

"GREENING" THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

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Résumé

Cet article vise à fournir une brève réflexion sur les liens entre la protection internationale de l'environnement et la protection des droits de l'homme. On analysera le processus d'écologisation du système interaméricain des droits de l'homme. Ce phénomène se produit lorsque les questions d'environnement sont protégées par la Déclaration américaine des droits et devoirs de l'homme et par la Convention américaine relative aux droits de l'homme alors que ces instruments sont, en principe, des instruments de garantie des droits civils et politiques.

Abstract

This article aims to provide a brief reflection on the interrelationships between international environmental protection and human rights issues. We will analyze the "greening" process of the Inter-American human rights system. This phenomenon occurs when environmental issues are protected by the American Declaration of the Rights and Duties of Man and by the American Convention on Human Rights devices in spite of the fact that those instruments are in principle focused on the guarantee of civil and political rights.

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Despite the absence of a specific provision regarding environmental law in the main human rights instruments of the Organization of American States (OAS), the Inter-American Commission and the Inter-American Court of Human Rights, on many occasions, crystallized the position that the American Declaration of the Rights and Duties of Man, from 1948, and the American Convention on Human Rights, from 1969, can have an extended interpretation in order to secure an effective environmental protection based on provisions such as the right to a fair trial, freedom of speech, and property rights. Some scholars use the expression "greening international law" to refer to this phenomenon.¹

In the following article, we will explore how to develop strategies and techniques that are able to protect environmental issues in the Inter-American human rights system.

I. THE INTER-AMERICAN HUMAN RIGHTS SYSTEM AND THE ENVIRONMENTAL ISSUES

The Inter-American human rights system encompasses the Charter of the Organization of American States – OAS, the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights. Notwithstanding its imperfections, the Inter-American human rights system has been an important part of international law since its origins.

It is noteworthy that the American Declaration of the Rights and Duties of Man is eight months younger than the Universal Declaration of Human Rights, which was adopted by the United Nations on December 10, 1948. Furthermore, the OAS Charter provided a human rights framework before the United Nations due to the fact that Article 106 determines the elaboration of a future treaty envisaged to regulate the functioning of the Inter-American Commission on Human Rights.

The American Convention on Human Rights, beyond the norms of the Inter-American Commission, has also created the Inter-American Court, a juridical organ which deals with advisory requests and contentious cases in the Inter-

¹ See: P. SANDS (ed.), *Greening international law*, London, Earthscan Publications Limited, 1993; and G.F.M. TEIXEIRA, *O greening no sistema interamericano de direitos humanos*, Curitiba, Juruá, 2011.

American human rights system.² The Court is empowered to examine alleged violations of the American Convention by State Parties that accepted the Court's contentious jurisdiction.³

Considering that State Parties have never filed complaints against each other before the Inter-American Court, the contentious cases were sent by the Inter-American Commission, after analyzing individual petitions submitted to them according to Articles 44, 46 and 47 of the Convention.

During the 60s and 70s, while the OAS was establishing its mechanisms of human rights protection⁴, environmental issues started to be an international concern. Due to increasing environmental damages, the international community added the access to a healthy environment to the list of fundamental human rights in the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment, and in the Rio Declaration of the 1992 United Nations Conference on Environment and Development – also known as the Earth Summit.

The 1993 Vienna World Conference on Human Rights confirmed this logic by ensuring that all human rights are universal, interdependent and interrelated. Thus, Stockholm, Rio and Vienna contributed to the "the globalization of environmental law"⁵, that is, the comprehension of the interconnections between human rights protection mechanisms and environmental issues.

1. International Environmental Protection and Human Rights

The 1992 Rio Earth Summit established a "new engineering" which seeks to accelerate the implementation of international environmental norms by the adoption of generic provisions, annexes, and appendices forming an environmental framework of most emblematic treaties. This framework is to be complemented by

² Antigua and Barbuda, Bahamas, Belize, Canada, United States, Guyana, Saint Kitts and Nevis, St. Lucia and St. Vincent and the Grenadines have not ratified the American Convention on Human Rights. The Republic of Trinidad and Tobago ratified the Convention on April 3, 1991, but on May 28, 1998, gave notice to the Secretary-General of the Organization of American States of the withdrawal of its ratification of the said American Convention on Human Rights. See: General Information of the American Convention on Human Rights, available at: <http://www.oas.org/juridico/english/Sigs/b-32.html> (visited May 20, 2012). Also see: T. BUERGENTHAL, "The inter-american Court of Human Rights", *American Journal of International Law*, n° 76, april 1982, p. 1- 27; T. BUERGENTHAL, R. NORRIS, D. SHELTON, *La protección de los derechos humanos en las Américas*, Madrid, IIDH-Civitas, 1990; T. BUERGENTHAL, R. NORRIS, *Human rights: the inter-american human rights system*, New York: Oceana Publications, 1982; Articles 34, 36, 37, 37.2 and 78 of the American Convention; and articles 2 to 7, of the Statute of the IACHR.

³ From the twenty-four State Parties of the Convention, only three - Dominica - Grenada and Jamaica - have not yet submit to the jurisdiction of the Court. See: American Convention on Human Rights, available at: <http://www.oas.org/en/iachr/mandate/Basics/conventionrat.asp> (visited May 20, 2012). Also see: Art. 62, of the American Convention and H. FIX-ZAMUDIO, *Protección jurídica de los derechos humanos*, México, Comisión Nacional de Derechos Humanos, 1991, p. 164.

