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Title	The right to a healthy environment: a rights based approach to environmental issues
Author(s)	Costanzo, Chiara
Publication Date	2015-12-15
Item record	<a href="http://hdl.handle.net/10379/5426">http://hdl.handle.net/10379/5426</a>

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The Right to a Healthy Environment:  
A Rights Based Approach to  
Environmental Issues

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October 2015

## ABSTRACT

This thesis analyses the Right to a Healthy Environment (RHE) and identifies the added value of rights-based approaches (RBAs) in the broader context of sustainable development. It focuses particularly on the requirement for ‘meaningful participation’ and how a rights-based approach can provide a means to reconcile environmental protection, social development and economic activities.

There is an existing consensus over the strong connection between human rights and the environment, but different approaches are used to advance environmental claims in the current human rights framework. Regional approaches have been particularly helpful in contextualizing environmental claims, and adopting different rights-based approaches to environmental protection. Current debates indicate an inclination towards the adoption of the procedural approach, consisting in environmental access rights to information, public participation and justice.

The country context of Panama illustrates the opportunities and limitations of the procedural approach to issues of environmental contestation. An in-depth examination of the processes and outcomes of environmental decision-making in four major development projects indicates that the procedural approach cannot deliver substantive outcomes as it stands. This points to a fundamental failure of current RBAs to address environmental protection and sustainable development.

‘Meaningful participation’ is identified as being core to the RHE, but it lacks efficacy within the procedural approach. Public participation has a role in democratizing environmental decision making, but it is also important for promoting rights interdependence, transparency and accountability, and ensuring just distribution of benefits and burdens. The research elaborates on the nature of RBA to the RHE, identifies criteria for procedural rights, and offers a ‘4 As’-based approach to public participation processes in environmental decision making. This research suggests a more expansive interpretation of the RHE that looks to solidarity rights, marking a complementarity with the Right to Development and the recovery of rights indivisibility.

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## **List of Abbreviations**

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AIDA	Asociación Interamericana para la Defensa del Ambiente
ANAM	Autoridad Nacional del Ambiente
CBDR	Common But Differentiated Responsibilities Principle
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedom
ECLAC	Economic Commission for Latin America and the Caribbean
EComHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EIA	Environmental Impact Assessment
ESCRs	Economic, Social and Cultural Rights
IACommHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
ICESCR	International Covenant of Economic, Social and Cultural Rights
ILO	International Labour Organization
IUCN	International Union for the Conservation of Nature
IPCC	Intergovernmental Panel on Climate Change
OAS	Organization of American States
PRTRs	Pollutant Release and Transfer Registers
RBA	Rights Based Approach
RHE	Right to a Healthy Environment
SD	Sustainable Development
UDHR	Universal Declaration of Human Rights
UNEP	United Nations Environment Programme
UN/ECE	United Nations Economic Commission for Europe
UNDP	United Nations Development Programme
UN/GA	United Nations General Assembly
UPR	Universal Periodic Review (EPU - Examen Periódico Universal)
WCED	World Commission on Environment and Development
WCN	World Charter for Nature

## **Author's Declaration**

I declare that this thesis is my own original work except where otherwise stated and I have not obtained a degree in this university or elsewhere on the basis of this PhD thesis.

Signed: *Clare Costanzo*

Date: December 15<sup>th</sup>, 2015

## **Acknowledgments**

This thesis would have never been completed without the support of my supervisor Dr. Su-ming Khoo, who believed in me when I did not.

I would like to thank Raisa Banfield that gave me the opportunity to collaborate with CIAM Panama, Felix Wing Solis who I see as a role model for any human rights activist for his knowledge and broad view of human rights as well as for his humbleness and determination. I would also like to thank all my colleagues in CIAM: Tania Arosemena Boderó, Maruxi Acuña, Joana Abrego, Luis Mencomo, Mariana Méndez Bonini, Jairo David Carrasco, Washington Lum, Jenny Asyn and Jonathan.

I would like to thank the Panamanian communities of Isla Pedro Gonzalez, Santa Clara, Juan Diaz, Donoso. Getting to know them has contributed to shape my thinking as a human rights activist.

The maps in this thesis are courtesy of Santiago Gonzalez Arriola. Also, I thank him for the encouragement and moral support, for the love and care, despite this thesis keeping us apart.

I would like to thank my family who endured this journey with me, my parents, Giovanni and Teresa, for their love and my sisters, Alessandra who put a roof over my head in Galway, and Francesca.

*Fundamental rights have themselves no fixed content; most of them are empty vessels into which each generation must pour its content in the light of its experience.*

Keshavananda Bharati v. State of Kerala 1973 4 SCC 225, Supreme Court, India.

## Introduction

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Current international consensus agrees on the effectiveness of the procedural approach to environmental issues. The procedural approach consists of guaranteeing the right to access to information, public participation and access to justice in environmental decision-making. Shelton (1991) considers environmental degradation as being relevant to human rights since environmental degradation affects the right to life and to health. Boyd (2012) believes that constitutionalization of environmental rights is having an impact in shaping environmental laws and achieving better environmental performances. The UN Special Rapporteur John Knox (2014a) hailed procedural rights as the most suitable means to address environmental harm that interferes with the enjoyment of other human rights. Foti and de Silva (2010) advocate for procedural rights as a means to advance and expand participation and inclusion, promoting more democratic decision-making processes and providing mechanisms to challenge administrative decisions and seek redress.

Environmental issues or issues of environmental contestation refer not to environmental degradation or environmental quality per se, but to those environmental issues that create and exacerbate social conflicts. This interpretation goes beyond the meaning of environmental harm interfering with human rights, but also those interventions on the environment that affect access to and use of natural resources in manners that discriminate and marginalize peoples in the name of economic growth.

This research aims to analyse the contribution of the procedural approach – access to information, public participation, and access to justice - to address issues of environmental contestation within a human rights framework. Drawing on elements from different disciplines – law, post colonialism and resource sovereignty, and sustainable development - it examines the international provisions for a Right to a Healthy Environment (RHE) in the context of the contested paradigm of Sustainable Development (SD). It specifically looks at the Latin American interpretation of procedural rights to negotiate competing claims of SD. The main research question is whether meaningful participation, the key feature of the procedural approach to the RHE, can contribute to the advancement of environmental and social development pillars of SD.

This researcher dissents with most of the mainstream conclusions found in the existing literature stemming from the lack of holistic understanding of environmental issues. Three clusters of conclusions can be identified: I) environmental degradation undermines the core of human rights; II) constitutionalization of procedural rights as a signal of the acknowledgement of environment as a human rights issue; III) procedural rights as a means to advance democratic decision making processes. Having identified the gaps in these three established clusters, this research complements them with: IV) the different regional perspectives, specifically the Latin American one through the employment of the case study of Panama; and V) an

analysis on sustainable development and the underspecified pillar of social development. The points identified are elaborated in further detail below and the aims of this research (VI) are subsequently outlined.

#### I. Environmental degradation undermines the very core of human rights (life and health)

Shelton (1991) considers environmental degradation to be relevant to human rights since it can lead to violations of the right to life and to health. Jurisprudence shows consistently that environmental degradation can affect the right to life and the right to health, impeding the realization of other rights. The most recent documents produced by the UN independent expert Knox elaborate further this view; stressing the need to address environmental harm that interferes with the enjoyment of other rights. This research will not dispute this agreed view. However it considers said view limited. It can only afford protection to certain established rights, leaving aside claims for access to resources and distributional equality. The Universal Periodic Review mechanism shows that civil society recognises a cluster of environmental issues tied up with the Right to Development (RtD). Considering the lack of enforceability inherent to the RtD, current human rights regimes fail to address such environmental violations through established rights. Therefore, this research tries to recalibrate the attention on the environment as a human right as well as a developmental issue. From this perspective, it identifies social development as a main gap in environment as a human rights issue in the literature. This research therefore aims to appreciate the role of the environmental pillar within SD, and the relation not only with economic growth, but most importantly with the social development pillar.

#### II. Constitutionalization of procedural rights as a signal of the acknowledgement of environment as a human rights issue

Boyd (2012) believes that the constitutionalization of environmental rights is having an impact in implementing stronger environmental laws and in achieving better environmental performance. The fact that a right to environment is enshrined in a country's constitution directly promotes laws to foster environmental protection which in turn guarantee a suitable environment to fulfil human rights. Boyd's analysis, based on a quantitative comparison of legislation, does show that a constitutional RHE provides stronger environmental policies and enhances implementation and enforcement of law, but fails to address whether it can empower citizens and communities to participate in decision-making. It also fails to examine the capacity of constitutional environmental rights in preventing discrimination or providing remedies for violations of rights. While he considers that there are factors affecting the influence of RHE, such as economic, social and political conditions, availability of resources for implementation, rule of law and strength of civil society, he does not include them in the evaluation process.

This research differs from Boyd's analysis since it examines the political context within which the environmental claims are generated, adopting a transdisciplinary approach and examining the RHE within the paradigm of SD. Instead of looking at the RHE only as a means to further environmental protection, this research is concerned with the capacity of RHE to guarantee distributional equity and access to resources. Public participation plays a key role in this aspect of RHE. Therefore, it is questioned whether public participation can deliver access to decision-making process and inclusiveness.

### III. Procedural rights as a means to advance democratic decision making processes.

Foti and de Silva (2010) advocate for procedural rights as a means to advance and expand participation and inclusion, promoting more democratic decision-making processes and providing mechanisms to challenge administrative decisions and seek redress.

The case study of Panama is used to observe how the procedural approach works in a real decision making process and if it indeed delivers the above mentioned promises. What the case study shows is that the capacity of procedural rights to deliver substantive justice is limited. In fact, procedural rights are confined and contained within the environmental impact assessment processes, therefore cannot influence the core decision-making on use and access to resources. In addition, the procedural approach delivers administrative justice rather than substantive justice. However, it does not tackle the root of the environmental problem, but only the manifestation. Participation is limited by the technical nature of the process which is reflected in other rights. The procedural approach is designed to guarantee fairness in the process but it is not equipped to determine fair outcomes and it does not create the space to contemplate alternative development scenarios. In addition, the procedural approach is invoked to avoid environmental degradation from interfering with human rights enjoyment, instead of promoting indivisibility of rights considering the environment as a vehicle for the fulfilment of all human rights.

### IV. Regional perspectives: case study of Panama

There is extensive literature focusing only on regional interpretations of the RHE, specifically to regions with a supranational judicial system. Literature on the environment, human rights and regional systems however do demonstrate that there are different attitudes towards the subjects and that while the European Court for Human Rights has privileged a more traditional positivist approach, the American and the African systems have been more progressive; especially because of the type of claims that are presented. The case study of Panama which this research employs, and the focus on Latin American countries demonstrates the unique approach taken by the region in pushing for alternative participatory processes. The case study also demonstrates the deficiency in envisioning a synthesis between environmental claims and developmental claims, which reflects an underestimation of the social

development component of sustainable development. The urge for democratization of the Latin American region leads to question the appropriateness of the procedural approach in environmental issues.

#### V. Missing piece in the analysis: The social development pillar

Atapattu (2002) identifies a significant incoherence within the human rights regime that promotes the Right to Development and the RHE separately, advocating for a much needed synthesis of the competing interests presented by development and the environment in a right to SD. This research acknowledges Atapattu's analysis and identifies social development claims at the intersection of the right to development and the right to a healthy environment. In addition, the focus on the social development pillar reinforces the role of the three main international environmental law principles: the Precautionary Principle, Common But Differentiated Responsibilities Principle (CBDR) and the principle of intergenerational and intra-generational equity.

Considering the difficulties encountered in the realization of solidarity rights, this research does not endorse a right to SD. However, it recognizes the importance of negotiating a common ground between the Right to Development, which is recognized in virtue of the international declaration of 1986, and the right to a healthy environment, established in its procedures, but lacking an agreed substantive character.

#### VI. Aims of the research: procedural rights advancing sustainable development

This research aims therefore to position environmental rights as a negotiator of social development with economic growth, which are both limited and controlled by scientific and cultural standards that guarantee environmental protection and sustainability.

Procedural rights currently aim to compromise the needs of the environmental pillar in competition with the economic growth pillar, underspecifying the social development pillar demands for meaningful participation and redistribution (or distributional equity). The procedural approach therefore is used in deciding what level of environmental protection or degradation is acceptable to achieve economic growth purposes.

This research advances the idea that procedural rights should be seen as a means to negotiate sustainable development's competing interests. Participatory processes should aim to negotiate between the social and economic development pillars, and to promote concerted efforts for the access to, use and protection of natural resources for the benefits of all. Within this understanding, the procedural approach could intervene to resolve development disputes within scientifically and culturally agreed environmental limits.

## **Chapter 1 The Right to a Healthy Environment: contextualization of a trans-disciplinary topic**

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This chapter provides a contextualization of the research topic, the right to a healthy environment (RHE). It explores in depth the often conflicting relation between environmental protection, human rights and sustainable development.

The following section explores briefly the history of the concerns over environmental protection emphasizing the critical moments that shaped the evolving and contested discourses about environment and development. It frames the context for analysing the RHE and outlines the potential value of a rights based approach to addressing issues of environmental contestation. It attempts to address the limits imposed by existing legal frameworks and approaches in order to shift focus towards a sustainable development paradigm. Because of the existence of evidently conflicting goals – economic growth, social development and environmental protection – a rights based approach to the paradigm may offer the opportunity to overcome the current impasse and provide a basis for alternative conceptualizations.

This chapter provides an overview of the structure of the thesis and an outline of the contents. The initial literature review positions the research, locating it within the existing body of knowledge.

### **1.1 Uneven rights context**

Environmental demands have emerged in the context of the postcolonial and transnational processes of globalization. Environmental crisis and the challenges of environmental protection have sparked claims that there are fundamental environmental rights. If the 1972 Stockholm Declaration established the foundation of modern international environmental law (Atapattu, 2002: 71), the conceptualization of the right to environment sanctions the beginning of a new environmental era (Kiss, 1992: 199).

Environmental claims have found a place in the incomplete and continuously evolving project of human rights (ICHRP, 2009: 1). The process through which rights have been expanded or created *ex-novo* has been defined as a “rights revolution” (Boyd, 2012: 7). The rights revolution has been enabled by, on one hand, the constitutionalization of fundamental rights and the role of courts in the judicialization of politics (Boyd, 2012: 7). On the other hand, human rights organizations and local issue-driven struggles contributed to question the contents of recognised human rights and the capacity of current human rights regimes to address changing human rights threats. Human rights regimes have been failing to fulfil their aspiration of enabling “just communities committed to the full realization of both individual and collectivities” (Goodale, 2006: 491). The Declaration of the Right to Development in 1986 and the conceptualization of solidarity rights define a shift in focus from individual to collective human rights, responding to the need for

increased protection for a range of different groups as well as the need for justice and equality. The rise of the right to a healthy environment fits in the rights revolution context, as matters of concern are not limited to single individuals or to environmental protection. Instead, it vindicates the interdependence, interrelation and indivisibility of human rights and the systemic causes of human rights violations. It promotes a new understanding of human rights violations, approaching environmental issues as a result of social and economic processes that should be addressed before violations occur.

