts have been reluctant to decide on these cases considering that they belong to questions of social policy than a matter of rights, which have set a stance among some academics that these rights would be non-justiciable.[69]

Justiciability has been defined recurrently in a variety of ways. A first definition points out that it is applicability of rights by -but not restricted to- judicial or quasi-judicial organs with the aim of a factual protection of rights and their related obligations.[70] Besides, justiciability has also been seen as a matter of rights, in the sense of whether certain rights are suitable for a certain type of amendment or judicial review by State organs.[71] . In this respect, precautionary measures would be included as another element that reinforces justiciability. Similarly, some define justifiability in terms of "the extent to which an alleged violation of a right invoked in a particular case is suitable for judicial or quasi-judicial review", which could depend not only in the judgment itself but also in the attitude of the judge or the characteristics of the domestic system in particular.[72] In any case, according to these definitions, in order for a right to be justiciable it is necessary the existence of a monitoring judicial or quasi-judicial organ that can receive and decide claims by individuals or groups alleging violations of some of these rights.[73] Certainly, the level of justiciability is higher when it comes to judicial organisms

[68] Alemahu Yeshanew (n 56), 73.
[69] Stanley Ibe, 'Beyond Justiciability: Realising the Promise of Socio-Economic Rights in Nigeria' (2007) 7(1) Afr Hum Rts LJ 225, pag 230.
[70] Alemahu Yeshanew (n 56), 4-5.
[71] ibid, 60.
[72] Fons Coomans, 'Some introductory remarks on the Justiciability of Economic and Social Rights in a Comparative Constitutional Context' in Fons Coomans (ed), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Intersentia 2006), 4.
[73] Alemahu Yeshanew (n 56), 67.

with actual binding power, which would be complemented by the provision of measures and redress.[74]

Additionally, it is important to note that the term "justiciability" is to be differentiated from other terms that sometimes are used as synonyms or interchangeable, such as "enforceability", "implementation" or "protection" of human rights. Enforceability involves the execution of sentences by judicial organisms, being therefore concerned with what it comes after a judgment is emitted and not with the possibility or suitability of a certain allegation. Accordingly, problems with the execution of sentences would not mean that a certain right is not justiciable. In the opinion of Alemahu, as far as it exits a mechanism protecting a right through judicial or quasi-judicial organisms in a way that can result in remedies for the person affected, there would be justiciability.[75] However, enforceability is indeed relevant when it comes to the factual protection of rights. The sole decision of judicial bodies would be merely decorative if not followed by mechanisms to control and enforce compliance. For this reason, this thesis considers enforceability as an important complement to justiciability. On the other hand, concepts such as "implementation" and "protection," have more to do with public policies and general measures, and not with the legal protection of rights that can be held by courts.[76]

In addition, some have argued that the problem of justiciability of human rights could be dealt with by a broader and more expansive interpretation of civil and political rights, such as it did the HRC in General Comment nº6 where it widened the interpretation of the right to life to include some socio-economical rights such as the right to food or shelter.[77] As analyzed later on, this resource has been used repeatedly, particularly in the Inter-American system.

Both the African and Inter-American system of human rights contemplate a contentious body that can receive claims by individuals or groups and that can hold judgments, determining whether the alleged human rights were violated or not by the State and providing remedies. As stated by Alemahu, this characteristic is an important proof that shows that justiciability is present in a high degree in these systems.[78] In a similar way, Langford points out that social

[74] Coomans (n 67), 4.
[75] Alemahu Yeshanew (n 56), 67.
[76] ibid.
[77] Hajjar Leib (n 5), 61.
[78] Alemahu Yeshanew (n 56), 68.

rights jurisprudence is significant in the systems that have strong mechanisms of judicial or quasi-judicial review of rights.[79] However, despite the fact that the Inter-American and the African system of human rights have mechanisms of judicial review, this is not enough to assure that all the rights contemplated in these systems are justiciable, especially when we think of justiciability as in which rights are suitable of review by courts. Hence, it will still be necessary to analyze case-by-case and right-by-right and see if these are also complemented by elements such as precautionary measures or enforceability.

In what it comes to the justiciability of the HRHE in particular, it has been claimed that the concept of "healthy environment" is too difficult to grasp or to assert and that no justiciable standards could be developed to enforce this right, specially taking into consideration the inherent variability of environmental conditions.[80] These critics provide with enough drive to set forth the current study.

Taking into consideration these definitions, this thesis understands the concept of justiciability as the feasibility of a right to be alleged and claimed by individuals or groups before a judicial or quasi-judicial body that can hold a decision indicating when this right has been violated, consequently condemning the responsible State. The concept of enforceability is considered as a relevant complement to justiciability. In addition, this study is based on the idea that the HRHE can be asserted and can be given a content to make it justiciable before judicial organisms.

3 CHAPTER 2: THE JUSTICIABILITY OF THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT IN THE AFRICAN SYSTEM

3.1 General aspects of the African regional system of Human Rights

The African regional system of human rights originates from the Organization of African Unity (OAU) later replaced by the African Union (AU) and it was born within the adoption of

[79] Malcolm Langford, 'The Justiciability of Social Rights: From Practice to Theory' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International Comparative Law* (Cambridge University Press 2008), 10.
[80] Shelton (n 46), 131.

the Banjul Charter in 1981.[81] The Charter provided for the first time with a comprehensive system of protection of human rights in the African region, being one of its particularities the recognition of economic, social and cultural rights on the same footing as civil and political rights.[82] Additionally, the Charter explicitly included both collective and individual rights.[83] The African Commission on Human and Peoples Rights (African Commission) was created as a monitoring organ.[84]

The African Commission can receive and decide on communications from States and examine State reports that they must submit every two years.[85] However, it did not have much effectiveness during its first 10 years of existence because of a confidentiality clause found in article 59 of the Banjul Charter. By 1994 the Commission finally decided to depart from the principle of confidentiality,[86] thus its resolutions became public and subject to analysis. However, it remained restricted to only to prepare reports with recommendations.[87] The fact that the Commission is not established as a judiciary organism and cannot provide with remedies to redress violations or to enforce its orders is another factor that affects its power.[88]

Furthermore, neither the African Charter nor the African Commission's rules of procedure establish a method to follow-up the recommendations and ensure these are complied, as well as there are no legal consequences for a State's non-compliance with the them.[89] According to Mzinjenge, this lack of power has also influenced States in the sense that these do not seem to have political will to implement the Charter rights or to abide by the findings of the African Commission and its recommendations.[90] These low the enforceability standards permeate the justiciability in the African System.