⁴ For more about the origins of the Inter-American human rights system see: T. BUERGENTHAL, "Recordando los inicios de La Corte Interamericana de Derechos Humanos." *Revista IIDH*, vol.39, San José: IIDH, enero/junio 2004, p.11-34.

⁵ For all see A.A. CANÇADO TRINDADE, *Direitos humanos e meio-ambiente: paralelo dos sistemas de proteção internacional*, Porto Alegre: Sérgio Antônio Fabris Editora, 1993, p. 41-45.

decisions from future periodic meetings of the State Parties, the so-called Conference of the Parties or COPs.⁶

For example, the United Nations Framework Convention on Climate Change, adopted in the 1992 Rio Earth Summit, is complemented by the 1997 Kyoto Protocol and by the COPs decisions; however, this "new engineering" raises serious questions especially because the meetings' decisions are deprived of normative status, that is, a State Party cannot be sanctioned even if it fails to comply with these soft law norms.⁷

The fragility or the relative effectiveness of international environmental agreements⁸ shows that environmental issues have not reached their maturity in the context of contemporary international relations. Dinah Shelton and Alexander Kiss, however, believe that this maturity points to increasing links between the protection of the environment and of human rights.⁹

Thus, at the end of the twentieth century, the international human rights protection systems experienced a process of greening¹⁰: a) both the 1981 African Charter on Human and People's Rights and the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, adopted in San Salvador, in November, 17, 1988, have provisions that explicitly ensure the access to a healthy environment as a human right¹¹; b) the European

⁶ G. SOARES, "Dez anos após Rio-92: o cenário internacional, ao tempo da cúpula mundial sobre desenvolvimento sustentável (Joanesburgo, 2002)", In: V.O. MAZZUOLI, C.T. H. IRIGARAY (eds), *Novas perspectivas do direito ambiental brasileiro: visões interdisciplinares*, Cuiabá, Cathedral, 2009.

⁷ G. SOARES, *Direito internacional do meio ambiente: emergências, obrigações e responsabilidades*, São Paulo: Atlas: 2001, p. 101. Also see: R.B. MITCHELL, "Problem structure, institutional design, and the relative effectiveness of international environmental agreements", *Global Environmental Politics*. Vol. 6, n.º. 3, Cambridge, The MIT Press, August 2006, p. 72-89; and D. SHELTON (ed), *Commitment and compliance: the role of non-binding norms in the international legal system*, Oxford, Oxford University Press, 2000. Also see: I. PORRAS, "The Rio Declaration: a new basis for international cooperation", In: P. SANDS (ed.), *Greening international law*, London, Earthscan Publications Limited, 1993.

⁸ R.B. MITCHELL, "Problem structure, institutional design, and the relative effectiveness of international environmental agreements", cit., p. 72-89; A. BOYLE, "Human Rights or Environmental Rights? A Reassessment", *Fordham Environmental Law Review*, Vol XVIII, 2007, p.471-511. Also see: A. BOYLE, "The Role of International Human Rights Law in the Protection of the Environment" In: M.R. ANDERSON, A. BOYLE, (eds). *Human rights approaches to environmental protection*, Oxford, Oxford University Press, 1996, p. 43-70.

⁹ See: A. KISS, D. SHELTON, *Guide to international environmental Law*. Koninlijke Brill, NV, Leiden, Martinus Nijhoff Publishers, 2007; A. KISS, D. SHELTON, *Judicial handbook on environmental law*, Nairobi, United Nations Environment Programme, 2005; D. SHELTON (ed), "Environmental rights and Brazil's obligations in the inter-american human rights system", *George Washington International Law Review*, Vol. 40, Washington D.C, George Washington University, 2008, p. 733-777; D. SHELTON, "Human rights, environmental rights and the right to the environment", *Stanford Journal of International Law*, vol, 28, Palo Alto, Stanford University, 1991, p. 103-138; M. PALLEMAERTS, "International environmental law from Stockholm to Rio: back to the future?", In: P. SANDS (ed.), *Greening international law*, London, Earthscan Publications Limited, 1993.

¹⁰ See: R.CHURCHILL, "Environmental Rights in Existing Human Rights Treaties." In: M.R. ANDERSON, A.E. BOYLE, (eds), *Human rights approaches to environmental protection*, Oxford: Oxford University Press, 1996, p. 89-108.

¹¹ V.O. MAZZUOLI, *Curso de direito internacional público*, 5ª ed. rev., atual. e ampl. São Paulo, RT, 2011, p. 1001-1003.

Convention on Human Rights, despite the lack of any specific provision regarding environmental protection, has been interpreted to cover environmental issues.

Notwithstanding its early stage, the European Court is undertaking a process of "greening" based on diverse linkages between environmental issues and provisions of the European Convention related to the protection of neighborhood, privacy, family life and property rights. As milestones of the European Court "greening", we highlight two cases related to the noise pollution caused by the Heathrow airport in its neighborhood: *Powell and Rayner* (1990) and *Hatton and others* (2001) v. *United Kingdom*.