Even though the conceptualization of the RHE appeared as early as the 1990s, the human rights community has not embraced it. Rather it has been attacked as another result of the overproduction of human rights (Baxi, 2002: 67; see also Goodale, 2006), alongside the solidarity rights which have not been pursued in implementation for the alleged vagueness, lack of definition and their non-justiciability. However, the persistence, worsening and increasing scale of environmental problems, has led to the recognition that global concerted efforts were needed (Atapattu, 2002: 80).

Boyd (2012) argues that an environmental rights revolution is currently underway. In its analysis of constitutional RHE, he argues that because of RHE enshrinement in so many constitutions, law has finally accepted the environment as a human rights issue no less important of any more established rights. Years earlier Douglas Scott (1996: 110-111), reviewing constitutional environmental rights in the European Union, affirmed that those constitutional rights were a false hope and were merely a statement of intention for public policy, or a mandate to legislators to enact environmental protection measures, and were not providing a right for individuals to exercise. The European Union in 1999 adopted the Aarhus Convention which provided a comprehensive and progressive template for access rights, but policies and law have not changed dramatically, not recognizing a right to environment and persevering in the application of the right to life (art. 2 ECHR) or the right to family and private life (art. 8 ECHR) to vindicate what are environmental rights in principle. Much progress has been achieved in 20 years. However, Boyd talks about an environmental rights revolution that is, in reality, geographically limited, and it is part of a broader human rights revolution driven by civil society movements that addresses concerns of global capitalism and democracy (Blau and Moncada, 2009). The geographical and historical contexts are important factors and make comparison across regions problematic and difficult. Similar characteristics are shared by the most progressive countries: high proportion of indigenous populations; strong dependency on natural resources; existing colonial legacies; and a compelling urge for bottom-up democratization. On the other hand, the European Union does not present these exact characteristics. Despite its role as a supranational political entity, which proposes agreements on transnational environmental issues, appealing to the inherent international character of public interest issues and 'common good' (Yearley, 1996), the European regional system faces challenges of implementation and policy integration (Selin and VanDeveer, 2015), adopting a top-down approach

that limits peoples' direct involvement in environmental decisions in opposition with the critical feature of broad participation of environmental governance (Douglas Scott, 1996). Blau and Moncada (2009) even suggest that top-down governance structures are incompatible with informed and empowered citizens that have and exercise rights. In contrast, the Latin American and Caribbean regions have a different character, with instances of bottom-up democratization and collective mobilization that makes environmental contestation one of the grounds for revolutionary approaches to be tested.

## **1.2 Contextualization of the topic: why the RHE**

Environmental protection has become a predominant topic of discussion in the international arena in the last five decades. Environmental consciousness has developed in different phases, incorporating different issues. Many commentators suggest that the international debates were sparked by Carson's *Silent Spring* (1962) which described the effects of pesticides on local fauna. While the problem of pesticide pollution continues, environmental problems are now more diffuse and urgent. Recent environmental concerns revolve around global climate change that has "increased likelihood of severe, pervasive, and irreversible" (IPCC, 2014b: 14) effects on natural systems and human beings. The approaches that shaped environmental concerns evolved from largely "scientific" questions centred on detecting and evidencing instances of environmental damage. Changes on a more systemic level and multidimensional problems were recognized with the rise of systems approaches that conceptualize the world as an interconnected set of elements organized to achieve a particular purpose as an integral whole without legitimate boundaries (Meadows, 2009). Systems approaches have contributed to environmental concerns to incorporate issues of equitable access to resources and human rights enjoyment dependent on the respect and protection of the environment. Despite the broad recognition that multidimensional inequality and vulnerability to climate change is caused by intersecting social processes (IPCC, 2014a: 7), interacting social, economic and cultural factors have not been fully analysed in addressing climate change vulnerability (IPCC, 2014b: 11). Fair and transparent decision-making is key to achieve the goal of climate-resilient sustainable development. Political choices are created through "iterative learning, deliberative processes, and innovation" (IPCC, 2014b: 26). Such processes may secure climate resilient means to improve social and economic wellbeing while guaranteeing "responsible environmental management" (IPCC, 2014b: 25), but only if they are shaped by local needs and understandings.

The relation between environment, human rights and economic development has established itself because of issues arising in the local and global context (Atapattu, 2002: 70; see also Lutz *et al.* 1988). The convergence of environmental and human rights movements contributed to identify environmental problems that give rise to human rights violations (Atapattu, 2002: 69). At the same time, it became evident the dependency of the right to life on the environment. The UN Special Rapporteur on

Human Rights and Environment John Knox (2012, 2013b), whose mandate as an independent expert, first, has been extended to study the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment as well as challenges and obstacles to their implementation (A/HRC/RES/19/10, A/HRC/28/L.19), recognized that a firmly established relation is that environmental degradation can adversely affect human rights enjoyment (Knox, 2012: para. 34). Specifically, environmental threats caused by climate change, toxic waste and extractive industries threaten directly the right to health, water and food (Knox, 2013b: para. 20-22).

### **1.3 Political context**

The international political context for the RHE has tended to be dominated by claims for resource sovereignty. The trend of resource depletion and environmental degradation greatly affect developing nations and are perceived as one of the consequences of colonialism (Woodhouse and Chimhowu, 2005). Claims of resource sovereignty are primarily concerned with gaining access to opportunities for economic development. But there is also a concern for environmental protection and to restore traditional use of resources.

The demands of the Declaration on the Establishment of the New International Economic Order (UN/GA, 1974) contributed to changes in framing environmental debates, bringing together claims of resources sovereignty, equity and the Right to Development. A new international economic order could not be established without changing the system of international law, considering law as a suprastructure that needs adjustments according to political and economic changes (Bulajić, 1986: 43).

Globalization has complicated the assumptions of territorial sovereignty, adding new claims to the classic sovereign demand for benefits from indigenous environmental resources to be enjoyed within countries boundaries. The role of globalization and the formation of a global economy have encouraged on one hand the promotion of human rights regimes and on the other hand soft states that lack political and economic power (Baxi, 2002: 140-142) to control and protect the environment. Globalization and transnationalization since the late 1970s have stimulated new issues of regulation, interest in ‘polluter pays’ measures and bans on specific types of transnational trade in hazardous or toxic products. However, lack of strict responsibility rules for foreign investments in environmental hazardous activities and in natural resources exploitation in countries with poor institutional capacity to enforce environmental regulations have produced infamous environmental disasters such as Bhopal gas accident (1984, India. Baxi, 2010), Ok Tedi mine pollution (1999, Papua New Guinea. WRI, 2003), and oil pollution by Shell in Ogoniland (2001, Nigeria. UNEP, 2011).

Globalization also contributed to the consolidation of natural resources management practices shaped by colonialism. The imposition of a new human-

nature relationship was the foundation of colonial economy that contributed to unequal access to, and control over, resources (Woodhouse and Chimhowu, 2005). The dichotomy of the modernity of industrial society of the colonial countries and the forcibly maintained, “traditional” societies of colonized ones contributed to the elaboration of two opposing narratives: one promoting modernization, the other attempting to protect traditional social forms against industrial society (Woodhouse and Chimhowu, 2005: 183). Concerns about production/consumption patterns, adverse impacts of technologies and critiques of modern scientific knowledge led to many-sided questioning of the relationship between people, nature and natural resources. This culminated in the conceptualization of sustainable development. Environmental matters became a development policy concern, involving issues of access to resources and justice. Thus, the environmental discourse has evolved into a space of contestation over alternative visions of development (Peet and Watts, 2004, cited in Woodhouse and Chimhowu, 2005: 194-195).

#### **1.4 Approaching RHE: a complex trans-disciplinary topic**

The literature review for this research spans different topics related to the environmental subject from different disciplines, building a logical connection from the rights based approach towards sustainable development. The variety of disciplines involved in the literature review reflects the complexity of the subject of the ‘environment’ beyond the technical aspects of environmental protection. Three broad approaches can be identified: i) law, ii) post colonialism and resource sovereignty, and iii) sustainable development. Each topic contributes to address a specific aspect of the environmental debate and fills the void left by the others. The initial literature review pulls out eight themes characterizing the dimensions of the environmental debate and justifying approaches to address it. Each subsections deals with them in turn: (i) environment and rights; (ii) debates on the scope of environmental rights; (iii) solidarity rights; (iv); sustainable development and procedural approach; (v) limitations of a procedural approach; (vi) juxtaposition of rights and development; (vii) postcolonial legacies; (viii) regional approaches.

To begin with, a comprehensive but not exhaustive overview of the legal literature on human rights and the environment is attempted. This literature establishes the relation between human rights and the environment through the main legal instruments that have been adopted at international, regional and national level. Two different approaches can be discerned within the legal literature. The positivist approach relies on the argument that human rights exist when there are the institutions and laws that affirm they exist (Langlois, 2009: 17). This approach focuses on individuals as rights holders and the need to fulfil certain justiciability criteria. The constructivist approach offers the view that human rights are socially constructed, and are the product of the balance of power of political interests at a particular point in history and in particular social contexts (Short, 2009: 95). This view is more expansive than the positivist one. It creates the opportunity to expand the categories of rights holders and duty bearers. In this perspective, the surge of

solidarity rights becomes particularly relevant as they attend to communal aspects of human beings (Langlois, 2009: 24) and counter the excessive individualism of human rights (Wellman, 2000: 642).

Concepts found in the literature on post colonialism and self-determination are useful to fully understand the realm of solidarity rights. Therefore, a brief overview of literature on resources sovereignty and environmental colonial legacies is offered. While the legal literature tends to reinforce the separation between individuals and the environment, the approach on post colonialism reconnect the peoples to the environment, bringing to the forefront political questions surrounding claims for access and benefit sharing that fail to be answered by law. The overview of claims to self-determination and resource sovereignty outlines the fundamental aspects of countries' struggles in the international arena, where the North/South divide becomes a major political barrier that is challenging to overcome. Claims of resources sovereignty are generated in specific geographic contexts. Human rights are filtered through local experiences and needs. This move redefines the meaning of solidarity rights and questions the significance of human rights' universality. The appreciation of regional perspectives on human rights addresses these two issues, providing a perspective of human rights globalization.

The political struggle for access to resources embodied by the North/South divide includes rights claims as well as economic claims to development. Sustainable Development (SD) paradigm has provided the main context for environmental struggles and claims for economic development, since its three pillars – economic, environmental and social development – express the breadth of environmental contestation. Environmental protection and social development are often subordinated to economic growth, creating a conflict of, and trade-off between, objectives. Nevertheless, the problem of sustainable development and the balance between the pillars is challenging but solutions to environmental conflicts can be addressed through public participation in the process of development. Public participation is seen as a basic ground for establishing equitable access to resources while protecting the interests of future generations.

Public participation is also the strategic component of the procedural approach that aims to increase environmental protection through the inclusion of marginalized groups in environmental decision-making. Leading scholars such as Shelton (1991, 2010a, 2010b) and Boyle and Anderson (1996) consider procedural rights, or the procedural approach, the strongest argument for the environment to be formulated in human rights language. The procedural approach addresses environmental issues in terms of access to information, participation and justice. The importance of the role of participation is that it draws attention to matters of power, discrimination and poverty which are developmental concerns. However, while procedural rights represent an opportunity to arrive at environmentally sound decisions, they do not address the developmental benefits and burdens of the decision-making processes

and fail to engage directly with core issues of poverty that are implicated in environmental justice.

The failure of the legalistic approach to consider broader development issues connected to environmental matters is the reason to search for a more holistic perspective. The aim in this thesis is to reconcile the RHE with SD, using procedural rights to address the differing goals of SD in a constructive, rather than compromising, manner.

#### **i. Starting points for environment and rights**

The Stockholm Declaration (1972) ignited the recognition of the relation between environmental protection, human rights and economic development. The declaration stems from the concern of preserving the human environment while improving the quality of life for all. This definition of human environment is influential in setting the parameters of the debate on environment, human rights and development. Two core elements are identified for understanding and possibly addressing human environmental protection: the acceptance of human responsibility; and extensive cooperation at international level as the only way to achieve protection and improved quality of life for all. The preamble specifically characterizes the environment and the relation with human beings in terms of human environment interactions with basic rights and economic development. While the Stockholm Declaration was the first to synthesise this human environment relation in terms of human rights, it fell short in providing protection for the environment as it defined the environment somewhat narrowly on ‘human’ terms.

The introduction of human rights language into the field of environmental dispute has created a fertile ground for the formulation of a right to environment and environmental rights. The incorporation of specific environmental rights into regional as well as national legal instruments has established the environment as a human rights issue. This has also raised the questions about the capacity of human rights regimes to deal with changing needs and realities. The African and American regional systems contain direct references to a right to environment. The European system has avoided the recognition of a stand-alone right, favouring instead the promotion of procedural approaches to environmental rights.

The African Charter on Human and Peoples’ Rights (1981) is the only regional instrument to directly recognize the RHE as a solidarity right. The novelty of the African Charter lies in the incorporation of a new conception of human rights (Ougergouz, 2003: 57), enshrining solidarity rights with a “cluster of provisions on collective rights” (Scheinin, 2010: 346). Article 24 affirms the “right to a general satisfactory environment” with explicit reference to the environment as enabler of development. RHE as a solidarity right represents a hybrid of human rights, integrating a positive character concerned with welfare, similar to economic, social

and cultural (ESC) rights, and a negative character that prevent states from interfering with individual liberty, typical of civil and political rights (Boyd, 2012).

The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, known as Protocol of San Salvador (1999) enshrines the RHE in Article 11. The first clause of the article refers to the human environment, while the second clause states the obligation of the state to protect, preserve and improve the environment. The Inter-American system has endorsed the RHE as a collective right. However, it seems limited in practice to ‘indigenous’ collectives.

The RHE or specific environmental rights have been included in 93 national constitutions worldwide with varying definitions (based on 2011 data; Boyd, 2012: 59). The most comprehensive and progressive law has been elaborated by Bolivia in 2010. The *Ley de derechos de la Madre Tierra* (Law of the Rights of Mother Earth) recognizes the rights of ‘Mother Earth’ and specifies obligations and duties of the state, individuals, public and private moral entities, and society as a collective to guarantee the respect of these rights. The revolutionary approach of this law lies in the assignment of rights to Mother Earth. It provides a solidaristic understanding of entitlements based on alternative forms of legal knowledge (Roa-García et al., 2015: 272), recognising Mother Earth as a “collective entity of public interest” that subordinates individual rights to collective rights. Critiques have been formulated, though, for the ambiguity in the use of the indigenous concepts of ‘Living Well’ and ‘Mother Earth’, characteristic of social movements’ political discourse, as a legitimization strategy for the neoliberal Bolivarian state (Zimmerer, 2015).

## **ii. Debates on the scope of an environmental right implied by different legal perspectives**

From a positive law perspective, a one to one relationship between environmental protection and human rights may be expressed in two ways. Specifically, environmental protection may be seen as a facilitator for the achievement of human rights standards providing the adequate context for human rights enjoyment. Or conversely, human rights standards can contribute to the purposes of environmental protection (Shelton, 1991; Boyle and Anderson, 1996). The appropriateness of the relation of environment and human rights and the emergence of a right in itself are both subjects of debates in the light of a static international legal system and its inadequacy to deal with emerging issues of contestation. The positive law approach to environmental issues has provided tools to fill the legislative gap but has failed to fully accept the environmental dimension of human rights.