The Protocol to the Banjul Charter on the Establishment of an African Court of Human and Peoples Rights (African Court) was adopted later in 1998, vesting the protective mandate of the Commission in the African Court. The Protocol empowered the court to grant remedies when a right is violated and to take provisional measures in cases of urgency. The Protocol

[81] Alemahu Yeshanew (n 56), 5.
[82] Danwood Mzijenge Chirwa, 'African Regional Human Rights System: The Promise of Recent Jurisprudence on Social Rights' in Malcolm Langford (n 74), 323.
[83] Banjul Charter, arts 19-24.
[84] ibid, arts 19-24.
[85] ibid, arts 47, 62.
[86] Mzinjenge (n 77), 335.
[87] ibid.
[88] ibid.
[89] Van Der Linde & Louw (n 50), 180.
[90] Mzinjenge (n 77), 336.

also provided that the execution of the orders of the court should be monitors by the Council of Ministers.[91] The African Court started functioning officially in 2006 and it has jurisdiction to determine applications against State parties of the Protocol. To date, thirty States have ratified the Protocol.[92] Both the African Commission and African inter-governmental organizations can submit applications against these States, however, individuals or NGOs with observer status can only bring applications against States that have accepted the right of individual application. Up to today, only nine States have accepted the right of individual applications.

3.2 The Right to a Healthy Environment in the African system of Human Rights

The Banjul Charter is, together with the Inter-American Convention on Human Rights, the only general regional instrument that explicitly protects the HRHE. Article 24 of the charter reads: "All peoples shall have the right to a general satisfactory environment favorable to their development."[93] In the African region, the HRHE is also referred to in the Maputo Protocol, which holds in article 18 that "women shall have the right to live in a healthy and sustainable environment."[94] The Protocol also refers to sustainable development in article 19. These documents do not go further in stipulating more specific obligations or in clarifying the content of these rights. According to Alemahu, this can be problematic as it may bring up difficulties when applying this right into practice.[95] However, the Commission took the chance of deepening in the content of these rights when deciding on the *Ogoni case*, which I will analyze later.

The African Commission also had the opportunity of explaining in further detail the obligations of the States regarding the HRHE in the State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter Relating to Extractive Industries, Human Rights and the Environment. The document enhances the idea contained in article 1 of the charter by

[91] Protocol to the African Charter on Human and People's Rights on the Establishment of the African Court on Human and Peoples' Rights (adopted on June 1998 and entered into force on 25 January 2004) OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) (African Court Protocol), arts 27, 29.
[92] See: African Commission on Human and Peoples' Rights, ' Ratification Table: Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights' < http://www.achpr.org/instruments/court-establishment/ratification/ > accessed 13 may 2019.
[93] Banjul Charter, art 24.
[94] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) OAU Doc. CAB/LEG 66.6. (Maputo Protocol), art 18.
[95] Alemahu Yeshanew (n 56), 268.

recalling that the States have a general obligation to incorporate the HRHE in national legislation, together with measures to lay down effective protection of this right, such as administrative and judicial mechanisms.[96] Similarly, it reinforces the idea of the level of duties deriving from every fundamental right (already referred to in the past section) and it is helpful in clarifying the content and scope of the HRHE, all of which can in the end make more efficient the protection of this right when deciding on cases. Yet, even though these guidelines refer specifically to the acts of extractive industries, they can be a useful source when trying to interpret its content in the African system, especially when considering that the two treaties that protect the HRHE in the African system do not provide with more detail, and that there are not many documents by the Commission that refer to it.

3.3 Cases on the Human Right to a Healthy Environment before the African Commission on Human and Peoples rights

Currently there is no case concerning the environment or article 24 of the Banjul Charter that has been decided by the African Court. For this reason, this thesis has as a focal point within the African System the decisions of the African Commission.

3.3.1 Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria (Ogoni case)

The leading case regarding economic, social and cultural rights and more specifically, the HRHE in Africa is the *Ogoni Case*. This case concerns a complaint submitted on behalf of the Ogoni people to the African Commission alleging that the government of Nigeria had violated articles 2 (non-discriminatory enjoyment of rights), 4 (right to life), 14 (right to property), 16 (right to health), 18 (family rights), 21 (right of peoples to freely dispose of their wealth and natural resources) and article 24 (right of peoples to a satisfactory environment) of the Banjul Charter. This was as a result of being involved in oil production that had caused environmental degradation and health problems to their people, mainly due to the disposal of toxic wastes into the environment and local waterways. The complainants claimed, among other things, that the government had violated rights of the Convention by condoning and

[96] African Commission on Human and Peoples' Rights, ' State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter Relating to Extractive Industries, Human Rights and the Environment' (Niamei, Nigeria 2017), paras 37, 38.

even facilitating the violations by giving the companies involved support with military powers, therefore directly participating in the contamination of air, water and soil. The complainants also claimed that the government was guilty in the sense that it had not monitored the operations and it did not require oil companies to consult communities before beginning the operations.[97]

When analyzing the HRHE, the African Commission took the opportunity to define and in a way expand the obligations that emanate from this right, holding that it requires for a State to: (i) Take measures to prevent pollution and ecological degradation; (ii) To promote conservation and ensure ecological sustainable development and the use of natural resources; (iii) To carry out scientific monitoring of threatened environments and studies previous to major industrial developments such as EIA; (iv) To provide with information about these to communities affected and; (v) To grant those affected the opportunity to participate in the process.[98] However, it is relevant to note that in the analysis of article 24 the African Commission did not refer to the core content and minimum obligation of article 24 with due regard to a contextual approach as it did in the same case with the right to housing.[99]

Thus, the African Commission's analysis broadened the content of the HRHE environment in the Banjul Charter placing in it both substantial and procedural environmental rights. It also included some values contained in international environmental principles such as the preventive principle and the duty of care principle.[100] Taking into account these more specific definitions of the human right to environment, the Commission concluded that the Nigerian government had violated the human right to environment by directly participating in the contamination of air, water, soil in the Ogoni land. The Commission also declared that there was a violation of this right in the failure of the government to protect the community against the harm caused by the project and in the absence of an EIA to evaluate potential risks.[101]

The Commission finally held that Nigeria violated article 24 of the African Charter - as well as articles 2, 4, 14, 16, 18(1) - and it appealed the government to take a number of measures

[97] Communication 155/96, *SERAC and CESR (on behalf of the Ogoni People) v Nigeria*, (2001), AHRLR 60 (ACHPR 2001) (30th Ordinary session), paras 1-6.
[98] ibid, paras. 52- 55.
[99] Van Der Linde & Louw (n 50), 179.
[100] ibid, 178.
[101] *SERAC and CESCR v Nigeria*, para 50.

regarding the protection of the HRHE such as: to ensure the carrying out of EIAs in any future oil developments; to provide information on health and environmental risks regarding oil operations and communities' access to decision-making bodies regarding these operations; to conduct investigations into this and the other human rights violations and to prosecute the responsible officials and agencies involved and; to provide victims with compensation for the harm caused. Moreover, it went on to request for the government of Nigeria to provide with information regarding the work of new organisms and new laws addressing environmental problems.[102]

Is important to note that the African Commission also acknowledged the connection between articles 16 (right to health) and 24 enhancing the idea that a clean, healthy and safe environment is linked to economic, social and cultural rights in the sense that the quality of the environment affects the quality of life of the individual.[103] This might show that the Commission still craves for a connection between the violation of other rights and the HRHE, which puts in question whether it would be willing to declare a violation of article 24 if other rights were not violated.