In *Powell and Rayner v. United Kingdom* (1990), despite the recognition that the British State has the duty to take reasonable and appropriate measures to secure the applicants' rights under paragraph 1 of Article 8 of the European Convention (right to private and family life), the European Court considered that "*the operation of a major international airport pursued a legitimate aim and that the consequential negative impact on the environment could not be entirely eliminated*".¹²

However, eleven years later, more complaints about the Heathrow airport noise pollution, this time in *Hatton and others v. United Kingdom* (2001), made the European Court conclude that, in a clear violation to the Article 8.1 of the European Convention, "*the State failed to strike a fair balance between the United Kingdom's economic well-being and the applicants' effective enjoyment of their right to respect for their homes and their private and family lives*".¹³

It is notable that the period of eleven years between the two Heathrow cases contributed to the strengthening of linkages between the European Convention provisions and the environmental issues. During the nineties, especially after the Earth Summit in Rio de Janeiro (1992), the environmental concerns were emphasized as a major theme. Under this atmosphere, *López Ostra v. Spain* (1994), became an emblematic case for the future decisions of the European Court. The uncomfortable of the López Ostra family with a water treatment plant's sulfuric gas emissions in the town of Lorca, revealed that the environmental pollution implicates in damages to the human right to private and family life, and because of this, the State has the duty to dispose a fair balance between its measures and the well-being of the environment and of the individuals.¹⁴

López Ostra v. Spain also implicated in a second moment of the European greening Court: the diversification of the linkages between the environmental issues and human rights provisions. In *Ana Maria Guerra and others v. Italy* (1998), the European Court concluded that local authorities' failure to provide information about a chemical plant leakage in Manfredonia had implicated in violations to the Article 10 of the European Convention, related to the right to freedom of expression, and access to information.¹⁵ In 2004, the right to respect for individuals private and

¹² See European Court, *Powell and Rayner v. the United Kingdom*. Judgment of February 21, 1990, application n° 9310/81, § 42.

¹³ See European Court, *Hatton and others v. United Kingdom*, Judgment of October 2, 2001, application n° 36022/97, § 107.

¹⁴ See *López Ostra v. Spain*, Judgment of December 09, 1994, application n° 16798/90.

¹⁵ See *Ana Maria Guerra and others v. Italy*, Judgment of February 19, 1998, applications n° 116/1996/735/932.

family life, ensured by the Article 8.1 of the European Convention, was once more, linked to an environmental issue, this time in *Moreno Gómez v. Spain* (2004), regarding a disco club's noise pollution in Valencia.¹⁶

During the 21st century first decade, two cases seemed to be iconic to the European Convention on Human Rights greening: *Öneryildiz v. Turkey* (2002) and *Tatar v. Romania* (2009). In *Öneryildiz v. Turkey* (2002), a methane explosion on 28 April 1993 at a municipal rubbish tip in the slum quarter of Kazım Karabekir in Ümraniye (Istanbul), which caused the destruction of the applicants properties and the deaths of thirty-nine people, made the Court arrive to the conclusion that the State authorities failed their duty to remedy and to inform the inhabitants that area about the deficiencies of the Ümraniye's grabage dump. Thus, the Court held that the Turkish State had violated Articles 2, 8 and 13 of the European Convention, related respectively to the rights to life, private and family life and effective remedy before a national authority notwithstanding.¹⁷ In *Tatar v. Romania* (2009), about an ecological disaster caused by a gold mining company's cyanide spill into the Sasar River, the European Court decided that the Romanian state violated the Convention by failing to provide its duty of prevention and information about the risks of the gold mine installations.¹⁸

Thus, despite being at an initial stage, from the noise of a disco in Valencia to the Sasar River pollution, and from a chemical plant leakage in Italy to a disaster in a garbage dump in Turkey, the European greening gradually demonstrates a notable ability to extend the scope of the European Convention to cover a considerable variety of environmental issues. Arguably, this approach is a parameter to other regional systems.¹⁹

2. Greening the Inter-American Commission and the Inter-American Court

Compared to the European system, the greening of the Inter-American Commission and of the Inter-American Court is far away from issues such as noise pollution caused by a disco club or an airport. The vast majority of the environmental cases handled by the Inter-American system stem from the increasing demands of large urban centers for food, water, fuel, garbage dump areas, raw materials, and other goods and services supplied by large forests and rural zones. Indigenous peoples, the Maroons, and the peasant communities of the Americas, under this context, are vulnerable populations to economic expansion over natural resources.²⁰

¹⁶ See *Moreno Gómez v. Spain*, Judgment of November 16, 2004, application n° 4143/02.

¹⁷ See *Öneryildiz v. Turkey*, Judgment of June 09, 2005, application n° 55723/00, November 30, 2004, § 87.

¹⁸ See *Tatar v. Romania*, Judgment of 01/27/2009, application n° 67021/01.

¹⁹ See C.A. GOMES, *Textos dispersos de direito do ambiente*, vol III. Lisboa, Associação Acadêmica da Faculdade de Direito, 2010.