Shelton (1991: 138) argues that human rights and environmental protection, despite representing “different but overlapping social values”, can enhance each other’s sets of objectives since they strive for the same ultimate goal: the achievement and maintenance of the highest quality of human life. Shelton

reinforces the idea of mutual reciprocity that human rights depend on environmental protection and environmental protection depends upon the exercise of existing rights such as the right to information and the right to political participation. However, from a positivist stance, Boyle and Anderson (1996) consider the RHE to be problematic for two reasons: it is not recognised in any legally binding universal instrument, and it has no operational definition that allows its enforcement. The lack of a precise formulation of the RHE is rooted in the perception of the environment as a value judgement that varies across cultures. This variability makes it difficult to codify in legal language.

In addition, the eventual recognition of an environmental human right is considered to be impossible because of the chronic vagueness of the formulation and interpretation of the right. Critiques of vagueness refer to the interpretation of meanings assigned to the term “environment”, the qualitative and quantitative standards of reference of the right, the clear identification of rights holders and duty bearers. The importance of this debate lies in the fact that the capacity of the right to be enforceable and justiciable might be undermined by the lack of a precise definition. However, many authors provide solutions to this critique of the RHE addressing various supposed weaknesses of the right.

Desgagné (1995) addresses the critique of the vagueness, and broadness, of the term “environment”, that would discourage interpretation and application of the right. He asserts that the vagueness of the term is a reflection of the persistent doctrinal controversy surrounding human rights and environmental protection. However, the number of legal instruments that include the RHE shows a general acceptance that human rights and environmental protection are in fact related in multiple ways and, even though they might represent different social values (Shelton, 1991), they need equal promotion (Desgagné, 1995).

Van Dyke (1994: 355) argues that the vagueness of RHE is, in fact, a positive feature conferring a flexibility that enables the right to adapt to social and environmental necessities.

Anderson (1996b) similarly believes that “substantive ambiguity” gives enough flexibility to fill gaps in regulations and can address complex and indirect environmental issues. He stresses that narrow definitions of RHE should be avoided since they carry different social and economic consequences (Anderson, 1996b: 225) and could reduce the capacity of the right to be protected.

More broadly, Alston considers the vagueness a “*chameleon-like quality*” (Alston, 1984: 613; see also Alston, 2001) of new solidarity rights that allows consensus building and support.

Boyd (2012) argues that the alleged vagueness of the RHE has not impeded enshrinement in constitutions, courts interpretation and implementation of the right. In fact, the problem of the vagueness of the right is often seen as a common feature of every human right (Freeman, 2002: 5). Boyd (2012: 33) adds that constitutional provisions are by necessity brief and inherently vague. The understanding of human

rights should not derive from detailed definitions nor court interpretations, but rather from a more systemic analysis of concepts, moral judgement and social scientific knowledge (Freeman, 2002: 5) or from public consciousness (Shelton, 1991: 135). Operational meanings are shaped by the political, social and cultural contexts (Boyd, 2012: 33; see also Shelton, 1991: 135), and develop over time. Therefore, the RHE is as vague as other rights. A degree of vagueness is further justifiable by the changing scientific capacity to define and quantify environmental quality standards (Boyd, 2012).

Whatever the challenge presented by the positivist perspective, environmental issues could not be ignored by the human rights discourse. The need to address environmental protection as a major gap in human rights stimulated three main RBAs to environmental issues: 1. reinterpreting existing human rights; 2. formulating a new human right; 3. expanding existing environmental rights (Shelton, 1991; Atapattu, 2002).

Boyle and Anderson (1996) identified advantages and disadvantages of approaching environmental issues through a rights framework. The advantage may be that a rights based framework provides a strong claim to an absolute entitlement not prone to negative influences of strong powers. It provides wider access to justice, supporting legitimate claims that would otherwise fall through legislative gaps. The general statements that characterize human rights regime can stimulate political activism at local as well as international level. In general, rights encourage political debates for the creation of meanings and contents relevant to specific contexts. At the same time, they may provide means to bridge local issues to global concerns, promoting political mobilization (Anderson, 1996a: 22).

The disadvantages of applying a rights framework to environmental issues are: the inadequacy of human rights to address the technical component of environmental management; and the incapacity of rights to understand the social and economic factors underlying environmental degradation (Anderson, 1996a: 22-23).

In a recent and influential book arguing that a stand-alone human right to environment can lead to better environmental performances, Boyd (2012) considers the fact that the right to a healthy environment is enshrined in many constitutions to be a turning point in what he calls the environmental rights revolution. Based on a comparative analysis of states' legislation, courts' cases and international instruments, Boyd argues that the RHE automatically overcomes all the critiques of lack of substantive content and justiciability aimed against it by positivist law because it signals a presence at the very highest level in the hierarchy of legal instruments. A constitutionalized RHE transcends the debates, being an individual and collective right and having a positive (welfare) as well as a negative (liberty) character. In addition, analysing the capacity of the constitutional RHE to contribute to environmental protection, Boyd suggests that constitutional RHE leads to better environmental performance. Even though RHE is contributing to environmental progress, Boyd recognizes that ecological sustainability remains a distant goal. However, Boyd's study does not consider the social and economic contexts of the

legislation examined, leaving the question of implementation open to interpretation. Boyd's quantitative study on the constitutional RHE fills the gap in environmental rights literature of a quantitative study, and indicates a potential benefit in taking a constructivist approach to tailor a human right to environment.

A less controversial Rights Based Approach (RBA) to environmental issues lies in the application and expansion of existing procedural rights – access to information, participation and access to justice. Procedural rights are supposed to guarantee a transparent decision-making process that may lead to better environmental decisions. The importance of this approach is that it represents a compromise between the positivist and the constructivist approaches, offering a way to also reconcile the perennial division of human rights into the more or less justiciable categories of civil and political rights, and economic, social and cultural rights. Boyle (1996) identifies three possible functions of environmental rights within the current international law framework. First, environmental rights as identified in the procedural approach can be ascribed to civil and political rights, serving an empowerment role and increasing participation. Second, the development of a substantive component of environmental rights to promote a defined level of environmental quality (Boyle, 1996: 48) could enable such rights to be granted a comparable status to economic, social and cultural rights. Thirdly, environmental rights could be ascribed to solidarity rights, imposing duties of international cooperation and financial and technological transfer.

Shelton (1991) adds a further argument that the RHE as an international human right needs substantive minima to support procedural rights. At state level, a definition based on independent criteria of health and safety could be elaborated to address changing threats to humanity. These instruments should be capable of adapting to scientific knowledge and models of the environment as well as to the variables of space and time. The definition envisioned by Shelton, though, could be criticized for being anthropocentric and reductive. Grounding the RHE in health and safety criteria could be interpreted in terms of the need to preserve the biosphere so that human existence is not threatened. This critique of anthropocentrism suggests that there is an alternative ecocentric view questioning the possibility to protect the environment beside the consequences that might have on public human health. Nevertheless, Shelton's narrow definition would not be capable to address environmental issues generated by value conflicts beyond public human health concerns. For instance, a definition based on health and safety criteria would not be able to support claims of sustainable development, cultural or aesthetic value of the environment.

The UN Special Rapporteur John Knox observes that there are a “growing number of legal statements that together create a body of human rights norms relating to the environment” (2013b: para. 26) and that despite their diversity, these legal statements are coherent, providing “strong evidence of converging trends towards greater uniformity [...] of human rights obligations relating to the

environment” (Knox, 2013b: para. 27). Knox suggests that human rights law provides the base for imposing procedural obligations on state as well as substantive obligations. However, while legal statements agree that human rights applied to environmental protection impose procedural obligations on states (Knox, 2013b: para. 29), they diverge on substantive obligations. States have obligations to protect against environmental harm that interferes with the enjoyment of other defined rights, but their content depends on the specific human rights violated by environmental threats (Knox, 2013b: para. 44). Substantive obligations can be related though to the necessity of states to adopt and implement an adequate legal framework to protect against environmental harm that may infringe on enjoyment of human rights and to regulate private actors to protect against such environmental harm (Knox, 2013b: para. 46).

### **iii. Solidarity Rights**

Solidarity rights may represent an alternative to the dissatisfaction of well-established individual human rights and the shortcomings of an individualistic approach in local contexts despite their universality. In this sense, we might consider solidarity rights as the product of glocalization of law, where glocalization is understood as the entanglement of global and local processes (Randeria, 2007: 14).

Boyle (1996: 46) affirms that solidarity rights are programmatic in nature and inhere in groups rather than individuals, imposing a diffuse type of responsibility and largely influenced by the concept of redistributive justice between states. If environmental rights were to be recognised as solidarity rights, extensive cooperation between states and international institutions should provide the necessary financial and technological means to achieve global environmental targets, benefiting especially developing states (Boyle, 1996: 48). International environmental treaties already recognize the need for cooperation assistance to guarantee that all the states parties can reach the common agreed targets of environmental protection. Boyle (1996: 57-58) questions whether an environmental solidarity right imposing an obligation to technical and financial cooperation would lead to greater commitment by states. He argues that the application of the Common But Differentiated Responsibilities (CBDR) Principle makes the question irrelevant as it already imposes positive obligations to cooperate.

Kiss (1992) affirms that the right to environment understood as principle synthesises elements from both civil and political rights and economic, social and cultural rights, providing protection for the rights of future generations and imposing the idea of collective responsibility.

#### **iv. Contested nature of Sustainable Development and possible advantages of a procedural approach**

The procedural approach as expressed in Principle 10 of Rio Declaration (1992) is centred on public participation as a means to promote the processes of sustainable development. Ksentini (1994: 70) notes the importance of participatory democracy in the context of the environment for the concept of sustainable development to have substance. However, the conceptualization of sustainable development remains open to debate and lately the terms have become nearly devoid of meaning due to their over use (or even abuse) by governments and industries.

The procedural approach relies upon the implementation of Principle 10 of Rio Declaration as a means to achieve greater environmental protection (Foti and Silva, 2010). The procedural approach involves participation in decision-making processes; appropriate access to information; and effective access to judicial and administrative proceedings. Procedural rights promoted in Principle 10 can be distinguished from the ones enshrined in the International Covenant on Civil and Political Rights (1966b) for their specificity to the environmental context and the way they establish the interdependence of the main principles of participation (Boyle, 1996). This “refinement” (Handl, 1992: 139-40) represents the main justification for human rights law moving into environmental issues (Boyle, 1996: 61). Boyle (1996: 59) suggests that procedural rights constitute the “narrowest but strongest argument” for the environment to be formulated in human rights language. Handl (1992: 139-40) specifies how environmental procedural rights are pivotal in the triangulation of human right, democracy and environmental protection. Therefore, the application of Principle 10 sanctions the intertwining of the right to a healthy environment with sustainable development discourse.

Jones and Stokke (2005) affirm that procedural rights are instruments for the citizens to be legitimate and active agents in realizing human rights. The processes of citizen actions in relation to the environment become the focus of procedural rights. Since vulnerable groups are excluded from the decision-making processes, the procedural approach tends primarily to protect them and promote their participation as they are the immediate sufferers of environmental degradation.

Advocates of the procedural approach suggest two characteristics that make it superior to the substantive right to the environment. First, the democratic and informed debate that the procedural approach advocates for constitutes the means to address unequal distribution of environmental costs and benefits (Boyle and Anderson, 1996: 9). The advocates of this approach suggest that if the social groups most affected by environmental degradation are involved in decision-making, the process would necessarily lead to the adoption of policies more favourable to environmental protection. Second, procedural rights can provide the flexibility and cultural, as well as contextual, sensitivity to address the legal problem of defining in universal terms the desired quality of the environment, which is considered a value judgement (Boyle and Anderson, 1996: 9).

The procedural approach can also respond to the critiques of anthropocentrism of the right to environment. In fact, (Boyle, 1996) notes that access rights can be exercised on behalf of the environment and its non-human components. Redgwell (1996: 86) adds that procedural rights are able to incorporate non-human interests into the legal process, even though they are characterized by anthropocentricity.

#### **v. Limitations of a procedural approach**

Despite some clear advantages that the procedural rights present in comparison to the substantive right to environment, they have limitations in practice. Procedural rights are highly dependent on transparent democratic processes, rule of law, and enforcement of non-discrimination policies. Particular attention should be given to the analysis of the processes and of the outcomes in a separate manner. The aim of procedural rights is to guarantee transparent processes through which reach decisions that improve environmental protection through citizen control. However, such decision-making processes are rarely purely environmental, but deal also with core issues such as access to resources and dynamics of power, not only within a state but also between states (ICHRP, 2009). Public policies impact on human rights, development and the environment at the same time. Procedural rights could be equipped to address complex issues of sustainable development, where economic development, environmental protection and social development must be reconciled. Failure of procedural rights to deliver justice, environmental and social, suggests that procedural rights do not automatically fulfil any of the aims of protecting human rights, improving environmental protection or promoting sustainable development friendly decisions.

#### **vi. The juxtaposition of ‘rights’ and ‘development’**

Human rights issues that are framed as legal problems often cannot be resolved by law, but require broader developmental and political measures (ICHRP, 2009). Especially in the environmental context, the legal route has fallen far short of fulfilling the need for justice or environmental protection. Different legal approaches have managed to concentrate on single aspects of environmental issues, but never managed to address environmental contestation phenomenon as a human rights and developmental whole. The need to explore the development and political discourse to fill this gap is quite compelling and few authors have explored this route with similar theoretical findings.

States that have as a primary objective to increase economic growth are more likely to weaken environmental protection legislation, marking an adversarial relationship between economic development and environmental protection. In the context of environmental degradation or exploitation for economic purposes, human rights violations are often recorded. There is an increased potential impact of environmental degradation on human rights violations in the case of economic development activities, as highly polluting activities tend to migrate to countries

characterized by laxer laws and regulations (Yearley, 1996). It is evident therefore, that development and environment are two potentially conflicting subjects that sustainable development tries to reconcile by triangulating them with social demands. In these cases where environmental interests are threatened by economic activities, the procedural approach does not necessarily guarantee higher standards of environmental protection, or the reaching of “environmentally friendly” decisions. Since procedural rights challenge the process, governing principles and results of public policies decision-making, a more complex analysis that incorporates economic development issues needs to be adopted.

Giorgietta (2004) and Atapattu (2002) investigate the relationship between development and the environment, arriving at similar conclusions. Giorgietta, analysing the relationship between human rights and the environment, affirms that the concept of sustainable development ideally incorporates the interrelated domains of economic development, environmental protection and human rights. She importantly claims that sustainable development principles are a viable solution to reconcile these concepts (see also Shelton, 2010). Giorgietta recognizes participation as the central element underpinning the RHE, as stated by Principle 10 of the Rio Declaration (1992) and subsequently deepened in the Aarhus Convention (1998).