The Ogoni case has been labeled as "a landmark decision" because the Commission dealt with a large number of socio-economical rights in a deeper degree than it had done before.[104] In the case of the HRHE this is displayed when the commission takes steps to defining this right and the different obligations that it entails, therefore deepening and broadening its content. Based on its own definition of this right, the African Commission declared the violation of a series of rights of the Banjul Charter, being this the first time for the HRHE in the African System.

3.3.2 Other cases concerning article 24 of the Banjul Charter

The Ogoni case is the only one in the African system where the right to environment of article 24 has been significantly dealt with in the African Commission. Few numbers of cases have been brought to the Commission alleging a violation of article 24 of the Banjul Charter. In addition to this, many of them have been declared inadmissible on the basis of non-

[102] ibid, holding.
[103] *SERAC and CESCR v Nigeria*, para 51.
[104] Mzijenge (n 77), 332.

compliance with the requirements of article 56 of the charter, without giving the opportunity to the commission to pronounce on the substantial matter.

One of these rejected cases is *SERAP v. Nigeria (Awory case),* where the complainants alleged that the State failed to address the consequences of a pipeline explosion, which resulted in the loss of numerous lives, permanent injuries to people and environmental degradation. The Commission declared the communication inadmissible among others, because it didn't fulfill the requirements of exhaustion of domestic remedies of article 56 (5) of the charter and also, because it found that the complainant made 'generalized statements about the unavailability of legal remedies in the respondent State without attempting to exhaust them'.[105] The complainants alleged that there were no adequate or effective remedies to address the mentioned violations, but the commission observed that the Oil Pipelines Act provided with remedies for pipelines explosions. Similarly, in *Peter Odiwor Ngoge & others v. Kenya* where the complainants alleged a violation of among others, article 24, the court estimated that the requirement of exhaustion of domestic remedies had not been fulfilled, therefore dismissing the complaint.[106]

A slightly different case is *Front for the Liberation of the State of Cabinda v. Angola*, where the complainants brought a petition on behalf of the people of Cabinda against the Republic of Angola, alleging that the respondent State had infringed the rights of the people of Cabinda to the natural resources of the area by unilaterally granting exploitation licenses or concessions and by failing to administer such resources to their benefit. In this case, the commission reminded that the exception of exhaustion of domestic remedies of article 56(5) had to be available, effective and sufficient, and it considered that in the present case the exhaustion of domestic remedies was impossible due to the lack of standing of the complainants before Angolan courts.[107] However, it held that the complaint did not provide with sufficient evidence to support the alleged violation of article 24 or to dispute or challenge the respondent State, therefore it found no violation of the HRHE.[108]

[105] Communication 338/07, *SERAP (on behalf of the people of Awori Community in Abule Egba in Lagos State) v Nigeria,* (2010), (ACHPR 2010) (48th Ordinary Session), paras 39, 66.
[106] Communication 524/15, *Peter Odiwor Ngoge & others v. Kenya*, (2018), (ACHPR 2018) (23rd Extra-Ordinary Session), paras 55-60.
[107] Communication 328/06, *Front for the Liberation of the State of Cabinda (on behalf of the people of Cabinda) v. Angola*, (2013), (ACHPR 2013) (54th Ordinary Session), paras 51, 52.
[108] ibid, para 136.

In any case, there are other African international organizations that have received petitions on article 24. After the declaration of inadmissibility of the *Awori case* before the African Commission, the claimants brought the case to the Economic Community of West African States Court of Justice -ECOWAS (ECCJ), which held that the Federal Republic of Nigeria had violated Articles 1 and 24 of the Banjul Charter by their failure to protect the Niger Delta environment from degradation. The ECCJ stressed that, "when viewed together, Articles 1 and 24 impose a positive obligation on member States to take every measure necessary to maintain a quality of the environment that can satisfy people and enhance their sustainable development".[109] Although the Nigerian government had taken a number of legislative measures to respond to the environmental situation in the Niger Delta, the Court considered that, in practice, these measures were insufficient to prevent the environmental degradation. The ECCJ also ordered Nigeria to fix environmental damage in the Niger Delta in order to protect against further environmental damage and to hold the perpetrators of the damage accountable. Thus, the decision reinforced the duty of Member States to protect against environmental degradation by oil companies that result in an adequate standard of living. The ECCJ's decisions are binding and enforceable according to articles 15(4) and 19/2) of the ECOWAS Treaty. Article 77 even imposes sanctions if the judgment is not complied with, all that shows a high degree of justiciability in the ECOWAS system.

It is also relevant to consider times when there is an environmental content in allegations where article 24 is not included, having the Commission an opportunity to refer to it. In *Free Legal Assistance Group and others v Zaire*, for example, the Commission had an opportunity to consider article 24 linking it with article 16 on right to health, in their consideration of the government's duty to provide basic services such as clean drinking water. However, even though it found a violation of article 16, it did not take the opportunity to pronounce on the HRHE.[110] In this sense it is possible to note that unlike the Inter-American System (see section 4.3) there is no case law in the African System of human rights concerning the environment outside of article 24, or relating other binding rights in the context of environmental degradation, which would be another way of securing this right in the region.

Finally, it is important to recall that the African Commission enacted resolutions on general or specific matters relating the protection of the environment, which even though not binding are

[109] *SERAP v. Nigeria*, Judgment, ECW/CCJ/APP/12/07; ECW/CCJ/JUD/07/10 (ECCJ 2010), para 107.
[110] Van der Linde & Louw (n 50), 177.

important for States to resort to them when deciding on a certain case. From this perspective, these resolutions could be a useful tool in helping decide whether a right has been violated and making the degree of justiciability grow higher.

3.4 Remarks on the justiciability of the Human Right to a Healthy Environment in the African System

The Banjul Charter makes all rights justiciable before the African Commission and the African Court. Correspondingly, the Commission seemed to have no difficulties in declaring a violation of article 24 in the *Ogoni case* and in ordering for Nigeria to take several reparatory measures, showing important justiciability elements regarding the HRHE in the African System.