²⁰ About the advance of economic demands over indigenous and the traditional peoples areas, see: S.GARFIELD, "A nationalist environment: indians, nature and the construction of the Xingu National Park in Brazil", *Luso-Brazilian Review*, vol. 41, n° 1 (2004), p. 139-167; V. SHIVA, Vandana, *Biopirataria: a pilhagem do conhecimento*, Trad. Laura Cardellini Barbosa de Oliveria, Petrópolis, Vozes, 2001; J.G. DE SOUZA, José Gilberto, "A geografia agrária e seus elementos de crítica sobre os avanços do capital monopolista no campo brasileiro", *Canadian Journal of Latin*

This finding is confirmed by the Organization of American States' (OAS)²¹, which highlights examples of environmental protection in the American system: *a)* the *Resolution n.º 12/85 from the Yanomami People v. Brasil*²², about the interrelationships between road building in the Amazon territory inhabited by the Yanomami ethnic group and the rapid process of violation of the rights to life, health, freedom, security and residence of the affected indigenous group; *b)* and the case of the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*²³, about illegal logging concessions on indigenous lands: the first environmental issue analyzed by the Inter-American Commission and by the Inter-American Court, respectively.

After Resolution No. 12/85, the Inter-American Commission dealt with nine other cases related to environmental issues. Three of these cases – involving similar episodes in Chile, Panama and Brazil – are associated to the construction of hydroelectric power plants on traditional indigenous peoples' lands without the prior consent of the affected communities and consequent violations to the American Convention provisions related to property rights, right to life, right to humane treatment, right to a fair trial, rights of the family and right to judicial protection.²⁴ In this same sense, in *Indigenous Maya Communities of Toledo v. Belize* and *Kichwa people of Sarayacu and its members v. Ecuador*, the American Commission also established linkages between log and oil concessions in indigenous lands without prior consent of the affected ethnic groups and the violations of the traditional people's property rights.²⁵

Furthermore, in *Community of San Mateo de Huanchor and its members v. Peru*, related to a mining company using the surrounding peasant communities as a toxic waste dump, and *the Inuit People Petition against the United States*, about the Arctic ecosystem damages caused by the global warming and, as a result, by U.S economic and environmental policies, the Inter-American Commission was enforced to deal with issues related to the environmental degradation and its consequences to

American and Caribbean Studies. vol. 34, nº 68, Calgary: University of Calgary Press, 2009, p. 147-175.; and D. VARVARIGOS, "Environmental degradation, longevity and the dynamics of economic development", *Environmental and Resource Economics*, vol. 46, issue 1 (2010), p. 59-73. For more about the traditional peoples see: S.J. ANAYA, "International human rights and indigenous peoples: the move toward the multicultural state", *Arizona Journal of International and Comparative Law*, vol.21, nº. 13, Tucson, University of Arizona, 2004, p. 13-61; and H. HANNUM, "New development in indigenous rights", *Virginia Journal of International Law*. vol.28, nº. 4, Charlottesville, University of Virginia School of Law, spring 1998, p. 649-678.

²¹ See: General Secretariat Report on Human Rights and Environment, April 4, 2002; V.O. MAZZUOLI, *Curso de direito internacional público*, cit., p. 1001.

²² Resolution No. 12/85, Case No. 7615 (Brazil), March 5, 1985, printed in, Annual Report of the IACHR 1984-85, OEA/Ser.L/V/II.66, doc. 10 rev. 1, Oct. 1, 1985, at 24, 31(Yanomami Case).

²³ *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001).

²⁴ See: Report N° 30/04 , Friendly Settlement Mercedes Julia Huentes Beroiza, March 11, 2004; Report N° 75/09, Ngöbe Indigenous Communities and their members in the Changuinola River Valley v. Panama, August 5 , 2009; and The Indigenous Communities of the Xingu River Basin request for Precautionary Measures, PM 382/10, November 11, 2009.

²⁵ See: Report N° 40/04, Maya Indigenous Communities of the Toledo District v. Belize, October 12, 2004; and Report N° 62/04, Kichwa people of Sarayacu and its members v. Ecuador, October 13, 2004.

the traditional peoples enjoyment of the rights to life, liberty, security, health, residence, and to the benefits of an access to culture.²⁶

As can be noted, from the ten cases related to environmental issues that were examined or that are still under analysis by the Inter-American Commission, only two – the *Report No. 84/03 on the Parque Natural Metropolitano in Panama*, concerning alleged damages caused by building a highway in an ecological reserve, and the *Community of La Oroya v. Peru*, regarding air pollution contamination caused by a metallurgical complex in the thirty thousand-inhabitant city of La Oroya, 175 km from Lima – are not connected to indigenous or traditional peoples' issues.²⁷

The Inter-American Court, by its turn, after *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, analyzed five other cases of environmental issues. Four of these cases are connected to conflicts evolving the non-recognition of indigenous and maron peoples traditional lands in Paraguay and in Suriname.²⁸ The only case of environmental issues that is not related to violations against indigenous or traditional communities which was examined by the Inter-American Court was *Claude Reyes and others v. Chile*, about the State's failure to provide information about a deforestation project to three Chilean citizens.²⁹

As can be noted, the Inter-American system greening seems to be an important way for the protection of the traditional people's rights. Moreover, it might be emphasized that the Inter-American greening is not focused on environmental concerns itself, but on the strict application of the American Declaration and of the American Convention provisions such as those related to the judicial guarantees, right to life or to the right to property. In other words, the extend of the scope of the American Convention to cover environmental issues seems to be the result of a process of greening through other colors.