Atapattu (2002) calls for a new right, the Right to Sustainable Development, to reconcile development and environment. He supports the procedural approach, affirming it is an example of existing human rights machinery applied for the resolution of environmental disputes. Atapattu argues that procedural rights do not imply the recognition of a stand-alone RHE, leading him to focus on the theoretical gap that lies between the Right to Development and the concept of sustainable development. The concept of sustainable development is seen as a solution to reconcile development and environment through solidarity rights such as the right of future generations. Atapattu (2002) suggests also that Right to Development might be deployed as a justification to weaken environmental protection, thereby undermining the scope of RHE. Even though he fails to move beyond a purely formal conceptual debate, he does recognize the importance of the solidarity rights understood as rights that need concerted efforts of all social actors for their realization.

Anderson (1996a: 9) lists procedural rights specific to environmental decision-making. It includes the right to be informed in advance of environmental risks, the right to participate in environmental decision-making at international level, the right to environmental impact assessment. In addition, three complementary rights of the right to access to justice are identified that highlight the complexity of environmental procedural justice: the right to legal redress, the right to expanded *locus standi* to facilitate public interest litigation; and the right to effective remedies in case of environmental damage.

Foti et al. (2008) suggests that access rights are means of environmental democracy that enable individuals to enjoy a clean and safe environment. Enabling individuals to participate in environmental decision-making processes can also influence decisions on the entitlement, allocation and use of resources, engaging with core issues of poverty. Meaningful participation can only occur if individuals have the possibility to influence the outcomes of decision-making process (Foti and de Silva, 2010: 13). However, the procedural approach has limits. Despite legislative efforts to enforce procedural rights at national level and the number of international instruments covering the issues of information and participation, the focus is still on “availability” rather than on the “usability” of procedures, excluding the poor (Foti and de Silva, 2010: 3). Participation is also often reduced to a requirement compliance of environmental impact assessments, negating peoples the chance to decide.

#### **vii. Postcolonial legacies and the question of resource sovereignty**

Several authors identified the violation of cultural rights as concurrent with environmental degradation (Anderson, 1996a: 6). Therefore, Anderson argues that the right to self-determination might positively influence environmental protection in two ways. First, it promotes the absolute concept of permanent sovereignty over natural resources which contribute to protect the environment from resources exploitation. The second approach promotes a certain degree of political and economic autonomy to ethnically distinct groups within state boundaries (Anderson, 1996a: 6).

Randeria (2007) illustrates the colonial legacies of environmental governance practices through the analysis of Indian conservation policies. Along similar lines to the critique of RBAs being inadequate to address environmental consequences of political economy (Anderson, 1996a: 22-23), Randeria suggests that human rights approaches promote a political project of disassociating people from nature and the natural resources they were previously interdependent with. The mutually exclusive concepts of nature as resource to be either conserved or exploited, constitute the colonial legacy that ignore local norms and practices of resource based populations: in effect, colonialism imposes a global regime that controls both resources and populations. She observes that natural resources management – biodiversity conservation and commercial exploitation – historically accompanied the curtailment of the rights of local populations. Debating the framing of a new green neoliberal governmentality, she presents a critical view of participation, considered merely functional to the efficient implementation of conservation projects. Randeria (2007: 14) notes that states’ practices in natural resource management become over time more repressive to resource based populations. Presenting the conservation experience in India, repressive practices produce and justify either forced displacement or, as an alternative, tropes of “enforced primitivism” (Wilder, 1997:217 cited in Randeria, 2007: 20).

Woodhouse and Chimhowu (2005) recognise that current policies of access to and use of, natural resources have their foundation in countries' colonial past. The policies of resources conservation and commoditization of production, central theme of development discourse, have redefined the relation between colonized peoples and nature and are at the core of environmentalist critique of industrialization as a model of development.

In line with the second approach identified by Anderson (1996a) against absolute sovereignty, Turton (2003) and Pateman (2007) point out how states' exercise of the right of 'eminent domain', appropriate 'private' property for 'public' use, while displacing vulnerable groups. This highlights a foundational contradiction within both the understanding of sovereignty and of 'development' – people versus the state.

### **viii. Considerations regarding regional approaches**

The perspective on self-determination and cultural rights having an impact on environmental protection cast doubts on the potential for universality of a stand-alone human right to environment. Is a universal human right to environment appropriate to respond to local contestations that are peculiar and unique from one another? In addition, the recognition of negative colonial legacies and the burden of environmental cost left on vulnerable groups, often indigenous peoples, raise the question of redistributive justice, and historical responsibility. Boyle (1996: 49) notes that "in its broadest view, concern for environmental rights stems directly from a view of the common interests of humanity". However, the meaning of common interests is quite controversial. To address these preoccupations, some authors have explored the realm of solidarity rights and their relation with the environment, in order to identify possible resolutions to the conceptual and practical hurdles of the RHE.

Since the universality of human rights in general and the RHE in particular, are questioned, it is worth exploring environmental issues at regional level, which is a dimension that balances local features with international consensus, bottom-up with top-down governance. Practice suggests that regional approaches in the field of environment are preferable, since they take into consideration features that are similar in terms of judicial and value system, socio-economic and cultural experiences, as well as historical legacies. For instance, the Aarhus Convention, even though open for accession to any country outside the European region, lacked the capacity to establish itself as a global agreement. On the other hand, the Latin American region has been particularly relevant in the environmental field and has been defined "the vanguard of modern constitutionalism as regards of environmental issues" (Repetto, 2003: 16).

Interestingly, at the time of the writing of this research, Latin American countries are undergoing a process of coordination for the implementation of Rio Principle 10 which includes drafting a regional instrument for access rights, inspired by Aarhus

framework and based on UNEP Bali Guidelines (2011b) taking into consideration local experiences and cultural features.

Human rights regimes are the product of transnationalization of law (ICHRP, 2009) and states are influenced not only by other states and international institutions, but also by non-state actors, making it difficult to separate what is local from what is not and benefiting from the boomerang effect of changes from below and from outside (Keck and Sikkink, 1998 cited in Sieder, 2008: 68). Social movements and pressure from organized civil society has played a key role in the legal transformations of the Latin American region, using the rule of law as an arena to claim equity and human rights (Roa-García et al., 2015).

### **1.5 Structure of the Thesis**

This review of the seven themes in the literature has informed the formulation of the central research question. This is: what is the contribution of the Right to Healthy Environment to the existing human rights protection and environmental protection framework? The central question is divided in two parts: what is the added value of the Right to a Healthy Environment in the broader context of sustainable development and how meaningful participation of the public can contribute to reconcile environmental protection, social development and economic growth.

Chapter 2 presents the methodology chosen by this researcher and the theoretical perspective. It then illustrates the research methods adopted to address the research questions to examine and assess the possible solutions.

Chapters 3 and 4 include an overview of the rights based approaches to the environment. Chapter 3 offers a complete overview of both soft and hard law instruments that defined the environmental debate and intertwined it with development issues. It highlights the relevance of the regional approaches in addressing environmental claims. Relevant court cases and human rights mechanisms are then examined since they offer a route to identify and address environmental problems as rights violations.

Chapter 4 provides an analysis of the different legal perspectives that have been adopted to address the environment. First, it describes the environment as a human right and highlights the intrinsic contradictory dualities of a stand-alone right to a healthy environment that generate conflicts of interpretation and implementation. It then explores different rights based approaches (RBAs) to environmental conflicts, from environmental regulations to human rights. The procedural approach, which deploys civil and political rights to deliver environmental protection, emerges as the dominant RBA.

Chapter 5 examines and illustrates the implementation of environmental procedural rights in the country context of Panama. It reviews the social, economic and cultural context of the country in order to pinpoint the common causes of environmental conflicts in Panama. It examines in depth the processes and outcomes of environmental decision-making in three major development projects and presents a fourth one for background context and analysis. It becomes apparent that there is

profound disconnection between sustainable development policies and environmental protection policies. In addition, procedural rights are found to lack effectiveness as they are limited to the environmental impact assessment process and are not equipped to take into consideration the social aspect of development.

Chapter 6 explores the evolving dynamic from the procedural approach of access rights to a substantive Right to a Healthy Environment. Elaborating on the limitations of the procedural approach, this chapter identifies the rights based dimensions and elements that make up 'meaningful participation' as the substantive component of the RHE. It presents human rights 4 As' criteria for justiciability and measurement of RHE implementation and for 'meaningful participation' evaluation. Chapter 6 explores the capacity of the RHE to question development processes, reinforcing the importance of the social component. A comparison with the Right to Development is drawn so that it is possible to redefine the role of the RHE within the human rights regime to promote indivisibility of rights, equal distribution of resources, transparency and accountability.

Chapter 7 concludes the thesis summing up the content and highlighting the main understandings of the application of a human rights based approach to the RHE. It also discusses current directions and future opportunities.

## Chapter 2 Research Methodology

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The literature that engages directly or indirectly with the RHE is mainly within the field of environmental law. A critical review of the literature on the RHE suggests that despite extensive work on the link between environment and human rights, and on environment as a human right, both bodies of literature fail to examine environmental matter beyond a debate about whether this right has enough *raison d'être*. The existing literature poorly analyses the implications of sustainable development policies on environmental protection measures while field experience shows increasing number of conflicts arising from the use of resources, even when the use is promoted as 'sustainable', in violation of human rights. Therefore, concepts and practices of environment and sustainable development appear to diverge, not converge. This research further examines the possible reconciliation of the concepts and practices of environment and sustainable development through procedures and processes of meaningful participation. It will also contribute to debates on the role of participation in the implementation of the RHE in providing illustrative cases from Panama and recent developments in the Latin American and the Caribbean region in general.

This research aims to analyse the Right to a Healthy Environment (RHE), focusing on the value that a rights based approach (RBA) might add to the understanding of environmental contestation and RHE as a means to achieve sustainable development (Shelton, 1991). This leads to the recognition of the importance of participation as a "procedural approach to environmental protection". This research points towards the need to substantiate participation in relation to environmental protection.

### 2.5 Research question

This chapter reflects the process of developing the research questions based on the previous extensive literature review which highlighted seven main discussion themes. Consideration of these themes led to the formulation of a central research question, and three associated subquestions (Creswell, 2003: 105). The research questions can be divided in three groups to reflect the three main elements which this research is based on, human rights, environmental protection and participation.

The central question is: What is the contribution of the Right to Healthy Environment to the existing human rights protection and environmental protection framework?

In line with the three main discussion themes, the research sub questions are the following:

- What claims and responsibilities of Right to a Healthy Environment can be derived from the Rights Based Approaches to environmental issues?
- How can the procedural approach to Right to a Healthy Environment further the objectives of sustainable development?
- Can ‘meaningful participation’<sup>1</sup> fulfil the promise of procedural approaches to justice and deliver a balance between the pillars of Sustainable Development?

## 2.2 What is methodology, purpose and scope of methodology chapter

Methodology is the strategy that the researcher adopts to choose and use certain theories and methods (Creswell, 2003: 5) to describe and explain the research subject in a systematic manner (Kothari, 2004: 8). The objective of this methodology is to ensure that there is “coherence between the research questions and approaches proposed” (Lewis, 2003: 47) as well as between the philosophical stance and the methods applied, enabling a valid analysis. The purpose of the methodology chapter is to outline the philosophical frame of reference as well as the methods of analysis and interpretation, and position this research contribution.

This theoretical approach to human rights based approaches is based on constructivist perspectives, allowing for meanings to be socially constructed and incorporating advocacy perspectives which are political and issue oriented (Creswell, 2003: 18). This study is largely analytical and interpretive so qualitative methods are relying on official and legal documents, cases and the critical interpretation of legal approaches. Qualitative research is particularly appropriate since it is open to changes and is able to consider unexpected issues that might arise (Lewis, 2003). Documentary analysis, participant observation and case studies are used to investigate aspects of the subject and theorizing RBA to environmental contestation.

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<sup>1</sup>‘Meaningful participation’ is not to be confused with the doctrine and remedy of ‘meaningful engagement’ emerged in the context of South African evictions law (Liebenberg, 2014). In the landmark case of 51 Olivia Road (2008), concerning the decision of the city of Johannesburg to evict 400 occupiers of inner-city buildings for health and safety reasons, the South African Constitutional Court issued an interim order requiring the parties to engage with each other meaningfully. While agreements on alternative accommodation and interim measures to render safe some buildings were reached, the Court refused to decide on the reasonableness of the entire housing plan. Based on this and subsequent judgements, commentators (Tissington, 2008; Pillay, 2012; Liebenberg, 2014) point out that meaningful participation and engagement are fundamentally different in scope. While meaningful engagement is a mechanism of dispute resolution to avoid legal proceedings (Liebenberg, 2014: 328) and a manifestation of a deliberative model of judicial review (Pillay, 2012: 749), meaningful participation is much more far-reaching addressing broader systemic issues as it aims at the exercise and realization of the indivisibility and interdependence of human rights (see Chapter 6). In addition, Liebenberg (2014: 328-29) further observes that meaningful engagement that is too loosely based on human rights standards might contribute to undermine the normative values of socio-economic rights and, instead of delivering just outcomes, might only deliver bargaining inequalities. Similarly Pillay (2012: 746) notes that “the Court’s approach to the rights is driven by a concern to develop a set of tools through which to measure the reasonableness of state action, rather than an attempt to set out the minimum, or other, content of the rights to housing and health care”.

Aspects of this thesis can be understood as evaluative. Evaluative research is particularly appropriate for political issues, since it aims to evaluate how processes take place and what outcomes they produce. Evaluative research can be distinguished between formative and summative modes of enquiry. This research can be best described as being formatively evaluative, a policy learning approach providing information about the implementation process of a policy or political intervention (Ritchie, 2003a).

Documentary analysis, or desk based research, is the method used in this research to analyse existing documents on the research subject, in particular within the legal and political realm. The aim of this type of analysis is to identify fundamental concepts as well as to delineate the historical and political continuum that affects them, unveiling implicit meanings (Ritchie, 2003a). While there is a wide range of literature on human rights from different perspective and discipline, methodological accounts of human rights research are scarce (Freeman, 2002; Morgan and Turner, 2009).

The case study approach is applied to investigate research questions and a phenomenon, or process, within a specific, “often causal” (Hartley, 2004: 324), context (Lewis, 2003), shedding light on the theoretical aspects of the research object (Hartley, 2004). The case study is not merely a tool used in this research but is better identified as a research strategy in itself, with multiple methods (Yin, 1994, cited in Hartley, 2004: 323). The context chosen is Panama and the focus of the analysis is on participatory processes of environmental decision-making. Aspects of opportunity and convenience were involved in this choice. A job offer with a local environmental organization specializing in environmental rights was the critical factor. In addition, in 2010 Panama was due to undergo the Universal Periodic Review (UPR) and was not yet a member of The Access Initiative network, which this researcher tried to engage, interpret and promote. Panama was chosen for its social, economic and environmental features that make it distinct from other countries (Ragin, 2007: 68) and yet similar enough to provide possible ground for inferential or theoretical generalization (Lewis and Ritchie, 2003: 264) of the findings. The engagement with the human rights reporting process in Panama identified the case studies, which could be further analysed in light of the trends of state human rights practices in relation to the environment. The ultimate goal for the application of the case study is that it could be instrumental (Stake, 1995, cited in Platt, 2007: 102; see also Hartley, 2004: 326) to contribute to knowledge beyond the case study. An ethnographic approach (Mitchell, 2007: 5) is used to describe in detail the social context of Panama within which the participant observation element of this research take place.