In the analysis of the *Ogoni case*, the Commission took the opportunity to deepen in the content of the HRHE. Coomans sees this way of reasoning as a "dynamic approach" that could contribute to a better and more effective protection of socio-economical rights in the African system and could help make these type of rights fully justiciable.[111] But whether a dynamic approach would make rights in the Banjul Charter more justiciable could be open for discussion. Dynamic interpretations do not necessarily entail a broader protection; they could actually implicate quite the opposite. As it is well known that dynamism can work both ways, I support the idea that a dynamic approach of the HRHE makes it justiciable only if it interprets it in a broader way and not in a restrictive one. Thus, it would be desirable that the Commission pronounced on this matter and enhanced the idea that the dynamic interpretation can only be admitted when it is used to strengthen human rights and not to restrict them. On the other hand, by explicitly highlighting the connection between article 24 and economic, social and cultural rights, the Commision still seems to somehow rely on the violation of other rights to declare a violation of the HRHE. In this sense it would be interesting to see if, in the future, the African System deals with the violation of article 24 outlining its relevance as an autonomous right.

Besides the *Ogoni case* the African Commission has not dealt with the HRHE broadly, and even though it is possible to elaborate conclusions on the justiciability of this right in the

[111] Fons Coomans, 'The Ogoni Case before the African Commission on Human and Peoples' Rights' (2003) 52(Part 3) Int'l & Comp LQ 749, pag 757.

African System, these are focused in this case in particular. Several complaints claiming a violation of article 24 have been rejected due to admissibility failures, mainly due to lack of compliance with exhaustion of domestic remedies, which is a call out both for the claimants and the African Commission. It is indeed concerning that so many cases go lost because of procedural issues, especially considering the political instability and weak institutional networks of certain countries of the region,[112] which could affect the compliance with the requirement of exhaustion of domestic remedies to a greater extent. It is also interesting to observe that the African Court - which does have a legal binding power - has not received any complaints regarding article 24. This is relevant because justiciability is better represented and secured by judgments of jurisdictional institutions with binding power. Hence, the justiciability of the HRHE could grow higher if cases regarding this right got to the African Court.

In addition, as already discussed, it is necessary to emphasize that the African system does not count with a monitoring method for the decisions made by the Commission or the Court, which is another element that contributes to the justiciability of rights. This diminishes the power of the decisions, resulting in a lack of political will to implement the Charter rights and a consequent decorative function of the HRHE in practice.

As explained in section 2.3, resolutions or judgments that after a throughout analysis are able to determine that a human right has been violated and condemn the State, constitute an important asset when deciding on the degree of justiciability in that system of protection. For this reason, the fact that the African Commission has found a violation of article 24 by the Nigerian government in the *Ogoni case* enhances the justiciability of this right in the African System of Human Rights.[113] In addition, when a resolution further on orders a series of measures to be taken and there is a way of reviewing if these are being followed, the degree of justiciability grows higher. We can see that in this case the Commission provided with a long list of measures to be taken. Nonetheless, these recommendations are not subject to review as there are no strong monitoring mechanisms in the African System. Therefore, although is relevant that the Commission determines that there is a violation of the HRHE providing with steps to take forward, there is still some space for justiciability to grow higher. Furthermore,

[112] See generally: Julia Bello Schünemann, & Jonathan D Moyer (2018), *Structural Pressures and Political Instability: Trajectories for Sub-Saharan Africa* (ebook) Insitut for Security Studies. Available at: https://reliefweb.int/sites/reliefweb.int/files/resources/ar9.pdf (accessed 11 May 2019).
[113] Van der Linde & Louw (n 50), 176.

the fact that the Commission and the Court have not pronounced on the HRHE outside of article 24 or when this was not alleged, even despite the environmental content of some allegations, may evidence a lack of will in expanding the jurisprudence in environmental matters.

Notwithstanding, it is significant that the rights contained in the Banjul Charter can and are being used by other African regional courts that have a binding power, such as the ECCJ. In the meantime, this could open the window for making the HRHE more justiciable in the African region.

4 CHAPTER 3: THE JUSTICIABILITY OF THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT IN THE INTER-AMERICAN SYSTEM

4.1 General aspects of the Inter-American regional system of Human Rights

The Inter-American system of Human Rights initiated in 1948, with the adoption of the American Declaration of the Rights and Duties of Man and the creation of the Organization of American States (OAS). The Inter-American Commission (IACommHR) started operating some years later in 1960, with the role of safeguarding the rights contained in the declaration. However, the declaration was not binding, which is why the OAS called for the incorporation of a more complete and binding treaty on human rights for the region. Later on, the American Convention on Human Rights (ACHR) entered force in 1978, thus establishing for the first time a jurisdictional system of control of the human rights obligations in the region.[114] Up to date, two complementing protocols have been adopted to complete and reinforce the protection of human rights of the convention: the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) in 1988 and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty in 1990.

[114] Olivier de Schutter, *International Human Rights Law*, (2nd ed, Cambridge University Press, 2014), 1006-1010.

The IACommHR called for the creation of the Inter-American Court on Human Rights (IACtHR), which began operating in 1979 and has binding power towards States. Both the Commission and the Court remained, playing different roles. The Court decides individual petitions submitted by State parties or by the IACommHR against States that have violated rights of the ACHR and it also provides with advisory opinions on specific questions of law.[115] The Commission, on the other hand, acts as a first phase for individual petitions, which means that -if not a State- the complainants must go to the commission first, which will analyze and investigate the petition and present it to the Court when suitable.[116] The Commission also has the role of promoting friendly settlements between the parties, conducts in loco visits to countries, releases reports on specific human rights issues and reports on the human rights situation of a given State.[117] Moreover, both the Court and the Commission can -in urgent cases- request States to take precautionary measures, among some other functions.[118] In what respects to justiciability, an important complement is a monitoring system of compliance of sentences. The ACHR contemplates this in articles 33 and 65.

4.2 The Right to a Healthy Environment in the Inter-American System of Human Rights

The HRHE is explicitly recognized in the Inter-American system. However, it was not firstly included in the ACHR, but it was rather incorporated in the additional Protocol of San Salvador, which entered into force in 1999. The Protocol holds in article 11 that "everyone shall have the right to live in a healthy environment (...)" and that "States shall promote the protection, preservation and improvement of the environment". Currently, 16 countries have ratified it. The Protocol does not include more specifications on the content of the HRHE, but it holds in article 2 that States must adopt legislative and other measures to make these rights a reality.[119]

A relevant contribution to the understanding of the protection of the environment under the Inter-American system can be found on the 1997 IACommHR Report on Ecuador. Here the

[115] ibid, 1016.
[116] ibid 1011.
[117] ibid.
[118] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 144 UNTS 123 (Pact of San José, Costa Rica) arts 41, 63.
[119] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (entered into force 16 November 1999) OAS Treaty Series No 69 (1988) (Protocol of San Salvador), art 2.

commission concluded: (i) That environmental pollution which may cause serious physical illness or suffering on a certain population, is "inconsistent with the right to be respected as a human being" and[120] (ii) that the conditions which threaten human health require that "individuals have access to: information, participation in relevant decision-making processes, and judicial recourse."[121] In this sense, the Commission also reiterated the relevance of EIAs.