²⁶ See: Report N° 69/04, Kichwa people of Sarayacu and its members v. Ecuador, October 15, 2004; and the Inuit People Petition 1413/05 v. the United States, December 7, 2005. Also see: J.H. KNOX, "Linking human rights and climate change at the United Nations", *Harvard Environmental Law Review*, vol. 33, Cambridge: Harvard Law School, 2009, p. 477-498; H. M. OSOFSKY, "Inuit petition as a bridge? Beyond dialectics of climate change and indigenous people's rights", *American Indian Law Review*, vol. 31, Norman: The University of Oklahoma College of Law, 2007, p. 675-698.

²⁷ For more details about the environmental cases examined by the Inter-American Commission see: G.F.M. TEIXEIRA, *O greening no sistema interamericano de direitos humanos*, Curitiba, Juruá, 2011, p. 163-227. Also see: IACHR. Report No. 84/03, Metropolitan Natural Reserve v. Panama, October 22, 2003; Report N° 76/09, Community of La Oroya v. Peru, August 5, 2009. For more about Community of La Oroya v. Peru see: .K. CEDERSTAV, A. BARANDIARÁN G, *La Oroya cannot wait*, Lima, Sociedad Peruana de Derecho Ambiental, setembro de 2002; and P. SPILLER, Paula, "The La Oroya case: the relationship between environmental degradation and human rights violation", *Human rights brief*, vol. 18, issue 1, Washington D.C, American University of Washington College of Law, fall 2010, p. 19-23.

²⁸ See: Inter-American Ct. H. R. Case of Indigenous Community Yakye Axa v. Paraguay. Judgment of June 17, 2005. Series C No. 125; Case of Sawhoyamaya Indigenous Community v. Paraguay. Judgment of March 29, 2006. Series C No. 146. and Case of Saramaka People v. Suriname, Judgment of November 28, 2007. Series C No. 172.

²⁹ For more details: G. F. M. TEGIXEIRA, *O greening no sistema interamericano de direitos humanos*, Curitiba, Juruá, 2011, p. 229-285. Also see: Case of Claude Reyes and others v. Chile, Judgment of September 19, 2006. Series C No. 151.

II. "GREENING" THROUGH OTHER COLORS IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

The strict application of certain admissibility provisions of OAS instruments such as the American Declaration and the American Convention limits the increasing greening of the inter-American system. *Report No. 84/03 on the Parque Natural Metropolitano in Panama* is a great example of how the non-observation of provisions of the American Convention might implicate on the inadmissibility of a petition. In August, 11, 1995, Mr. Rodrigo Noriega sent Petition 11.533 to the Inter-American Commission related to alleged violations of "environmentalist, civic and scientific groups", and of property rights of the "citizens of the Republic of Panama" caused by the construction of a highway in an ecological, scientific and cultural reserve called *Parque Metropolitano*.³⁰ The Inter-American Commission, when analyzing the complaint, decided that although Article 44 of the American Convention establishes that "any person or group of persons (...) may lodge petitions with the Commission", the petition cannot be admitted without the identification of concrete, individual, and specific victims. Moreover, the victims must be individuals since the Commission has no jurisdiction over corporations or entities.³¹

After these considerations, the Commission observed that when Petition 11.533 was lodged in the name "of the citizens of the Republic of Panama", the criterion of "any person or group of persons" was not met. Furthermore, the petitioner, by claiming that the highway construction would affect the interests of "environmentalist, civic and scientific groups", instead of including individuals on the list of victims, mentioned entities, thus violating provisions of the American Convention. Therefore, the Commission considered that the petition was not admissible under the scope of the Inter-American system.³²

The outcome of the *Parque Metropolitano Petition*, according to Dinah Shelton, "suggests that the more widespread the violations – which can occur in many contexts where environmental harm is the origin of the complaint – the less likely the Commission will find the complaint admissible".³³ This means that the environmental protection in the Inter-American system is the result of the strict appliance of the American Declaration and of the American Convention devices, especially the ones related to the admission of individual petitions before the Inter-American system.³⁴ Consequently, the process of greening Inter-American system requires the observation of an indirect or reflex pathway technique³⁵, which consists in demonstrating the interconnections between an environmental issue and violations of the OAS instruments.

³⁰ IACHR. Report No. 84/03, *Metropolitan Natural Reserve v. Panama*, October 22, 2003: § 1-2.

³¹ IACHR. Report No. 84/03, cit., § 28-33.

³² IACHR. Report No. 84/03, cit., § 34-37.

³³ SHELTON, D. *Environmental rights and Brazil's obligations in the inter-american human rights system*, cit., p. 775.

³⁴ See Articles 3, 23 and 24 of the American Declaration of the Rights and Duties of Man and Articles 8.1, 12, 13, 21, 46 e 47 of the American Convention on Human Rights.

³⁵ For all: C.A. GOMES, *Textos dispersos de direito do ambiente*, vol III. Lisboa, Associação Acadêmica da Faculdade de Direito, 2010, p. 163-205.