The researcher worked within a local organization as a participant observer from March to December 2010 and has experienced first-hand the participatory processes in relation to environmental high impact economic activities. The researcher took the role of assistant to the public participation program, which included the following tasks: analysing Environmental Impact Assessments, participating in public consultation, accompanying local communities and coordinating the UPR

submission on the environment on behalf of an environmental NGO and civil society coalition. Therefore the use of the participant observation method (Ritchie, 2003a), enabled the researcher to “view social action on the ground as it unfolds” (Mitchell, 2007: 56).

The first-hand experience acquired through the engagement with a civil society organization has enriched this research. The method of participant observation has complemented the desk-based aspect of the research by adding the dimension of experiential knowledge. As Morgan (2014: 53) notes, the qualitative method of participant observation gives the researcher the opportunity to encounter, discover and make sense of new things by investigating a context, the research setting. The goal is to progress from observation to theory, and to build observation into a broader, holistic understanding of why things are the way they are or why things happen in a certain way. Recalling the differentiation of affected and interested public formulated by Steele (2001) and used in this research to widen the identification of the ‘public’ in participatory processes, participant observation contributes to produce a knowledge that is situated, born by the proximity of the issue, but also reflective of the wider theoretical framework, in this case the human rights framework. Situated knowledge has been developed by this researcher interacting with communities affected by certain environmental issues and actively participating in public participation processes. Despite these interactions, this researcher remains part of the broadly rather than narrowly defined ‘interested public’ not personally and physically affected by the issues of environmental contestation. Over time, this researcher has gradually formed and developed a knowledge orientation that is more sensitive to the complexity of human rights struggles on the ground. This is what Morgan (2014: 53) describes as the ‘strength of subjectivity’ in participant observation. Participant observation allows the researcher to create a subjective understanding of the objects and subjects of the research, but also obliges the researcher to engage in a subjective effort to create new meanings. This inter-subject effort mirrors the role of mutual awareness in constituting public goods, explored by Kallhoff’s theory of public goods (2011), as discussed in Chapter 6 (section 6. 2). The experience in a local environmental civil society organization has allowed this researcher to gain privileged access to issues, people and processes which have stimulated the researcher’s thinking and interpretation of the meanings of human rights, development and environment. In particular, the participation in the Universal Periodic Review process has provided this researcher with the breadth of the human rights framework and the observation of civil society practice of collating issues in human rights terms.

### **2.3 Methodology chosen, underlying assumptions and transdisciplinary approach**

The methodology chosen to approach issues of environmental contestation is related to three main domains identified for exploration: 1) the normative frame of human rights; 2) public participation and access rights; and 3) the sustainable

development debate. Human rights are used as a normative framework to contextualize environmental protection and the possibility of alliance or antagonism. The tools to enable participatory processes, known as access rights or procedural rights, are considered in the context of issues of environmental contestation to understand their potential scope and effectiveness. The general sustainable development debate opens up wider questions over the challenges of implementing a model of sustainable development that adequately accommodates all three economic, social and environmental pillars simultaneously.

Since the research spans across these three domains, a transdisciplinary approach is called for. The necessity of drawing from multiple disciplines comes from the complexity of the environment as a human right and the profound connection of environmental issues with development. Similarly, human rights cannot be understood only by law, as their scope and dimensions interest society, culture and economy.

In applying the hybrid approach, the intention of this research has been to shift from an inter-disciplinary to a potentially transformative transdisciplinary approach to environmental issues, regulation and contestation within a human rights frame. Transdisciplinarity identifies issue or problem-driven approaches to conducting social research that prioritize problems at the centre of the research and is responsive to public needs (Leavy, 2011). This researcher identified several opportunities in bringing together disciplines and perspectives: to analyse the complexity of human rights issues without reducing them to separate factors; to coordinated actions with development policies to advance substantive equality; to overcome the inherent tensions between neoliberal tendencies and human rights, and to question power in creating inequalities (Leavy, 2011). Therefore, the transdisciplinary approach has the potential to provide a more holistic and potentially transformative understanding of social issues to address and provide solutions for the polarities of sustainable development and human rights, or what Barry (2012) describes as “actually existing unsustainability”.

Inter-disciplinary, let alone trans-disciplinary approaches face multiple challenges in practice, mainly related to the compartmentalization of professional expertise derived by the compartmentalization of knowledge. This researcher’s experience as human rights activist and as a development professional suggests that the field of human rights and development remain separated and travelling on parallel tracks (see Alston, 2005). Especially in the field of human rights, this researcher detects a particular resistance to take on board the complexities and political and social contestation presented by ‘development’, both at the level of discourse and debates and at the level of development in practice. This is observable in the different stances taken by the UN Special Rapporteurs on Human Rights and the Environment. The former Special Rapporteur Ksentini is open to the idea of talking about human rights and development, questioning the human rights framework and evaluating expansive interpretations of rights. On the contrary, the present Special Rapporteur Knox retreats to largely legalistic and reductive approaches, carefully avoiding contested

issues of development and demands for substantive equality.

However, this researcher believes that this kind of approach is needed to advance commitments to social justice while challenging the theoretical and methodological approach of positivism (Leavy, 2011: 38). Transdisciplinarity is characterized by multiple sets of disciplinary resources being brought together to create synergistic methods and theories to holistically address problems and serve the public interest. Overall, the perspective of transdisciplinarity encouraged this researcher to challenge fragmented, competing and positivist approaches, and to attempt to vindicate the political character of human rights and their social construction (see Freeman, 2002).

#### **2.4 Hybrid approaches to human rights practice**

The starting point for this research is the sense of a deep dissatisfaction with the application of procedural rights, or access rights, in environmental decision-making and their capacity to achieve equitable outcomes. Since these rights are identified as the new benchmark in environmental democracy (UN/ECE, 2006), this researcher has decided to trace back the origin of the environmental rights debate and analyse the opportunities and challenges offered by different approaches to environmental protection, within the overarching concept of human rights, specifically the right to a healthy environment.

The operationalization of the human rights system will be analysed by considering legal instruments and human rights monitoring mechanisms, such as the Universal Periodic Review (UPR) and the civil society driven The Access Initiative (TAI), to unpack the RHE in theory and practice. The UN Special Rapporteur on Human Rights and the Environment, John Knox report (2013b: para. 27) shows that UPR process and other international human rights and environmental reporting instruments are functional in showcasing the trends of state human rights practices in relation to the environment. Fabra (1996: 261-62) recognizes that international human rights mechanisms have a positive influence on domestic legal systems as they serve two functions. First, they provide directly alternative redress mechanisms for human rights and environmental violations when national legislations or courts cannot guarantee access to justice. Second, they can benefit domestic legal systems promoting change in line with the constant development of international law.

Boyd (2012) suggests that an environmental rights revolution is taking place, but the consensus that has been reached at the international level concerns only procedural rights and their application. The procedural approach may, in practice, discriminate people by reducing, instead of widening, participation. The findings of the UN Special Rapporteur Knox (2013b) clearly asserts that legal statements on human rights and environmental protection only converge on procedural obligations, but cannot reach an agreement on the substantive ones. The weakness of the international consensus leads rights advocacy to pursue environmental issues in a disjointed and fragmented manner, looking at specific environmental issues and examining separate effects on human rights.

This procedural approach to environmental rights could be seen either as a regression or a simplification. It could be a regression since it rejects holistic perspectives on environmental issues that in reality are deeply intertwined, and not separated. Climate change cannot be investigated from a human rights perspective without considering the effects of colonialism and current power dynamics between states. Pollution of natural resources and quality standards need to be addressed by a more systemic institutional analysis, identifying the challenges faced by states that do not have the necessary institutional capacity to protect and control the environment. A debate on extractive industries cannot be constructive if issues of economic growth, social development and foreign responsibility are not addressed. On the other hand, the debates on the environment might be simplified for practical reasons. First, the approach of treating the RHE as a new right has not found substantial support, while violations of existing rights have been recognized consistently throughout the national and international judicial mechanisms. Second, the failure to analyse and address socio-economic aspects of environmental issues has prompted the policy and legal consensus to shift back towards purely technical aspects of environmental degradation.

While concentrating on workable procedures and specific technical goals might be an understandable and technical strategy for environmental protection in the short term and in specific locales, there are structural issues of poverty and power that will continue to surface at both local and global level. The shortcomings of existing approaches to environmental protection to consider and deal with social and economic factors are the real barrier for environmental democracy. For this reason, this research turns to right based approaches and a constructivist perspective to restore the importance of inherent features of human rights. It does so aiming to highlight the importance of accountability and justice while promoting environmental democracy beyond environmental protection.

### **i. Constructivism and RBA**

The rights based approach (RBA) is a “mode of analysis, a way of understanding a given problem, and it is a set of interventions which seek to address these problems” (Gready, 2009: 389) grounded in human rights legislation (Nyamu-Musembi and Cornwall, 2004b).

Features of the RBA are its concerns with power, injustice and discrimination. RBA employs the specific language of human rights to convey the urgency to challenge injustice and the “ethical imperative of buttressing universal human dignity” (Gearty, 2010: 20-21). RBA contributes to diagnosis and remedy of a problem (Gready and Phillips, 2009: 2) providing a normative basis (Gready, 2009: 385) that promotes accountability.

This research applies a rights based approach to environmental issues as its methodological framework. Many scholars argue that RBA adds value because of its integrative character (Cornwall and Nyamu-Musembi, 2004a; Nyamu-Musembi and Cornwall, 2004b; Gready, 2009; Gready and Phillips, 2009), specifically:

- Indirect use of the law: promoting a set of principles which informs the process of development. It provides a stronger platform for citizens to make claims;
- Transformative power: promoting positive obligations of the state to create the conditions to exercise human rights as well as legitimizing citizens as participants (Jones and Stokke, 2005);
- Accountability: identifying right-holders and duty bearers;
- Engagement with politics: redefining issues in a non-neutral way, exposing the underlying causes of problems.

## ii. RHE: the limitation of the legalistic approach

Freeman (2002) argues that the legal discourse has dominated the human rights field, distorting the understanding of human rights. The legal positivist approach neglects the inherently political character of human rights. It fails to understand the social and political processes that lead to human rights norms agreement and their application.

Freeman (2002: 12) affirms that human rights are “an interdisciplinary concept *par excellence*”, requiring the need to address it from a broader perspective (see also Morgan, 2009). The normative and factual character of law is relevant to address the normative aspect of human rights, but it cannot provide guidance on the reasons for the existence of human rights itself. Law can state whether a right exists, is respected or violated. A social scientific approach can help us understand why a right is needed and what respect and violation of a right entails. This attention to social practices of human rights and the recognition of their multiple dimensions – ethical, political, sociological, economic and anthropological – allows the social scientific approach to contribute to human rights implementation, advancement (Morgan, 2009b) and effective policy making (McCamant, 1981, cited in Freeman, 2002: 78) in light of contextual differences.

The institutionalization of human rights understood as legal formalization of rights is problematic from a sociological perspective, since it does not take into account the need for guarantee protection from abuse of power that complicates the relationship between states and its citizens. Human rights should be instead analysed as a social process involving power (Stammers, 1999, cited in Freeman, 2002: 85). Similarly, human rights institutionalization could be defined as a feature of the social process of globalization (Turner, 1993, 1995, cited in Freeman, 2002: 83). The political regime of human rights “responds *pragmatically to circumstances*”. Declaratory and promotional international human rights regimes (Freeman, 2002: 96) provide the groundwork to understand the circumstances that spark political debates as they are product of balancing power between political interests (Waters, 1996, cited in Morgan, 2009: 123).

The shortcomings of a strictly legalistic approach are evident, since it cannot achieve a comprehensive analysis of the reasons and effects of human rights in

practice. Morgan (2009: 7-8) argues that legal literature cannot describe the social and political origins of human rights, or the process of construction of international human rights law. Social sciences contribute to the understanding of human rights providing tools to analyse “objective processes and structures and subjective values and meanings” (Freeman, 2002: 99) that directly influence the capacity to construct, implement and enforce human rights.

Recognizing the importance of the political and social process of human rights, this researcher proposes a methodology that takes the legal literature as a starting point, but supplements it with a more trans-disciplinary approach incorporating social science perspectives, as well as ethnographic, participant observation and case study approach.

### **iii. Soft law and Hard law**

First, the researcher has analysed the legal literature relevant to the right to a healthy environment. It brings together soft and hard law that deal with environmental protection at the international and regional level. National constitutions and relevant environmental regulations are briefly described to outline the emergence of a RHE entailing state obligations.

Soft law instruments are those non-binding declarations, resolutions or statement of principles by authoritative international institutions that might influence states behaviour but do not entail specific legal obligations (Boyd, 2012: 79. See also Klabbers, 1996). Declaratory and promotional international human rights regimes have experienced a considerable growth (Freeman, 2002: 96). Even though they remain aspirational, rather than operational instruments, human rights declarations have come into being marking acts of political mobilization and struggle (Baxi, 2007: 46).

Soft law instruments on environmental protection constitute the basis of this research since they can facilitate the understanding of the root causes for and the evolution of the international political debate on the subject of the environment. Soft law, filling the perceived grey zones of legal rules (Boyd, 2012: 79), evidence the turning points in the conceptualization of the relationship between human rights and the environment and help to explain how the political debate has transitioned to focus on the relation between environment and development. Soft law instruments have already contributed to change in domestic legal systems as states increasingly adopt constitutional environmental laws. This analysis constitutes the foundation of the investigation.

Relevant international treaties and regional agreements are described to identify the origin of and the legal nature of the RHE. The regional instruments are particularly useful since they help in identifying precise contextual features that determine the realization or otherwise the rejection of the RHE. Since regional systems are the product of transnationalization of law and universal human rights are then filtered by cultural differences, identity and values (ICHRP, 2009), constitutionalization of environmental rights is better understood in the wider context

of regional human rights regimes. Constitutionalization is an important phenomenon related to the human rights revolution, advancing human rights protection securing them the highest moral and normative value. There is a consensus around the importance of environmental constitutionalism in providing the environment an absolute standard of protection and paving the way for ecological sustainability (Boyd, 2012; Kysar, 2012). Consequently, an analysis of environmental cases brought before international and national courts is provided in section 3.2 of Chapter 3, section 4.3 in Chapter 4 and section 5.3.4 in Chapter 5 to gain insight into the extent of the justiciability of environmental rights, commented especially in relation to: 1) the effectiveness of the violations-based approach, 2) the implications in terms of justice and recognition of responsibility in the rulings based on other human rights violations; 3) the competence of regional and national courts to deal with polycentric political disputes. Exploring environmental rights litigation aims to analyse how and whether existing mechanisms work to hold duty bearers accountable and to guarantee adequate redress for rights holders.