On 15 November 2017 the IACtHR enacted Advisory Opinion OC-23/17 regarding the environment and human rights requested by Colombia, were it deepened on the content of the human right to environment and on some of the obligations derived from it. The Advisory Opinion introduced a striking analysis regarding the protection of the human right to environment in the Inter-American system as follows:

The IACtHR highlighted, that the HRHE is as an autonomous right that "protects the components of the environment, such as forests, rivers, seas and others, as legal interests in themselves, *even in the absence of certainty or evidence about the risk to individual persons*"[122] (my emphasis). It further added that this right "is about protecting nature and the environment not only because of its connection with a utility for the human being or for the effects that its degradation could cause on other people's rights (...), but because of its importance for the other living organisms with whom the planet is shared, also deserving of protection in themselves."[123] Therefore, it recognized that the HRHE is an autonomous right and it also acknowledged the relevance it carries not only for people but also for the nature itself. Accordingly, the opinion noted and valued "the tendency to "recognize legal status and, therefore, rights to nature not only in court decisions but also in constitutions."[124] Hence, in this sense the HRHE would protect not only people but also the nature and the environment, as these would be useful and connected to the human being, causing its degradation a degradation of the rights of the individuals and their quality of life. If this interpretation was followed, this could mean that, even in the absence of harm to individuals or to violation of other rights, the harm to the environment could be justiciable and the right to a healthy

[120] Report on the Human Rights Situation of Ecuador (1997) (IACHR 1997) (OEA/Ser.L/V/II.96 Doc. 10 rev. 1), conclusions.
[121] ibid.
[122] Advisory Opinion OC-23/17 solicited by the Republic of Colombia, *Environment and human rights in the context of the protection and guarantee of the right to life and personal integrity - interpretation and scope of articles 4.1 and 5.1 in relation to articles 1.1 and 2 of the American Convention on Human Rights* (2017) (IACtHR 2017), [my translation], paras 47, 62 (my translation).
[123] ibid.
[124] ibid, para 62.

environment protected in itself.[125] In any event the opinion is quite recent, so it is too soon to see if the content has been applied in jurisprudence or in other recommendations, reports or advisory opinions.

Regardless the mentioned Advisory Opinion, the HRHE together with the economic, social and cultural rights protected by the Protocol of San Salvador, have a limited justiciability in the Inter-American system. As we know, the advisory opinions released by the IACtHR are not binding. They may be useful for States to take them into consideration when solving internal issues, and also for the IACommHR and the IACtHR themselves when deciding on cases, but they are not strictly law. Moreover, the Protocol of San Salvador holds in article 1 that States have the obligation to adopt measures regarding these rights "to the extent of their available resources and taking into account their degree of development."[126] In practical terms, this entails that States have an obligation of means towards these rights, and not an obligation of results.[127] Even more, according to article 19 (6) of the Protocol, only the right to trade union and the right to education would give rise to the system of individual petitions. For these reasons, no case brought before the IACommHR or the IACtHR has been decided on a violation of the HRHE under article 11 of the Protocol.

Nonetheless, the HRHE in the Inter-American system can achieve some degree of justiciability while being linked to other human rights protected by the main convention, such as the right to life and personal integrity.[128] In fact, as outlined in the next section, most of environmental cases within the Inter-American system have been brought to the IACtHR under these mentioned rights.[129]

4.3 Cases on the Human Right to a Healthy Environment before the Inter-American Commission and the Inter-American Court of Human Rights

It is possible to find several cases concerning the environment in the Inter-American system. While it is not the purpose of this thesis to go through all of them, in the following

[125] Maria L. Banda, 'Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights' (2018) 22(6) ASIL < https://www.asil.org/insights/volume/22/issue/6/inter-american-court-human-rights-advisory-opinion-environment-and-human > accessed 12 may 2019.
[126] Protocol of San Salvador, art 1.
[127] Sophie Thériault, 'Environmental Justice and the Inter-American Court of Human Rights' in Anna Grear & Louis J. Cotze (eds), *Research Handbook on Human Rights and the Environment* (Edward Elgar Publishing 2015), 313.
[128] ibid.
[129] ibid, 314.

subsections I will analyze the way in which the IACommHR and the IACtHR have dealt with the protection of the environment by selecting some cases that can be relevant for the matter in question.

4.3.1 Claude Reyes an others v Chile (Claude Reyes case)

The case *Claude Reyes v. Chile* is one of the key cases in the Inter-American system regarding freedom of expression and access to information. On December 1991 the Government of Chile signed an investment contract with two international companies for the development of a complex forest operation. Because of the environmental impact that the project would have, on may 1998 the petitioners requested information regarding the project with the purpose of executing social control and evaluating the environmental and social consequences of the investment. The information was catalogued by the solicitants as "public interest.[130] A committee rejected the request and the Court of Appeals and the Supreme Court followed the same line. The petitioners submitted a complaint to the IACommHR on December 1998 alleging, among others, a violation of article 13 of the ACHR on the right to freedom of thought and expression and demanding an adjust of the internal legislation so that it included mechanisms that guaranteed people effective access to public information regarding human rights, the environment and public security.[131] The case was submitted to the IACtHR, which concluded that Chile had violated the right to freedom of expression of article 13 as well as articles 8.1 and 25 of the ACHR and it ordered for the State to adopt measures to ensure the right access to public information, to provide training to public entities in these matters and to reimburse the applicants' costs and expenses.[132]

The *Claude Reyes case* is a well-known case mainly because this was the first time that the right of access to information was recognized in an international human rights court as an autonomous right.[133] An interesting feature of this case is the environmental content that it unfolds, particularly regarding procedural rights. The IACtHR based part of its analysis on several environmental law instruments that have established the principle of public participation for environmental cases, such as the Inter-American Democratic Charter,

[130] *Claude Reyes et al v Chile* (Merits, reparations and costs) IACHR Series C no 151, IHRL 1535 (IACHR 2006), paras 3, 57.12.
[131] *Claude reyes et al v Chile*, para 146.a.
[132] ibid, paras 7, 8, 9.
[133] Ricardo Pavoni, 'Environmental Jurisprudence of the European and Inter-American Court of Human Rights', in Ben Boer (ed), *Environmental Law Dimensions of Human Rights* (Oxford University Press 2015, 1st ed), 76.

Principle 10 of the Rio Declaration and the Aarhus Convention.[134], even though it did not highlight a connection between public participation or access to information and the protection of the environment. When doing so, the IACtHR promoted participatory rights in environmental decisions-making processes by interpreting article 13 on freedom of expression in an expansive way, as "encompassing the right to access state-held environmental information."[135] According to Boer, this provides with a significant precedent for cases regarding access to public information in environmental matters, paving the way for situations where people receive unjustified refusals from the State regarding access to information where the environment is at risk.[136]

Being based on the right of freedom of expression, it may seem difficult to establish a relationship between this case and the justiciability of the HRHE in the Inter-American system. In fact, its contribution to the HRHE as a substantial right is almost non-existent since the IACtHR does not refer to it at all. Nonetheless, the case reinforces procedural environmental rights, which can help protect and secure the environment and contribute to secure the substantive right.