1. Environmental Protection through the Reflex Pathway Technique

Environmental protection through the reflex pathway technique comes from three approaches observed by Alan Boyle.³⁶ According to the first approach, the existing mechanisms for international protection of civil and political rights can be used in support of environmental issues, especially when dealing with topics such as the right to information, political participation, and development of legal protective measures. The second approach gives access to a healthy and sound environment the same status as the other economic, social and cultural rights such as the rights to development and access to health. The third approach grants to "environmental quality" the status of a solidarity right able to ensure to the collective rather than to individuals the right to determine how to protect and manage environmental goods.³⁷

According to Alan Boyle, all three approaches are valid, but the notion that "the environmental quality" is, by itself, a protected right does not seem to be effective in the international plane since the so-called solidarity rights are wrapped in an extreme fragile international law framework comprised by nonbinding norms. This finding leads us to conclude that "there are rights that simply cannot be claimed to a Court".³⁸ Accordingly, to maintain environmental issues far from this type of situation, the most appropriate approaches seem to be ones that seek to green the existing international law mechanisms of civil, political, economic, social and cultural rights.³⁹

Thus, environmental law acquires two dimensions: an individual and a collective one. In the individual dimension, the access to a healthy environment is assured by vertical and horizontal relations. The vertical relations are related to the relationship between a group of individuals and State legal mechanisms focused on the protection of natural resources and on the guarantees of the civil and political rights such as the access to information and to the participation and management of environmental goods.

In the horizontal relations, environmental protection comes from the "third party effect," referred to in the German literature as "Drittwirkung." This means that fundamental rights must be ensured not only in relationships between individuals and states but also in relationships between individuals. Accordingly, the greening of civil and political rights results in an "environmental Drittwirkung," which, according to Cançado Trindade, corresponds to the "Drittwirkung" applied to the protection of human and environmental rights concerning the relationship between individuals, such as those regarding labor or private contracts, and the compliance

³⁶ BOYLE, A., "Human rights or environmental rights? A reassessment", cit., p. 471. Also see: A. KISS, D. SHELTON, *Judicial handbook on environmental law*, Nairobi, United Nations Environment Programme, 2005, p. 30-31.

³⁷ BOYLE, A., "Human rights or environmental rights? A reassessment", cit., p. 471.

³⁸ A.A.CANÇADO TRINDADE, "Os direitos humanos e o meio ambiente", In: J. SYMONIDES (ed). *Direitos humanos: novas dimensões e desafios*, Brasília: UNESCO Brasil, Secretaria Especial dos Direitos Humanos, 2003, p. 187. Also see: P.ELDER, "The wrong answer to the right(s) question", *Osgoode Hall Law Journal*. vol 22, n°. 2, Toronto, Osgoode Hall Law School of York University, Summer 1984, p. 111- 295.

³⁹ BOYLE, A., "Human rights or environmental rights? A reassessment", cit., p. 471-472.

with norms that guarantee to stakeholders their fundamental right of access to a healthy environment.⁴⁰

In the collective dimension, the human environment becomes a common good as the result of the greening of economic, social and cultural rights. This dimension results in the protection of vulnerable human groups or collectivities caused by the environmental degradation.⁴¹

In the Inter-American system, environmental protection through the reflex pathway technique is established by Article 19.6 of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, adopted in San Salvador, in November, 17, 1988, which states that issues related to the violation of those treaty provisions, including the right to the environment, can only be submitted to the Inter-American system upon demonstrating interconnections with violations of the American Convention on Human Rights.⁴²

Therefore, the Inter-American Commission and the Inter-American Court can only deal with violations of Article 11 of the San Salvador Protocol, namely, the right of access to a healthy environment, if the alleged environmental damage breaches at least one provision of the American Convention on Human Rights itself (not the Protocol). The following provisions of the American Convention are mostly inter-related with environmental issues: *a*) the right to juridical personality (Article 3); *b*) the right to life (Article 4); *c*) the right to a fair trial and to the due process of law (Article 8.1); *d*) the right to judicial protection (Article 25); *e*) and the principle of equality before the law (Article 1.1)⁴³.

2. Effects of Human Rights Greening

Indeed, in the Inter-American system, this dependence on a rigorous application of provisions of the American Convention is rather burdensome for environmental protection; however, it might be noted that within the fragility or "relative effectiveness" of the current international environmental law framework, environmental protection through a reflex or indirect pathway seeks to improve the

⁴⁰ See: A.A.CANÇADO TRINDADE, *Os direitos humanos e o meio ambiente*, cit., p. 188; and E. ENGLE, "Third party effect of fundamental rights (*Drittwirkung*)", *Hanse Law Review*, Vol. 5, n.º. 2, Bremen: Hanse Law School, p. 165-173.

⁴² Only cases of violation of Article 8, paragraph "a", and of Article 13 of the Protocol of San Salvador (related respectively to the rights of freedom of association and access to education) can be directly lodged to the Inter-American Commission or to the Inter-American Court without the need to demonstrate interrelationships with other provisions of the American Convention. For more about the Inter-American system procedures see: H.F. LEDESMA, *El sistema interamericano de protección de los derechos humanos, aspectos institucionales y procesales*, Instituto Interamericano de Derechos Humanos-IDHH, 3ª ed, 2004; and J.M. ARRIGHI, *OEA: Organização dos Estados Americanos*, Trad. Sérgio Bath, Barueri, Manole, 2004.

⁴³ For more details on the submission of environmental cases to the inter-American system see: G.F.M. TEIXEIRA, *O greening no sistema interamericano de direitos humanos*, Curitiba, Juruá, 2011, p. 99-161.

legal mechanisms focused on establishing a healthy environment and strengthening the protection of human rights⁴⁴.