#### **iv. RBAs and procedural approach**

Legalist approaches are subject to critique since they describe the right to a healthy environment only in terms of litigation (Boyd, 2012) and of violations of defined pre-existing rights. The needs to overcome the shortcomings of this approach are evident in the light of the Precautionary Principle and the concept of sustainable development that recur in connection with the right to a healthy environment. In addition, the substantive component of the right to a healthy environment is rejected by the legalistic approach, denying the possibility of positive environmental justice objectives of RHE to reduce or eliminate harms against the environment and human beings as well as “to redistribute inequitable allocations of environmental harms” (Boyd, 2012: 28).

Therefore, the research is focused on different rights based approaches to evaluate the conceptualizations of the right to a healthy environment as well as the operationalization in courts to address environmental violations. Three major Rights Based Approaches to environmental issues (Shelton, 1991; Atapattu, 2002) are discussed: 1. reinterpreting existing human rights; 2. formulating a new human right; 3. expanding existing environmental rights. All three approaches try to address environmental protection as a major gap in human rights discourse but they differ in their strategic focus.

While different, all three Rights Based Approaches converge on the importance of the environmental rights of access to information, public participation and access to justice. Therefore, the research pursues the line of approach offered by access rights, or the *procedural approach*, to environmental protection. The importance of the procedural approach is to remove barriers of information and remedy exclusion enabling participation in decision-making processes that have a direct or indirect effect on environmental protection. The ultimate aim is to foster public-government relationship that contributes to transparency, accountability and inclusiveness.

## v. Country focus and case studies

Reflecting upon this researcher's experiences, the implementation of the procedural approach to environmental issues is far from being perfect, especially if specific country features are overlooked. For this reason, a case-study approach (Hartley, 2004) is taken, choosing Panama as a good illustrative case of a country rich in biodiversity and natural resources.

Panama is a small country characterised by social complexity and inequality. Within the Panamanian context, nature is conceptualized in contradictory ways, as a resource to be exploited for economic gain and in need of scientific conservation, as well as emerging claims stemming from the needs of the local resource-based population (Randeria, 2007). Case-studies of environmental disputes have been identified based upon participant observation (Eisenhardt, 1989) during the collaboration with a Panamanian NGO<sup>2</sup>. Understanding social context and processes is required to solve research questions and illuminate theoretical issues (Hartley, 2004) and the question of enforceability (Apple, 2004).

First, a brief overview of the country is provided to delineate a social and economic background to situate the issues of environmental contestation. Then, the Panamanian environmental legal framework and specific provisions for environmental procedural rights - access to information, public participation and access to justice - are analysed.

Environmental litigation at the national and international level regarding Panama is also considered, focusing on the type of legal strategies used, the success rate as well as political and social implications, and most importantly on who are the claimants (Gloppen, 2008). This is relevant to identify and define the substantive features of the RHE.

Four case studies within the Panamanian context are presented: two of extractive industries and two of renewable energies. These cases have been chosen for the following reasons: high degree of environmental impact; high degree of social conflict generated; researcher's direct knowledge; wider significance of the struggle at the national political level. While the case studies present similar environmental and human rights violations and tend to have similar judicial outcomes, each one of them illustrates a particular claim within the environment protection/economic growth dichotomy. The case studies are a means to understand whether the procedural approach addresses competing claims, to what extent it contributes to the realization of constitutionalized environmental rights and how it interacts with relevant regional and international human rights instruments. In particular, an analysis of the Panamanian context can contribute to: 1. describing and understanding the relationship between social needs and ecological needs, identifying the tensions between environment and sustainable development; 2. carrying out a substantive application of a RBA to the specific environmental issues

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<sup>2</sup>Centro de Incidencia Ambiental (CIAM) / Environmental Advocacy Centre, <http://www.ciampanama.org/>.

in the cases; 3. evaluating the contribution of an enforceable RHE to human rights protection.

Even though the procedural approach is recognized to be a cornerstone in the development of environmental governance, the Panama case demonstrates limitations and opportunities of procedural rights, not only in the realm of environmental governance but also to the broader context of sustainable development. The procedural approach falls short of the task of bridging the demands for developmental rights, resources distribution and accountability (Newell and Wheeler, 2006). The discussion of the cases illustrates that access rights are not fully enjoyed even where environmental legislation exists and is consistent with international standards. The critical concerns for the participatory process are identified: the inclusion of vulnerable people; the capacity to affect decision-making outcomes; and identifying ineffective remedial mechanisms. Case data additionally suggest that the weakening of environmental protection encourages human rights violations, therefore increasing the relevance of a substantive RHE in such circumstances.

Since procedural rights are framed within Environmental Impact Assessment legislation for development projects, the case studies serve to demonstrate the limitations of the EIA as the principle regulatory tool. The procedural approach limited to the EIA fails to incorporate the social development claims of vulnerable peoples. The case studies might contribute to argue that sustainable development being too inclined towards economic growth is therefore ultimately antagonistic to environmental and human rights protection.

The case study of Panama is framed in the regional context of Latin America, which has demonstrated a commitment to extend human rights protection, especially in relation to natural resources. Access rights are currently a priority in governments' agendas across Latin America. The *Declaration on the application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean* and the *Lima Vision for a Regional Instrument on Access Rights relating to the Environment* were signed respectively in June 2012 and October 2013: signatory parties agreed to establish a Regional Public Mechanism<sup>3</sup> to foster access to information, to coordinate public participation in international meetings; and to contribute to the transparency of the process. The objective of this regional process is to advance towards the creation of a regional instrument for access rights, drawing upon the Aarhus Convention model, but adapting it to the regional context. The significance of this process lies in the will of Latin American region to filter international instruments of human rights through its own cultural, social and institutional structures.

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<sup>3</sup> This process is being facilitated by the Economic Commission for Latin America and the Caribbean (ECLAC).

## vi. **Beyond RBA to RHE. Sustainable Development and Environmental Principles**

From the analysis of legal literature, it is manifest that access to resources and power dynamics are not addressed as human rights limitations (Freeman, 2002: 87). The country context shows that the procedural approach over-determines environmental protection issues of development projects but underspecifies the social dimension. Similarly, it underestimates the correlation between the application of environmental principles and policy choices for development. Since the United Nations framework strongly points towards the dependence of environmental protection on sustainable development, the research explores the paradigm of sustainable development and two key principles of international environmental law, namely the Precautionary Principle and the Common But Differentiated Responsibilities Principle. The aim is to supplement the procedural approach, addressing social development issues that influence, and are influenced by, environmental protection.

The sustainable development paradigm recognizes that activities for economic growth might have a negative impact on the environment. Panamanian cases clearly show the tension between the pillar of environmental protection and the one of economic development. Current changes in Panama suggest that the research should focus on the contestation of major development projects such as open cast mining and hydroelectric power plants. These activities have raised questions regarding the sustainability of such projects, and their compliance with human rights norms (UN/CERD, 2010). The conclusion is that environmental struggles give rise to human rights struggles. Environmental protection and social development are overpowered by economic development, negating the very concept of sustainable development. Therefore, it becomes important to find a tool to overcome this impasse bringing the research back to the procedural rights that are limited when only applied narrowly in environmental decision-making, but that can become powerful when applied in a context of sustainable development decision-making.

To bridge the gap between social development and environmental protection, an analysis of the substantive principles of RHE is needed. Some environmental law principles have been linked to environmental protection, human rights and development in a systematic manner. They can serve several functions, ranging from policy guidance to legally binding normative indications which can be invoked before the judiciary (Maggio and Lynch, 1997). Since the literature points to it, this research will focus the attention on the Precautionary Principle as well as the common but differentiated responsibilities principle. Each of them deals directly with specific core issues relevant to the RHE that cannot be addressed through either environmental law or existing human rights.

The Precautionary Principle is described, since it has been included in “virtually every” (Freestone and Hey, 1996b: 3) environmental convention and agreement. The

core of the different existing principle formulations is that “action should be taken to prevent harm to the environment and human health, even if scientific evidence is inconclusive” (Myers, 2000). The Precautionary Principle covers several dimensions – science, technology, environment, and economics – highlighting the interconnectedness of these fields and how decision-making should take into consideration all of them, without giving precedence to one rather than another. This enables the principle to serve a twofold function: it is a founding principle of sustainable development; and, it informs the positive obligations contained within the RHE. The principle constitutes a common thread between sustainable development and the right to a healthy environment, allowing the research to converge and synthesise the dynamic between environmental protection, human rights and development.

The core concept of the Common But Differentiated Responsibilities (CBDR) principle is that the global environment is a physical commons (Brown Weiss, 2002) and that environmental hazards might have adverse consequences on any country, therefore the responsibility for environmental protection must be borne commonly by all countries. The CBDR helps in transitioning the research from the local dimension of specific development-generated environmental issues, to the global sphere of environmental matters, establishing a causal link between the inequality of resource distribution between states, and their responsibility for environmental harm. CBDR sets out the solidary nature of the RHE. In fact, the CBDR feature of differentiated obligations tends to acknowledge historical and political inequalities of contribution to, and invokes the capacity to remedy environmental wrongs in order to realize substantive equality and deliver corrective and distributive justice (French, 2000; Cullet, 2010). The CBDR principle might be a means for greater economic justice, intergenerational or intra-generational equity (Brown Weiss, 2002) and, consequently, might have the potential to boost the idea of global partnership (French, 2000), expressed in the UN Charter and cemented in both the Millennium Development Goals (MDGs) and the Sustainable Development Goals (SDGs). Therefore, the CBDR principle is used in this research to facilitate understanding of the politics of access to and redistribution of resources which are key to advance social development and economic development while respecting the limits for environmental protection.

The debate on RHE as a solidarity right and its position within the sustainable development paradigm requires also the analysis of the principle of intergenerational equality and the rights of future generations. Brown Weiss (1992b) explains that present generations have a duty to leave the planet in no worse condition than they received it, so that future generations can enjoy equitable access to natural resources. The same threat caused by the asymmetry in access to and use of resources is valid within societies, creating the claim for intra-generational equity (Maggio and Lynch, 1997). Solidarity rights are a response to new human rights threats caused by increased global interdependence, which requires international cooperative actions and joint obligations of states, peoples and non-state actors (Wellman, 2000: 642-

643). The principle of intergenerational equity provides “a valuable conceptual mechanism for bridging mutual concerns between environmental protection, socio-economic development and human rights law” (Maggio and Lynch, 1997: 16).

## **2.5 Conclusion**

The objective of this constructivist and hybrid research methodology is to bring together different approaches to RHE and reconcile environmental protection and sustainable development in a pragmatic manner. The structure has been designed in order to cover the following three debates: first, environmental protection and human rights, focusing on the role of the right to a healthy environment; second, the role of public participation in environmental decision-making through case studies, positioning that equality of process does not necessarily entail equality of outcome; lastly, the tension between the sustainable development pillars, highlighting the need to strengthen the social dimension. This methodology should contribute to support the idea that public participation tools are crucial for decision-making that supports sustainable development. Public participation enables the right to a healthy environment to uphold claims not merely for environmental protection but for indivisibility of rights, equal distribution of resources, transparency and accountability.

## Chapter 3 Legal Provisions and Normative Principles for Environmental Protection

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This chapter offers an overview of selected soft and hard law instruments that have shaped the debate on the right to a healthy environment. As the right to a healthy environment and the ‘environment’ as a topic of political contestation evolved over time and became associated with human rights and development, soft and hard instruments and laws crystallized, promoted, and sometimes constrained, these changes. Most of the modern treaties made from the Vienna Convention for the Protection of the Ozone Layer (1985) to the present have a more topical and specialist character addressing particular challenges – ozone depletion, climate change, biodiversity. They evidence a trend to internationalize the global environment as a common concern (Boyle, 1996: 54-55). Meadows et al. (2004) suggest that the ozone layer treaties and the history of their development are inspirational in the efforts to confront global limits and is evidence of scientific agreement on overshoot – exceeding the long term carrying capacity of the global environment. Environmental activism as well as strong international political will, leadership and cooperation, are critical in reversing unsustainable behaviours and redressing environmental damage. A general right to a healthy environment became identifiable in an international environmental law document in 1972 when the Stockholm Conference was held, marking not only the development of environmental law but also as the conceptual breakthrough, opening up new areas. Prior to 1972 the main international documents framed the environment in terms of permanent sovereignty over natural wealth and resources. In 1962, the Resolution on *Permanent Sovereignty over Natural Resources* declared “The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned” (Art. 1). The right to permanent sovereignty over natural resources, echoed in paragraph 4 (h)<sup>4</sup> of the 1974 Declaration on the Establishment of the New International Economic Order (NIEO), has been expanded by the right to restitution and full compensation for the exploitation, depletion, and damages to natural resources (paragraph 4 (f). UN/GA, 1974)<sup>5</sup>, to address the historical wrongdoings of colonialism to advance substantive, rather than formal, equality between States.

This chapter overviews both soft and hard law instruments that defined the environmental debate and intertwined it with development issues. Relevant court

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<sup>4</sup>“The right of the developing countries and the peoples of territories under colonial and racial domination and foreign occupation to achieve their liberation and to regain effective control over their natural resources and economic activities” (UN/GA, 1974).

<sup>5</sup>“The right of all States, territories and peoples under foreign occupation, alien and colonial domination or apartheid to restitution and full compensation for the exploitation and depletion of, and damages to, the natural resources and all other resources of those States, territories and peoples” (UN/GA, 1974).

cases and human rights mechanisms are examined since they offer a route to identify and address environmental problems as rights violations.

The first section comprises a compilation of soft law instruments, mainly United Nations declarations and resolutions that represent both guidance through, and a reflection of, the changing perspective on environmental matters.

The second section explores the existing international hard law instruments that endorse the environment, or aspects of it, as a legal standard. It provides an overview of the three regional human rights systems and characteristics of their approaches to environment as well as the environmental constitutionalization phenomenon, giving special attention to the progressive experience of Bolivia.

Finally, one international mechanism for the protection and promotion of human rights – the Universal Periodic Review - is summarized with the aim of finding an alternative approach to the RHE. The importance of this human rights mechanism is that it offers a route to identify and address environmental problems as rights violations.

### **3.1 The emergence of environmental protection as a human rights issue**

This section comprises selected soft law instruments which contributed to set the standards of the environmental debate and fuelled the international discussion on environmental protection as a human rights issue and as a development concern. In chronological order, these are: 1) Stockholm Declaration (1972), 2) the World Charter for Nature (1982), 3) the Commission for Sustainable Development Report (Brundtland Report, 1987), 4) Rio Declaration (1992), 5) the Final Report of the Special Rapporteur on human rights and the environment Mrs. Ksentini (1994), 6) the IUCN Draft Covenant on Environment and Development (1995-2010), and 7) the UNEP Bali Guidelines on access rights (2011).

The **Stockholm Conference on the Human Environment** held in 1972 represents the first international effort to put environmental issues on the global agenda. The objective of the conference was to identify guidelines to preserve and enhance the human environment in order to improve the quality of life for all. It recognized the need for a common outlook based on the acceptance of human responsibility for economic development, but also its role in transforming the environment and consequently contributing to environmental degradation. The Stockholm Conference pinpointed the importance of extensive and concerted international cooperation to provide necessary resources to contribute to environmental preservation while improving the quality of life for the world's people.