The right to freedom of thought and expression has not been related to the environment with much frequency in the Inter-American system, yet another example can be found in *La Oroya v. Peru*, which will be analyzed in section 4.3.6.

4.3.2 Kichwa Indigenous People of Sarayaku v Ecuador (Sarayaku case)

Most human rights cases with environmental content have been brought to the Inter-American system alleging a violation of the right to life and personal integrity or right to collective property. In the Sarayaku Case for example, on December 2003, the indigenous people Kichwa of Sarayaku submitted a complaint to the IACommHR on the grounds that Ecuador had signed a contract with an oil company to carry out oil extractive businesses in their ancestral land without their consent and consultation. The extractive actions initiated with high power detonations and the settlement of explosives on the land, limiting the Sarayaku

[134] ibid.
[135] ibid, 71.
[136] ibid.

freedom of movement and impeding them to look for means of subsistence.[137] The Commission submitted the case to the IACtHR, which ordered for a series of preventive measures and delivered its judgement on June 2012, concluding that there was a violation of the rights of article 21 (right to property), 4.1 and 5.1 (right to life and personal integrity) of the ACHR, among others, and ordering the State to deactivate the explosives, to consult with the community if new investment plans were to be carried out in their territories and to publicly recognize its responsibility for the violations.[138]

In this case The IACtHR makes no mention to the HRHE, but it referred to the protection of the environment when deciding on the alleged violation of article 21, where it pronounced on the right to consultancy of indigenous people. Particularly and based on the ILO convention, it held that "so that the exploitation of natural resources in ancestral land do not entail a denial of the subsistence of the indigenous people, the State must, among other things, carry out an EIA."[139] The IACtHR went further on to give details on what characteristics these assessments need to have in other to comply with the ACHR. Thus, it held that EIAs must be in conformity with international standards, respect the culture and traditions of indigenous peoples and be concluded before the concession is granted.[140]

In the present case the IACtHR also pronounced on the content of right to life, stating that States could not be responsible for every situation of risk to life and that for a positive obligation to arise, it had to be established that at the time of the events occurred the authorities "knew or should have known of the existence of a situation of real and immediate risk to the life of an individual or groups of individuals and did not take the necessary measures within the scope of its attributions to prevent or avoid that risk."[141] Thus, it concluded that, with the 1400kg of explosives planted, the State knew and there was a risk that it should have deactivated.[142]

Hence, according to this Court's analysis, the right to life can only address environmental issues if the ecological threats to human life are: (i) Certain and; (ii) Immediate. Using this

[137] *Kichwa Indigenous People of Sarayaku v Ecuador (Sarayaku v Ecuador)*, (Merits, Reparations, Costs) IACtHR Series C N 245, para 2.
[138] ibid, 301.
[139] ibid, para 157.
[140] ibid, para 206.
[141] ibid, para 45.
[142] ibid, para 46.

interpretation when analyzing human rights cases with environmental content may be problematic, as very often the environmental impacts on humans' health are unexposed for a long time and subject to some scientific uncertainty. This means that by following this analysis, the number of favorable decisions towards the victims in environmental cases under the right to life of the ACHR, would decrease.[143] Furthermore, as stressed by Theriault, holding that States cannot be responsible for all situations where life is at risk imposes severe limitations on the positive obligations that they have to secure the right to a "dignified life".[144]

Even though the HRHE is not explicitly mentioned in the Sarayaku Case, the Court's judgment develops two important precedents that provide with some clearance regarding the protection of environment in cases related with indigenous people. One, favorable to the victims, is the reaffirmation of the obligation of States to carry out EIA when development projects may harm the environment that sustains an ancestral community with certain conditions it should meet to comply with international standards. The other one is that States can be responsible for situations where life is at risk, although this risk has to be certain and immediate. This latter holding is favorable for the victims in the sense the IACtHR recognizes a responsibility if the right to life is merely at risk, but is less favorable in the sense that this risk requires certain characteristics, thus limiting the protection of the right to life. Despite having no environmental content, as so many human rights environmental cases involve a threat to the right to life, this latter analysis can be a useful precedent for the future.

4.3.3 Saramaka People v Surinam (Saramaka case)

A similar judgment regarding the right to property was held in *Saramaka v. Surinam*, where the IACtHR received a complaint on June 2006 concerning the occupation of the territory of the Saramaka, an indigenous group that had been living there since the 18th century. The complainants - who had been favored with precautionary measures by the IACommHR - alleged that the State granted concessions to third parties for mining activities in the Saramaka's territory whilst damaging the environment. The Saramaka had unsuccessfully requested several times titles and recognition of their rights over the land.

[143] Thériault (n 122), 316-317.
[144] ibid.

The court finally determined that Surinam had violated the right to private property of article 21 of the ACHR, among others, arguing that indigenous people have a close connection to their lands and natural resources and the incorporeal elements that arise from them, which had to be protected under article 21 of the ACHR.[145] The IACtHR went further on to detail the way in which the land and indigenous people had to be protected, such as EIA and consultation and the standards that these ought to meet when dealing with large-scale projects that may seriously affect the territory and the rights of peoples. The Court concluded that in this case the level of consultation was insufficient to assure the Saramaka's effective participation in the decision-making process and that the State had not carried out proper EIAs before granting the concessions, some of which had affected natural resources necessary for the subsistence of the Saramaka.[146] Moreover, it also recognized that the concessions had damaged the environment and that this deterioration had had a negative impact on the lands and natural resources of the Saramaka, therefore violating their right to communal property.[147] The Court ordered for the State to: recognize Saramakas' collective property over their land; to ensure the effective participation of the Saramaka in future development plans in their territory; to guarantee the them a reasonable benefit from these investments and; to carry out EIAs beforehand when there is a development project in their land.[148]

Here, just as in Sarayaku case, the Court took distance from the traditional individualistic approach of the right to property and it highlighted the special relationship between indigenous people and their ancestral land and the necessary protection that its natural resources entail.[149] The judgment is relevant as it continues with a tendency that opens the door for indigenous people to oppose major extractive projects in their territories that could put their health, well-being and cultural integrity at risk.[150] Even though the HRHE is not explicitly mentioned, the IACtHR analysis establishes a nexus when determining that, because of the destruction of the environment, the Saramaka's right to property has been violated. Furthermore, the judgment continues with the tendency of calling out for EIA as an obligation when major development projects threaten the environment where indigenous people live.