Most environmental issues handled by the Inter-American system are inter-related with violations of the civil and political rights of indigenous and traditional communities. Consequently, the Inter-American Commission and the Inter-American Court crystallized positions which could not be routinely addressed by other human rights systems outside the regional specificities of the Americas. Accordingly, decisions from the Inter-American Commission and Court are, to a large extent, in accordance with the so-called "postmodern law", which comprises elements such as the recognition of pluralism, intercultural communication, and the "appreciation of human feelings and narrative standards"⁴⁵.

In order to recognize a pluralist system, provisions of the American Convention cannot be limited by Western values. For example, the Inter-American Court in the case of *Awás Tingni Community* concluded that the environmental damage of illegal logging in the territory of traditional indigenous groups violated the affected communities' right of ownership. The Court argued that the protection of the right to property enshrined in Article 21 of the American Convention includes not only (a) the Western perception of property rights, similar to a kind of "marketable commodity"⁴⁶ related to the "bundle of sticks" of use, enjoyment or mortgage, but extends to (b) the common law concept of property of indigenous and of the traditional peoples, ensured by their right to live on their traditional lands and to use their natural resources as a way of maintaining their cultural habits such as religion, farming, hunting, fishing, and their communities livelihoods.⁴⁷

The Inter-American Court has also expressed concerns with the "return of human feeling".⁴⁸ In *Moiwana v. Suriname*, the members of traditional Maroon people that were expelled from their traditional lands due to a massacre perpetrated by the Surinamese army against a N'djuka Maroon community were facing enormous difficulties to return to their traditional lands because they feared the "wrath of the spirits of the murdered dead". Accordingly, this situation led the Court to develop the concept of "spiritual damage" resulting from violations of provisions of the American Convention such as the right to personal integrity, security and judicial protection, right to property, and freedom of movement and residence. More than an expression, the concern with a "spiritual damage" caused to others indicates

⁴⁴ A.A.CANÇADO TRINDADE, *Os direitos humanos e o meio ambiente*, cit., p. 191. Also see: E. JAYME, "Identité culturelle et intégration: Le droit international privé post-moderne", *Recueil des Cours*, v. 251, 1995, p. 9-267; P. SANDS (ed.), *Enforcing environmental security*, In: *Greening international law*, London, Earthscan Publications Limited, 1993.

⁴⁵ E. JAYME, "Identité culturelle et intégration: Le droit international privé post-moderne", cit., p. 251

⁴⁶ T.T. ANKERSEN, T.K. RUPPERT, "Defending the polygon: the emerging human right to communal property", *Oklahoma Law Review*, vol. 59, n°. 4, Norman, University of Oklahoma College of Law, winter 2006, p. 684.

⁴⁷ T.T. ANKERSEN, T.K. RUPPERT. "Defending the polygon: the emerging human right to communal property", cit., p. 684

⁴⁸ E. JAYME, "Identité culturelle et intégration: Le droit international privé post-moderne", cit., p. 251.

that the comprehension or understanding of human feelings is an important element to consider in the search for the best solution in contentious cases.⁴⁹

In *Claude Reyes and others v. Chile*, about the State's failure to provide information about a deforestation project to three Chilean citizens, the Inter-American Court decided that (a) environmental cases not related to indigenous issues can be analyzed by the inter-American system and (b) that the right to freedom of expression established by Article 13 of the American Convention is inter-related with the right of access to information of Principle 10 of the Rio Declaration on Environment and Development (1992). By reaching this decision, the Court pointed out that the values contained in soft law standards can help us understand the scope of hard law norms. Accordingly, due to the necessity of assuring access to information, especially in environmental issues, Article 13 of the American Convention – regarding the freedom of expression – had its interpretation expanded.⁵⁰ Intercultural communication – another element of postmodern law – is expressed by the theory of the "dialogue des sources," which acknowledges that a single source of law might not suffice to protect human rights, and the best solution to a dispute is to seek the most favorable norm in the light of the specific case, regardless of whether the norm is from a domestic or an international source.⁵¹

In *Sawhoyamaxa Axa Indigenous Community v. Paraguay*, about the food, medical, and healthcare vulnerability of the Enxet Lengua *Sawhoyamaxa Axa* Indigenous Community caused by the non-recognition of their traditional lands, the theory of the "dialogue des sources" was used by the Inter-American Court to decide on the demarcation of indigenous lands. In this case, the Inter-American Court analyzed provisions of the American Convention on Human Rights, the ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, and Paraguay's constitutional and infra-constitutional norms.⁵²

The same technique was used in *Saramaka People v. Suriname*, in which the Court verified that despite the lack of any norm in Surinamese national law ensuring the communal property rights of tribal peoples, the Republic of Suriname was a State Party of the United Nations International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, which provide the access to fundamental rights including the right to property of "all peoples",⁵³ without any distinction. Thus, the Court concluded that the non-recognition of the

⁴⁹ See: D.B. MAGRAW, L. BAKER, "Globalization and communities: community-based property rights and prior informed consent", *Denver Journal of International Law and Policy*, Vol. 35, n^os. 3 e 4, 2008, Denver, Sturm College of Law, summer-fall 2007, p. 427.

⁵⁰ Inter-American Ct. H. R. *Claude Reyes and others v. Chile*, Judgment of September 19, 2006. Series C No. 151.