The Stockholm Declaration may be regarded as one of the foundation stones of the international policy that would come to be known as “sustainable development”. Stockholm's key terms - human environment, well-being for present and future generations, quality of life, economic (under)development, responsibility, and cooperation - established the main concepts of the following debates on

environment. This conference achieved to set environment as a global issue (Sachs, 1999). Environment was no longer seen as a mere synonym of nature, but is a more complex notion encompassing nature and its interdependent, but also potentially inverse relationship with human beings and human activities.

The Stockholm Conference was the first international meeting where the issue of compatibility between development and environment was introduced. Development has different dimensions which the declaration refers to: priority is given to economic growth as well as to social development, which entails education and consideration of the values systems of each country. Recognizing the gap between developed and underdeveloped countries, the declaration notes that well-off countries shall technically and financially assist those countries that lack the means to protect their environment with the global aim of ensuring more favourable conditions for the improvement of the quality of life for all.

Despite its anthropocentric character with the environment subordinated to human beings, the innovative character of the Stockholm Declaration rests in the human rights approach of its opening principle, which establishes a clear relation between environmental protection and human rights norms. Principle 1 states: “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that allows a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations”. The declaration does not fully recognise the environment as a right in itself, but influenced the development of national environmental law (Chee, 2012) and created the basis for the elaboration of a substantive right to environmental quality (Sohn, 1973; Birnie and Boyle, 2002).

The **World Charter for Nature** (1982) built on the rights language of Stockholm but took an ecocentric approach, giving nature rights independently from the worth assigned to it by mankind. The World Charter for Nature (WCN) is the first non-binding document adopted by the UN General Assembly that establishes the concept of the rights of nature, identifying the global environment’s needs for substantive and procedural protection from the adverse impacts of development (Wood, 1985). The WCN presents procedural rights, highlighting its collective character and enhancing justiciability for environmental damage as a subject of redress (Principle 23). It emphasizes conservation of nature and natural resources, thus aiming to provide a philosophical and political framework to guide worldwide conservation efforts. Even if mainly symbolic, the WCN has a political and moral force to protect natural resources and prompt governments to address neglected environmental problems (Wood, 1985).

The WCN has been criticized by UN countries for being too aspirational in character since it directs all countries to adopt behaviour that minimize adverse environmental impacts, adopting a mandatory language. Yet in practice, it fell short of providing judicial enforceability. Developing nations, which were the main proposers of the charter, criticized the absence of provisions for differential treatment (Wood, 1985).

The WCN could be a valuable instrument for expanding currently existing environmental rights and possibly to the extent of full recognition of a right to environment. Atapattu (2002) suggests that recognizing a fundamental right to a healthy environment would go against the very nature of the charter since it does not promote rights of man, but rights of every form of life, in traditional human rights language. This researcher would argue that the ecocentric approach of the Charter can only add to the substantiation of a RHE rather than conflict with the current anthropocentrism of procedural environmental rights. It could contribute to shape a right that does not focus only on human beings but also on nature as a rights holder.

In December 1987, the World Commission on Environment and Development (WCED), established as an independent body by the UN General Assembly in 1983, published the **Brundtland Report**, “Our Common Future”. The Brundtland report marks a shift objectifying nature and entrenching the economic worldview of sustained economic growth to redress poverty and environmental degradation. ‘Nature’ is not considered an entity with its own agency and becomes the ‘environment’, a construct, a view of nature according to an urban-industrial system of thought (Escobar, 1995: 196). While the WCN emphasized natural resources conservation, the WCED report emphasizes more efficient use of scarce resources. The fundamental shift from the WCN and WCED approach to address environmental problems might be justified by the adoption of the Declaration on the Right to Development in 1986, which affected subsequent conceptualizations of, and agreements on, environment and human rights. Influenced by this historical event, the WCED report, strengthened the idea of the interdependence of environment and development. What followed were in what are complex historical processes that placed economic development activities within the context of environmental limitations. However, it also ingrained the view of a trade-off relation between environment and development, whereby ‘development’ causes both poverty/vulnerability and environmental degradation, stressing the fact that “many present development trends leave increasing number of people poor and vulnerable, while at the same time degrading the environment” (WCED, 1987: Overview para. 10). Environmental degradation is seen as a side effect of industrial wealth and as a product of the “downward spiral of linked ecological and economic decline” (WCED, 1987: Foreword). Poverty itself was identified as the main cause of environmental stress. Being endemic and prone to ecological catastrophes, “poverty itself pollutes the environment” (WCED, 1987: Chap. 1 - para. 8). This view implies an evident contraposition between developed and developing countries: low income position of poor nations represents the main reason why they are caught in the spiral of environmental degradation.

The main result of the Brundtland report was to broaden the understanding of sustainable development as a development that “meets the needs of the present without compromising the ability of future generations to meet their own needs” (WCED, 1987: Overview para. 27). However, it promotes a mainstream view of

sustainability which posits that sustained economic growth is the only solution to both poverty and environmental degradation.

In June 1992 the **UN Conference on Environment and Development** (UNCED) was held in Rio de Janeiro, Brazil (hereinafter referred as “Rio Conference” and its outcome document as “Rio Declaration”). The purpose of the conference was to elaborate strategies and measures to halt and reverse the effects of environmental degradation. The Rio Conference brought several new elements into the environmental debates. The Rio Declaration addressed the dilemma of poverty and the call for differential treatment by advancing a principle of solidarity in cooperation – the principles of common but differentiated responsibility. In addition, it redresses partly the strong anthropocentric approach applied in the Brundtland Report by promoting the Precautionary Principle (Princ. 15) to prevent environmental wrongdoings, but remains far from the WCN ecocentrism (Pallemaerts, 1996; Boyle and Freestone, 1999b). In contrast with Stockholm conference, which had a governmental profile, Rio witnessed an unprecedented participation from non-governmental organisations. Despite the use of obligatory language and the degree of consensus reached on international norms for environmental protection (Boyle and Freestone, 1999: 3), the Rio Declaration has been criticised for failing to recognize a healthy environment as a basic human right, departing from the Stockholm pathway that had established a human rights approach (Boyle, 1996: 43).

The Rio Declaration recalls and expands the concepts of sustainable development, global ecology and global economy, phenomena that are accelerating interdependence among nations on several levels, used by the Brundtland Report. It further broadens the concept of sustainable development (SD). Principle 1 highlights the twofold character of SD which is human centred but sees both states and individuals as rights holder. States have both the right to exploit their own resources and the duty to ensure that their activities will not damage the environment. Human beings are granted the entitlement “to a healthy and productive life in harmony with nature”. Principle 1 of the Rio Declaration, uses a right to development language and considers environmental protection as an integral part of the development process, thus marking a profound separation with the rights of nature promoted by the WCN.

The most notable contributions of the Rio Declaration to the environmental debate are the establishment of environmental principles of common but differentiated responsibilities (Principle 7), precaution (Principle 15) and public participation (Principle 10).

The concept of Common But Differentiated Responsibility (Princ. 7) is an expansive understanding of the gap existing between developed and developing countries. This gap is visible in the different contributions to global environmental degradation and in the different capacity of states to take remedial action. CBDR promotes a solidarity approach in cooperation as an alternative to address the dilemma of poverty and environmental degradation.

The Precautionary Principle (15) suggests that when scientific uncertainty exists regarding the eventuality or the magnitude of environmental harm caused by an activity (or anything that has an impact on the environment), decision makers should carefully consider whether to allow this activity to be carried out. The precaution is dictated by the belief that preventing damages might be less expensive than cleaning up afterwards. The Precautionary Principle is still debated, and its application is discretionary due to the unspecified scope and limitation of this principle. However, its undeniable importance lies in its attempt to partly redress the anthropocentric character of the declaration and to shape the environmental debate. This development has influenced subsequent conceptualizations of the Right to a Healthy Environment within the Sustainable Development paradigm.

Principle 10 on participation, access to information and access to judicial proceedings is one of the most familiar principles of the Declaration. As it states, environmental issues are better handled with the participation of concerned citizens. This participation is enabled by information availability and by the opportunity to take part in the decision-making process. Access to information, therefore, should be available for each individual who requests it and at the same time governments should encourage public participation by promoting awareness and disseminating information widely. Administrative and judicial remedies should be available in case the right to participation and/or to access information are violated. The concept of participation is used profusely in the declaration: participation of women, youth and indigenous peoples (Principles 20, 21, 22) is highlighted as the main element in the process of achieving a better coexistence between environmental protection and development needs.

The Rio Declaration is a milestone for international agreements on environment, being the first event with a prominent nongovernmental presence and the establishment of Principle 7 (CBDR); Principle 10 (participation and access rights), and Principle 15 (precautionary approach). It is also the event that marked the endorsement of sustainable development by the international community (Atapattu, 2006: 86). Gearty (2010) observes that Rio Declaration is about building environmental sensitivity in the right to development, and building on a collective dimension of human rights. This emphasis on development has been criticised as a preference over environmental protection (Atapattu, 2006: 89). Therefore, the question is whether the Rio Declaration detracts from a right to a healthy environment, as its critics claim, or does it support a RHE? Sustainable development should comprise the protection of the environment as a founding element along with peace and security, economic development, social development and governance (Atapattu, 2006: 86). The Rio Declaration attempts to “strike a balance between environmental protection and economic development” (Atapattu, 2006: 87). Even though the Rio conference could be judged as concerned about the environmental impacts on world’s economy (Sandbrook ,1992: 16, cited in Woodhouse and Chimhowu, 2005: 193) rather than the environment per se, it is still relevant for promoting international efforts to manage the environment and the importance of meaningful participation in decision-making.

In July 1994 the **Special Rapporteur Fatma Zohra Ksentini** submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the **final report on Human Rights and the Environment** (hereinafter Ksentini Report). This report is extremely valuable for the expansive and progressive comments provided. The aim of this report was to establish what legal framework exists to address emerging global concerns and to explore possible further developments of a right to a healthy and flourishing environment. The report contains a review of international and national human rights law and environmental law instruments, which are used to reinforce the existence of environmental rights. Relying on the concepts of human rights indivisibility and interdependence (Boyle, 2010: 11), it stresses the relation between poverty, development, enjoyment of human rights and environmental degradation. The Special Rapporteur concludes that the recognition of the global dimension of the environmental issues contributed to “a shift from environmental law to the right to a healthy and decent environment” (Ksentini, 1994: para. 22). The Ksentini Report represents a return to the Stockholm intention. Adopting a human rights based approach, it reframes the problem of analysis, presenting environment and development beyond the subordination of the former to the latter. The global, complex, serious and multidimensional character of environmental problems is to be addressed by exercising human rights.

Ksentini highlights how a right to a healthy environment would add value to human rights bringing a new dimension and going beyond reductionist concepts to “achieve a coalescence of the common objectives of development and environmental protection” (Ksentini, 1994: para. 5). She also noted the emergence of a new attitude towards a more universal perspective of human rights and environmental issues: a more global awareness and recognized responsibility of the international community brought the shift from environmental law to the right to a healthy and decent environment. In this sense, the Ksentini Report is much more in line with the approach of the Stockholm Declaration, viewed as the qualitative leap from sectorialized environmental regulation (eg. CFCs, toxic waste) to the global recognition of the right to a healthy and decent environment. The Special Rapporteur Ksentini definitely affirms that a right to environment has emerged and has been recognized.

Ksentini foresees the potential dichotomy between the right to environment and the right to development, but resolves it by presenting a right to a form of development that becomes ‘sustainable’. The Special Rapporteur reconciles the concepts of environment and development using the human right principles of indivisibility and interdependence which underpin the links between the right to development and the right to the environment. Departing from the view of economic growth as the panacea of poverty and environmental degradation, Ksentini reframes the dilemma in human rights terms, stating that efforts to counteract poverty are necessary because of the impossibility of efforts “to separate the claim to the right to a healthy and balanced environment from the claim to the right to ‘sustainable’ development” (Ksentini, 1994: para. 49).

The Ksentini Report contains the **Draft Declaration on Human Rights and the Environment** (hereinafter Draft Declaration), “the first international instrument that comprehensively addresses the linkage between human rights and the environment” (Ksentini, 1994: Annex 1), giving environmental rights an autonomous character which they lack in current international law (Boyle, 1999: 70). The Draft Declaration affirms that “all persons have the right to a secure, healthy and ecologically sound environment” (para. 2) adequate to meet equitably the needs of present and future generations (para. 4), reaffirming the principle of equality and non-discrimination, as well as the principle of solidarity. The substantive component of the right to a healthy environment is informed by existing human rights - right to be free from pollution and environmental degradation, and the right to protection, *inter alia*, of air, water, soil, biological diversity, and ecosystems – while the procedural component is constituted by access rights, wider than in other similar instruments (Atapattu, 2002). In fact, Draft Principle 17 of the Draft Declaration affirms the right to environmental and human rights education, which is an overlooked *conditio sine qua non* for the meaningful exercise of access rights. Wider access to justice is established in Draft Principle 20 of the Draft Declaration which states that “the right to effective remedies [...] for environmental harm or *the threat of such harm*” (emphasis added). This wording suggests the importance of the application of a precautionary approach by judicial bodies and that limitation imposed by the need to provide proof of harm is no longer an issue.

Although the Ksentini report is the first document to spell out the content of the human right to a healthy environment in specific terms (Wellman, 2000: 647), it did not receive a favourable response from UN agencies and states (Boyle, 2010: 11-12). No relevant discussions or actions to address report’s recommendations were undertaken (Wolfe, 2003: 48-49; for a detailed account see Earthjustice, 2005). The Draft Declaration was never adopted. Some authors have criticized the report. Boyle (1996: 47) points out that the report lacks reference to solidarity rights, despite its emphasis on the collective nature of obligations (Wolfe, 2003: 52-53). Atapattu (2002) questions the conclusion of the Special Rapporteur on the existence of an autonomous right to environment. He judges reasonable the statement that a new right to environment is emerging, but he strongly disagrees with the view that the right to a healthy environment is *de lege lata*, part of current law (Atapattu, 2002: 79, 82). Although Wolfe (2003: 53) notes that even the UDHR was not a representation of the existing international human rights law at the time it was adopted, he considers the Draft Declaration a “kitchen-sink approach to environmental rights” (Wolfe, 2003: 50): in attempting to identify the environmental dimensions in existing human rights, the Draft Declaration failed to decisively establish a healthy environment as an independent human right.

Other players in the international arena have contributed greatly with declarations and charters, often introducing innovative concepts and approaches later used in the UN Declarations described above. In particular, the International Union for Conservation of Nature (IUCN), previously known as the World Conservation of

Nature, has played an important role in the development of the environmental debate. Despite the several attempts, IUCN failed to secure the adoption of a charter of nature.

In 1980, IUCN presented the **World Conservation Strategy** which emphasized the dependency of humanity on natural resources conservation and the interdependence between conservation and development, presenting for the first time the term ‘sustainable development’. The conservation approach was reinforced by the World Charter of Nature in 1982 and the understanding of sustainable development was later advanced by the World Commission on Environment and Development in 1987.