[145] *Saramaka People v Suriname*, (Preliminary Objections, Merits, Reparations, Costs) IACtHR Series C N 172, para 214.
[146] ibid, para 148.
[147] ibid, para 153, 154.
[148] ibid, para 214.
[149] Theriault (n 122), 329.
[150] ibid.

4.3.4 Maya Indigenous Communities v Belize (Maya case)

The nexus between a healthy environment and the right to property is also highlighted in the Maya Indigenous Communities v. Belize petition before the IACommHR, where the petitioners claimed that the State granting of oil concessions on the Maya lands without previous consultation with the Maya people upon which the their depended, threatened long term and irreversible damage to the natural environment upon which the Maya depend.[151] They directly claimed their HRHE in connection with the right to life of article I of the American Declaration and the right to health and well-being of article XI of the same document.[152]

The IACommHR ordered precautionary measures and held that the concessions granted by the State had caused environmental damage, which had harmed the territory over which they had a communal property right.[153] Thus, the right of the Maya people to property in the lands they had traditionally used and occupied had been exacerbated by environmental damage occasioned by the oil concessions. The Commission brought up the *Ogoni case* in the African System as a basis for its argument and it also highlighted the relevance of mechanisms to supervise and monitor the projects and the obligation of States to consult indigenous peoples in order to give effect to the communal property right of the Maya in the lands they had traditionally used and occupied.[154] Consequently, the IACommHR decided that Belize had violated the right to property and it recommended Belize to repair the environmental damage resulting from the oil concessions "in respect of the territory traditionally occupied and used by the Maya people."[155] However, the Commission took distance from the Saramaka case as it determined that other additional claims such as right to nature or right to life and health and well being, were subsumed within the broad violations of the right to property.[156]

[151] *Maya Indigenous Communities of the Toledo District v Belize,* Case 12.053 (IACHR 2000) Report N 78/00, OEA/Ser.L/V/II.111, doc. 20, rev. (2000), para 19.
[152] ibid, para 53.
[153] ibid, paras 147, 148.
[154] ibid, para 150.
[155] ibid, para 197.
[156] ibid, para 156.

4.3.5 Community of San Mateo Huanchor v Peru (San Mateo Huanchor case)

On the other hand, the relationship between a healthy environment and the right to life and personal integrity of the ACHR is clearly portrayed in *Community of San Mateo Huanchor v Peru* the Inter-American Commission on Human Rights received a petition against Peru on February 2003 for the alleged violation of the fundamental individual and collective rights of the members of the Community of San Mateo de Huanchor, due to the consequences suffered because of environmental pollution derived from toxic waste from mining tailings adjacent to the community.

In its admissibility report in 2004, the IACommHR decreed precautionary measures such as to carry out an EIA, and it considered that if the effects of the environmental contamination and the public health crisis in the town of San Mateo de Huanchor were proven, they could constitute a violation of the right to life, personal integrity and right to property, among others.[157] The Commission also argued that the ratione personae requirement of article 44 was fulfilled, as the victims were an identifiable group: the community who lived in San Mateo de Huanchor.[158] This case presents a good opportunity for the IACommHR and the IACtHR to relate the connection between several fundamental rights and the protection of the environment. If the State is to be held responsible and measures are ordered, it will introduce another precedent to reinforce the protection of the environment through the protection of rights contained in the ACHR and bring it closer to justiciability.

4.3.6 Community of La Oroya v Peru

A similar case regarding the right to life and personal integrity is *Community of La Oroya v. Peru*, where IACommHR received a petition presented on December 2006 by various organizations in favor of a group of Peruvian people concerning air pollution in La Oroya caused by a metallurgical plant since the acquisition of the company by a US enterprise in 1997. Here the petitioners alleged the lack of supervision and oversight of the company that operated the plant which did not comply with environmental and health standards. In 2009 the IACommHR emitted an admissibility report similar to the one of San Mateo de Huachor v.

[157] *Community of San Mateo de Huanchor and its members v Peru (Community of San Mateo de Huanchor v Peru),* Report N 69/04 (admissibility report), Petition 504/03 (IACHR 2004) OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2004), para 66.
[158] ibid, para 44.

Peru, stressing that if the deaths and/or damages to the health of the victims as a consequence of the environmental contamination were proven, the events that had taken place could involve a violation of the right to personal integrity and the right to life under the ACHR.[159] Moreover, this case also brings up an issue concerning the right of access to information in environmental cases. The IACommHR considered that if the lack of information provided by the government on the environmental contamination was proven as well as the harassment against people who inform about it, the case could constitute a violation of the right to freedom of expression under ACHR. Finally, regarding the "ratione personae" requirement of article 44 of the ACHR, it recognized that the requirement of presenting itself as victims, a collectivity of identifiable persons, had been demonstrated. The Commission decided to order precautionary measures due to the urgency and gravity of the case.[160]

The decision has not yet been delivered. It will be interesting to see how the IACommHR pronounces on this case and if it forwards it to the IACtHR. If the events described are proved and the case gets to the Court, it will be a tremendous opportunity to decide on the right to personal integrity and right to life when there is environmental damage and the victims are not a determined or specific indigenous group but rather a generalized group of inhabitants of a certain area. It will also be a chance to reinforce procedural environmental rights as settled in the *Claude Reyes case*.

The reports by the IACommHR in the cases of La Oroya and San Mateo de Huachor declaring these complaints admissible under article 44 of the ACHR are in tension with the former *Metropolitan Nature Reserve v Panama* admissibility report of 2003 where the IACommHR declared inadmissible a petition on behalf of all the citizens of Panama on the grounds that it did not comply with article 44 of the ACHR of naming "specific, individualized and determined victims."[161] The IACommHR recalled that petitions on behalf of groups of victims when were to be admitted when the group was: a) specific; b) defined and; c) the individuals that comprised it were determinable, as in case of members of a defined community, such as the *Maya case*.[162] This decision, if followed, could dissipate the justiciability on the protection for the environment in the Inter-American system.

[159] *Community of La Oroya v Peru*, Report N 76/09 (admissibility rep), Petition 1473-06 (IACHR 2009) OEA/Ser.L/V/II., doc. 51, corr. 1 (2009), para 74.
[160] IACommHR, Resolution 29/2016: Ampliation of beneficiaries in Community of La Oroya v Peru (precautionary measure 271-05) (IACHR 2016), paras 25-29.
[161] *Metropolitan Nature Reserve (on behalf of the citizens of Panama) v Panama (Metropolitan Reserve v Panama)*, Report N 88/03 (admisibility rep) Case N 11.533 (IACHR 2003) OEA/Ser.L/V/II.118 Doc. 70 rev. 2 (2003), para 28.
[162] ibid, para 32.

Environmental disasters or pollution recognize no groups and they can affect a variety of people, many of whom may not be part of any indigenous group. Therefore, to secure the justifiability of rights in environmental matters, it would be important that the Commission maintained a stable praxis when deciding on the admissibility of cases to protect both indigenous and non-indigenous groups of people.