⁵¹ See: V.O. MAZZUOLI, *Tratados internacionais de direitos humanos e o direito interno*, São Paulo, Saraiva, 2010, p.129-177; and L.F. GOMES, Luiz Flávio; V.O. MAZZUOLI, *Comentários à Convenção Americana sobre direitos humanos: Pacto de San José da Costa Rica*, 3^a ed. rev., atual e ampl. São Paulo, RT, 2010, p. 206-207.

⁵² See: Inter-American Ct. H. R. *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of March 29, 2006. Series C No. 146, § 140.

⁵³ See: Article. 1 of the United Nations International Covenant on Civil and Political Rights; and Article 1 of the United Nations International Covenant on Economic, Social and Cultural Rights (1966).

Saramaka People's right to communal property constitutes a violation of Article 21 of the American Convention related to the right to property.⁵⁴

The dialogue between articles of the American Convention and provisions of other international treaties and of domestic law in order to apply the most beneficial provision for the protection of human rights is provided by Article 29.2 of the American Convention. This article spells out that no provision of the Convention shall be interpreted as "restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party".

In other words, Article 29 (b) of the American Convention is a provision that brings a *pro homine* interpretation to the Inter-American system. It represents an alternative to the "classical monism" which is incapable of differentiating international norms by their content, and consequently, in human rights matters, is replaced by the dialogue of international and domestic sources envisioned to select the most suitable norm to a specific case.⁵⁵ This approach is an important contribution of the Inter-American system to the strengthening of human rights protection. It allows "dialogues" between heterogeneous sources such as international conventions and municipal provisions, and enables "judges to coordinate these sources based on "what they say", that is, on their content."⁵⁶

Another effect of the "dialogue of sources" is to reinforce the idea that international human rights protection systems are subsidiary or complementary to those of domestic law. This means that the Inter-American system presupposes that primary jurisdiction for the protection of fundamental rights belongs to States. Therefore, international human rights protection systems do not intend to contradict State jurisdiction, but to inform which principles could be adopted domestically in order to achieve a common purpose of States and the international community: the protection and the promotion of human rights in the most effective and possible way.⁵⁷ Accordingly, Article 29.2 of the American Convention on Human Rights sets two important rules. First, it determines that the American Convention cannot restrict the application of more beneficial norms to the protection of individuals, regardless if these norms are domestic or international. Second, it informs that States must domestically apply provisions of the American Convention if they, as compared to the national provisions, prove to be more effective in protecting human rights.⁵⁸

In other words, the use of the "dialogue of sources" by the Inter-American Commission and by the Inter-American Court in environmental issues is a major contribution of the Inter-American system. This contribution surpasses the international plane because the study and the understanding of such interpretative techniques can encourage State Parties to adopt – in their respective legal systems –

⁵⁴ See: Inter-American Ct. H. R. *Saramaka People v. Suriname*, Judgment of November 28, 2007. Series C No. 172, § 93.

⁵⁵ V.O. MAZZUOLI, *Curso de direito internacional público*, cit., p. 90.

⁵⁶ E. JAYME, "Identité culturelle et intégration: le droit international privé post-moderne", cit., p. 259.

⁵⁷ See: C.M.A.CORAO, "Recepción de la jurisprudencia internacional sobre derechos humanos por la jurisprudencia constitucional", *Revista del Tribunal Constitucional*, n° 6, Sucre, nov. 2004, p. 23.

⁵⁸ L.F. GOMES, Luiz Flávio; V.O. MAZZUOLI, *Comentários à Convenção Americana sobre direitos humanos: Pacto de San José da Costa Rica*, cit., p. 209.

more effective solutions for disputes regarding environmental issues and the protection of human rights.

The international environmental protection established by the principles of the Stockholm Declaration on the Human Environment (1972) and by the Rio Declaration on Environment and Development (1992) is structured by a system whose engineering is able to accelerate the enforcement of its mechanisms; however, this same engineering only provides a relative effectiveness since it is comprised of non-binding norms. Nonetheless, it is possible to establish links between environmental protection and human rights provisions that are already crystalized in more developed international protection systems.

Thus, a different interpretation of the access to a healthy, decent or sound environment, and to provisions of civil and political rights – such as the right to information, political participation, and the development of legal protective measures – placed environmental law within the scope of the international protection of human rights.

However, environmental rights under the San Salvador Protocol are not justiciable, so the insertion of environmental issues into the Inter-American system is only possible through the demonstration of its interconnections with provisions from the American Declaration of the Rights and Duties of Man or the American Convention on Human Rights. There is no doubt the strict compliance with these provisions represent difficulties of bringing cases before the International Courts. However, within the fragility or relative effectiveness of the current international environmental law framework, environmental protection through a reflex or indirect pathway is an important bridge for the improvement of legal mechanisms focused on the protection of a healthy environment and on the protection of human rights.

Besides that, it might be emphasized that the Inter-American system was not intended to solve all the problems faced by the Americas, or to the replacement of the States' roles in the protection of human rights and the environment. Rather, the Inter-American system work is complementary to the OAS State Parties, which retain primacy in the protection of human rights. Consequently, its purpose is to encourage a domestic behavior compatible with the common goal of States and of the international community as a whole: the development of policies aimed at an effective protection of human rights.

Thus, the process of greening the Inter-American human rights system is an important contribution to the improvement of domestic and international mechanisms of environmental law and human rights.