4.4 Remarks on the justiciability of the Human Right to a Healthy Environment in the Inter-American system of human rights

Although the HRHE has been recognized explicitly in the Protocol of San Salvador, there is no declaration of violations of this right in the cases analyzed, as well as no explicit reference to it. The reason behind this is that the Protocol does not declare this right as binding. As a result, the petitioners have tried to claim the violation of other rights protected by the main ACHR document, establishing a nexus between the environmental harm and the violation of other rights. Consequently, the right to life, right to personal integrity and right to property have played an important role when securing the protection of the environment in cases where peoples lives or their territories are at risk due to development projects. Procedural environmental rights have also played a role alleged under freedom of speech or subsumed in the right to property when it comes to the obligation of carrying out EIAs, although this is most visible in cases involving indigenous peoples' claims.[163]

Although most of the cases decided by either the IACommHR or the IACtHR concern indigenous populations and the protection of their rights and territories, lately the Commission has had the opportunity of receiving claims by non-indigenous groups. This will be an interesting opportunity for both the Commission and the Court to show that they are willing to thicken a case law that protects groups of the population that not indigenous people in environmental cases. The IACommHR had the chance of doing so in *Metropolitan Reserve v Panama*, but it declined the petition because it considered that the group was undetermined. In this sense, it would also be necessary that the IACommHR took a clearer approach on which type of groups are definite and which are not with especial emphasis on environmental cases. This is particularly relevant as environmental harm damages not individuals but rather large parts of the population.

[163] Pavoni (128), 70.

Both the Commission and the Court have in a way protected victims in cases of environmental degradation by strengthening the interconnection between human rights and ecological protection. Taking a look at the decisions analyzed, it is possible to note that both the Commission and the Court have had no issues in declaring the responsibility of States in environmental cases, at the same time recommending them to take concrete, practical measures aimed at the prevention of further environmental damage and human rights violations. Besides, for the most part precautionary measures have been decreed, which is an important element when it comes to the factual protection of the vulnerable victims affected. Some cases analyzed (*Sarayaku case* and *Saramaka case* for example) even recognize a link between certain rights and the environmental harm explicitly. It is also important to consider that the Inter-American system contemplates a monitoring system, which contributes to enforceability and complements the justiciability of the rights contained in the ACHR.

However, although environmental disasters can in fact put the right to life or personal integrity at risk and interfere with collective indigenous property or the right of freedom of speech, it is argued that it is not possible to rely on the limited reasoning of the IACommHR and IACtHR to stop corporations from perpetrating environmental harm or to protect indigenous populations.[164] The fact that the claimants must prove the violation of certain binding rights contained in the convention significantly reduces the chances of bringing cases before the Inter-American System, as many times the effects of environmental harm (in people's health, for example) may not be significant or may not be visible immediately. If the Inter-American system persists with this tendency, petitioners could only bring cases when there was a risk of e.g. severe health benefits, which would not be enough to impede environmental degradation or to pose on States the duty to maintain elevated environmental standards.[165]

Finally, it is necessary to recall that in Advisory Opinion OC-23/17 the IACommHR pointed out the HRHE as an autonomous right that can be violated even with no violation of other binding rights of the ACHR. If considered in future cases, this recent opinion could fortify the justiciability of the HRHE and change the prospect for the protection of the environment in the Inter-American System.

[164] Pavoni (n 128), 216.
[165] ibid.

5 CONCLUSIONS

Environmental disasters and global warming have, gradually, put the concern for the protection of the environment in the center of the discussion in the international sphere. Inspired by this tendency, different academics have argued about the existence or even the need of a human right to environment. Following the tendency of the recognition of this nexus by several UN resolutions, both the African and the Inter-American systems of human rights recognized this right officially in their main conventions and/or protocols.

The African system of human rights recognized the right to a healthy environment as a binding right in its main charter and, further on, condemned Nigeria in the *Ogoni case* for a violation of this right. These two elements altogether show a high degree of justiciability. However, the IACtHR still seems to crave for a connection between other human rights and environmental degradation, which makes some wonder whether this would have declared a violation of the right to a healthy environment in the *Ogoni case* if other rights had not been infringed. In addition, despite all the environmental problems that the African region has suffered over these past years, a large number of complaints have been lost due to lack to comply with admissibility requirements and, sadly, the Ogoni is so far the only successful case regarding the right to a healthy environment in the African Human Rights system. On top of all this, the system presents almost non-existent monitoring methods for the decisions of the Commission or the Court, which lowers the justiciability standards and makes of it a less feasible scheme when it comes to protection of rights.

In the Inter-American system of human rights, on the other hand, the right to a healthy environment is not binding. Even though it was incorporated in the additional San Salvador Protocol, the document set only the right to education and trade union rights as subject to be brought before the IACommHR or the IACtHR. However, this has not been an impediment for claimants to submit complaints where a certain group of people is being affected by environmental degradation. The claimants then, have alleged the violation of other binding rights in connection with the environmental harm, such as right to life, right to personal integrity, right to property and even right of freedom of expression. In practice, many of these cases have been decided in favor of the claimants, yet a problem remains in the sense that it will always be necessary to prove the violation of other binding rights. As a consequence, the right to a healthy environment is not even mentioned in most of the cases concerning

environmental harm in the Inter-American system which means that it may never be protected if other rights are not violated together with it.

The current analysis of the human right to a healthy environment in the African and Inter-American system of human rights shows that the explicit recognition of this right is not enough and that it is not yet fully justiciable in the mentioned regional systems (and probably in the international arena). The recognition in both sytems lacks justiciability elements that make rights relevant in practice, as it would be for example, a thicker case-law declaring the violation of this right and follow-up mechanisms in The African system, or the viability of claiming its violation in itself without the need of connection with other rights in the case of the The Inter-American system.

It is indeed auspicious that the right to a healthy environment has been included explicitly in two regional systems and it would be desirable that others followed the same pattern. However, recognition is only one step in the large journey of justiciability and of making rights effective into practice. The right to a healthy environment needs not only to be recognized explicitly as a binding right, but also made justiciable by courts, which should have robust follow-up mechanisms to ensure the compliance with their decisions. Likewise, the need of establishing a link between the violation of other human rights and the environmental harm makes it more difficult to prove a violation of this right and it diminishes its purpose. In this sense, it would be relevant that the right to a healthy environment were considered a right in itself, without connection with other rights, thus cutting out the problems that emerge when trying to establish a nexus between environmental harm and the violation of certain human rights.

From the second half of the XX century the concern for the protection of the environment in the international area has been going strong, but an analysis of the right to a healthy environment under the African and Inter-American system shows that, despite recognition and important advancements in the matter, this right still has a way to go in the international human rights law.

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