IUCN presented in 1991 the ‘**Caring for the Earth**’ document in anticipation of the Rio summit stating current thinking about conservation and development. The goal was also to provide a document to bid for a charter on environment and development that did not happen in 1992.

In 1995, on the wave of the Ksentini Report, IUCN published the **Draft Covenant on Environment and Development** with the aim of providing an international legal framework to consolidate into a single juridical framework the vast body of widely accepted, but disparate, principles of “soft law” on environment and development and to reinforce the consensus on basic legal norms (IUCN, 1995: xiii-xviii). The Draft Covenant promotes sustainable development as it affirms the interdependency mutual reinforcement of development, environmental protection, and human rights (IUCN, 2010: 30). It provides substantive and procedural guidance for implementation effort of the concept of sustainable development, encouraging the pursuit of “integrated policies aimed at eradicating poverty, encouraging sustainable consumption and production patterns, and conserving biological diversity and the natural resource base as overarching objectives of, and essential requirements for, sustainable development” (Article 16; IUCN, 2010: 67).

The IUCN Draft Covenant aimed to be a broad framework treaty (Jeffery, 2005) and a model of international environmental law integration (Robinson, 1995). It seems that the international community has not welcomed it or at least ignored it. However, it is an exercise in what a covenant on the environment in human rights language might look like and it remains an inventory of rights on the environment and sustainable development (Robinson, 1995).

IUCN also launched the **Earth Charter Initiative** in 1994 and presented at Rio +10 Conference (2002). The Charter is focused on sustainable development but demonstrates disaffection with mainstream discourses of SD, emphasizing instead the goal of ‘sustainable communities’ as the practical expression of the broader norm of sustainability. Mainstream sustainability discourse emphasized sustained growth to alleviate poverty and only limited effort designated for conservation. In the charter, sustainability is a moral imperative to remove cultural, social, economic and political causes of injustice and deprivation, while valuing the environment (Lynn, 2004). The Charter is concerned with securing ecological integrity and equitable human community, promoting a general ethical dimension of care, integrity, justice and peace.

Reflecting more recent developments in environmental debates and the predominance of the procedural approach of access rights, which will be described in more detail in Chapter 4, the United Nations Environment Programme has drafted the so called Bali Guidelines on the implementation of Rio Principle 10 in preparation for the Rio+20 event (2012). The “**Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters**” (2011b) are voluntary actions that states can follow to speed up and facilitate implementation of legislation and good practices enabling access rights in environmental matters (UNEP, 2009). It consists of 26 guidelines in three pillars, mirroring the pillars of the Aarhus Convention on access rights. The Bali Guidelines do not provide any substantial innovation in the procedural approach, but shed some light on grey areas of Rio Principle 10 that are left to government discretion to deal with issues such as cost, timeliness, legal standing, quality of public participation all of which can be more difficult to achieve government consensus on (Worker and De Silva, 2015).

### 3.1.1 Conclusion

The soft law instruments that have been described so far represent the accepted milestones of the sustainable development paradigm that, marking the phases of the global environmental debate (see Table 1). In 2012, the UN Conference on Sustainable Development (Rio+20, to mark the 20<sup>th</sup> anniversary of UNCED) was held in order to reaffirm the principles set forth in both Stockholm and Rio Declarations, and to adopt strategic commitments on green economy and the institutional framework for sustainable development (CEPAL, 2012; Wible, 2012).

Rio 1992 marked a global awakening, contributing to the establishment of formal international processes which led to targeted agreements on desertification, climate change and biological diversity (Tollefson, 2012; Tollefson and Gilbert, 2012). Despite new commitments being agreed and more declarations being drafted, it appears there is minimal substantial advancement in the international debate on the relation between environment and development in human rights terms. If Stockholm made a statement because of its human rights approach, Rio 1992 and Rio+20 continue to advocate for a green path to development after Brundtland report’s conceptualization of sustainable development. But the issues of global inequality and poverty remain unresolved. Tollefson (2012) suggests that the focus of global inequality contributed to the failure of Rio +20 in establishing new international commitments (Barbier, 2012) on more important environmental issues such as global warming and planetary boundaries.

The 1984 World Charter for Nature stands out as a tangible effort to formulate the rights of nature and it is recalled in several documents and progressive environmental legislation. The Ksentini Report, with its expansive and progressive understanding of the right to a healthy environment, and the failed IUCN Draft Covenant are testimonies that the international law structure is not ready, willing or able to accept that environmental protection must be addressed within the human

rights and development framework. The Bali Guidelines are representative of the modern soft law approach to environmental rights, providing voluntary rather than imposed obligations to protect the environment.

SOFT LAW INSTRUMENT	APPROACH	INNOVATIVE ELEMENT	SUBJECT	MAIN CAUSE	REDRESS	PRACTICAL PROPOSALS
Stockholm Declaration (1972)	DEVELOPMENT-ANTHROPOCENTRIC Dichotomy of environment/development to be resolved with more development.	Human rights and the environment: basis for a substantive right to an environment of a certain quality	Human environment: environment is a precondition for improving quality of life	Economic (under)development causes environmental degradation	Contribute to environmental preservation while improving quality of life	International financial and technical cooperation
World Conservation Strategy (1980)						
World Charter of Nature (1982)	ECOCENTRIC Nature as a rights holder Environmental limits and carrying capacity	The right of every form of life	Environment/nature as a shaping force of human culture	Excessive exploitation and habitat destruction by man	Environmental damage as a subject of redress (independent from human worth)	Procedural rights: collective character and enhanced justiciability for env. damage
						EIA guidelines for decision-making
Declaration on the Right to Development (1986)						
WCED (Brundtland) Report (1987)	DEVELOPMENT ANTHROPOCENTRIC Interdependence environment-development-economy. Trade-off environment/development	Sustainable development. Reconciliation of ec. growth and the environment. Ec. growth is objective to be sustained	Environment as a construct (passive role): reworking relationship between nature and society.	Shift in visibility of and blame from polluters to poor. Poverty causes environmental degradation. Environmental degradation affects growth and potential for growth	Environmental managerialism: sustained growth to eliminate poverty and protect the environment	More economic growth with a more efficient use of scarce natural resources
'Caring for the Earth' document (1991)						

**Table 1** Summary of Environmental Soft Law Instruments (see also page 60).

Rio Declaration (1992)	DEVELOPMENT ANTHROPOCENT RIC	Environment, economic development and social development	Sustainable development	Human centred sustainable development	Unsustainable pattern of production/consump tion	Environmental protection as an integral part of the development process	International agreed norms of env. protection  P. 7 CBDR, P.10 Public Participation, P.15 Precautionary P.
Ksentini Report (1994)	HUMAN RIGHTS	Poverty, development, enjoyment of human rights and environmental degradation.  Development and environment on an equal footing.	Right to a healthy and decent environment  Draft Declaration on Human Rights and the Environment	Legal framework for a right to environment	Global, complex, serious and multidimensional nature of environmental problems	Indivisibility and interdependence of human rights  New International Order (art. 28 UDHR) environment and development to be treated together (towards a right to sustainable development)	Global problems and global commitment gives rise to a right
Earth Charter Initiative (1994)							
IUCN Draft Convention (1995-2010)	ENVIRONMENTAL LAW	SD: Development, environmental protection, and human rights.	Right of all persons to live in an ecologically sound environment adequate for their development, health, well-being and dignity	Broad framework treaty a model of international environmental law integration.	Failure to integrate environment and development	Reinforce the consensus on basic legal norms.	Procedural rights, environmental law, integrated policies for SD.

### **3.2 Environment as a legal standard within existing human rights instruments**

After recalling several non-binding instruments that have been created over time to examine environment as a context and element of development, it is necessary to look at legally binding international, regional and national instruments. The aim of this section is to trace the origin of the right to a healthy environment and the possible developments towards its substantiation, and therefore its legal recognition. Despite the failure of the Ksentini proposal to practically advance the reconciliation of development with environmental protection and social justice upholding a right to environment and the similar failure of the more recent IUCN Draft Covenant to get legal recognition, regional and national legal systems have found means to incorporate environmental protection within the human rights framework.

There are a number of international and regional instruments – for instance, the International Covenant of Economic, Social and Cultural Rights, the International Labour Organization Convention 169 and the San Salvador Protocol - that introduce environmental concerns in their conceptual framework. Despite this, they are similarly toothless because they fail to specify rules for protection of environmental rights (Sands, 1995). Several national constitutions enshrine the right to a healthy environment.

The inception of the right to a healthy environment is to be found in the International Covenant of Economic, Social and Cultural Rights (ICESCR): Article 12(2) on the Right to Health states that “[...] the steps to be taken by the States Parties [...] to achieve the full realization of this right shall include those necessary for [...] (b) the improvement of all aspects of environmental and industrial hygiene” (ICESCR 1966). Even though the ICESCR does not include any direct mention of the RHE, Article 12, for its drafting history and the wording, acknowledges that the Right to Health embraces a wide range of socio economic factors that promote a healthy life (General Comments n. 14, UN/CESCR, 2000). Within these enlisted factors, it could be argued that the healthy environment comprises all the other determinants of health expressed in the comment, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions (UN/CESCR, 2000: para. 4). General Comment n. 14 takes note of the developments in the enforcement of the healthy environment as a human right (UN/CESCR, 2000: footnote 13: 19) in relation to the need to prevent and reduce population’s exposure to detrimental environmental conditions which affect human health (para. 15). In doing so, it recalls Principle 1 of both Stockholm and Rio declarations as well as the San Salvador Protocol (OAS, 1999) in the Inter-American region. Environmental degradation can be easily connected to violations of economic, social and cultural rights contained in the Convention. As Sands (1995: 224) notes, the realization of violation of these rights could facilitate the monitoring of substantive environmental standards and whether these standards are satisfactory. Even though the ICESCR does not directly recognize a right to environment, there is a clear tendency towards the introduction of environmental concerns within the

human rights framework. The ICESCR also indicates that the environment as a legal standard can be upheld if it is considered as an element of the right to health.

The environment can also be identified as an intrinsic category of respect within the goals of education, as indicated by Article 29 of the Convention on the Rights of the Child (1989). It explicitly states that the education of the child shall be directed to "the development of respect for the natural environment".

The International Labour Organization (ILO) Convention 169 (1989) concerning indigenous peoples includes several references to natural resources and the environment. States are required to adopt special measures (Art. 4) to protect and preserve the environment and territories of indigenous peoples (Shelton, 2010b). Article 15 affirms the duty to safeguard their right to natural resources of their land, including the right to participate in the use, management and conservation of these resources. The ILO Convention also connects civil and political rights to environmental issues (Sands, 1995: 229), specifying the obligations of the state in relation to procedural rights. Article 6, 7 and 11 enshrine the right to participate in decision-making and access to judicial remedies. The ILO Convention 169 identifies the environment as territories and resources, making a strong connection with indigenous rights and property rights.

### **3. 2. 1 Regional Systems, National constitutions and other laws**

Even if a tendency towards the identification of a healthy environment as a human right can be definitely traced within human rights framework and instruments, the UN have not come yet to a formal statement, or an international instrument that is universally applicable (Atapattu, 2002), and that leads to the recognition to the right to a healthy environment. There are, nevertheless, two regional human rights instruments – the American Convention on Human Rights (ACHR) and the African Charter on Human and People's Rights (ACHPR) – and several national constitutions that recognise the RHE.

This section details the regional approaches to environmental rights and their implications on the judicial level. Relevant case law description is used to better understand how environmental conflicts are solved in presence, or absence, of a RHE. The ACHR and the ACHPR contain a specific environmental norm with an important difference: the American Convention did not make the right justiciable, since it the RHE is not subject to the individual complaint procedure, while the African Charter did (Shelton, 2010b: 7-12). The European Convention for the Protection of Human Rights and Fundamental Freedom does not contemplate a RHE. The right to a safe, clean and sustainable environment (art. 28, f) has been included in the Association of Southeast Asian Nations (ASEAN) Human Rights Declaration (2012) under the economic, social and cultural rights heading and as part of a cluster of rights that support the right to an adequate standard of living.

This section explores also the European regional system and its approach to environmental issues, noting the resistance towards the recognition of a new right.

National constitutions will be briefly covered to note their similarities and/or similarities, and/or differences, that can be useful to further identify the substantive components of the RHE.

### **3. 2. 2 American Convention on Human Rights**

Environmental jurisprudence in the American regional system can be used to test whether the view of human rights is instrumental to better environmental protection (Shelton, 2009b) holds up. This approach stresses the state's responsibility based not only on its direct conduct but also on its failure to enforce law and regulations on third parties (private sector) (Shelton, 2009b).

The protection of economic, social and cultural (ESC) rights was added through the San Salvador Protocol (1999) to the existing human rights system of the Organization of American States (OAS). The protocol champions the indivisibility of human rights, stressing the existence of a close relationship between ESC rights, and civil and political rights, and that the "different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person" (Preamble). Thus, all rights require permanent protection and promotion if they are to be fully realized and there is no justification for some rights to be realised against the violation of others and vice versa.

Article 11 of the San Salvador Protocol affirms the right to a healthy environment. The provision, more comprehensive than the one set forth in Article 12 (2,b) of ICESCR (Acevedo, 1989: 157), states that:

1. Everyone shall have the right to live in a healthy environment and to have access to basic public services; 2. The States Parties shall promote the protection, preservation, and improvement of the environment.

The San Salvador Protocol provides a more precise formulation of the right to a healthy environment than those presented in the soft law instruments described in the previous section. It situates the RHE within economic, social and cultural rights but it grounds it to the whole human rights framework based upon the principle of indivisibility. However, the RHE enshrined in Article 11 is far from being enforceable as it was not added to the list of rights subject to the individual complaint procedure (Shelton, 2010b: 7. See also Medina, 2009: 491). For this reason, there have been no cases brought before the Inter-American system on the direct violation of RHE. The one area where environmental rights have been addressed is in relation to indigenous peoples and natural resources exploitation. The minority focus of both the Commission and the Court has accomplished two critical understandings. First, it established that environmental quality directly affects the right to life, health and food as well as property rights although only in the indigenous context. Second, the resulting jurisprudence has recognized indigenous and communal rights rather than individual rights (VanderZee, 2009: 20; see also Atapattu, 2002).

With the *Yanomami vs Brazil* case (IACCommHR, 1985) – over the construction of a highway passing through indigenous territory and subsequent natural resources exploitation -, the Inter American Commission concluded that ecological destruction caused the violations of the right to life, health and food (Sands, 1995: 228), and it established a link between environmental quality and the right to life (Shelton, 2002d: 16). The Commission found the state was responsible for its own actions through violating rights<sup>6</sup>, and also for its failure to prevent environmental degradation caused by the private sector (Shelton, 2009b) - authorizing private natural resources exploitation.

The *Awas Tingni vs Nicaragua* case (IACtHR, 2001) - logging exploitation on Awas Tingni community's tropical forest without prior consent - is the first where the Inter-American Court directly addressed property rights of indigenous peoples (Grossman, 2001). Both the Commission and the Court have based their decisions on arguments supporting the relation between the enjoyment of human rights and the state of the environment (Taillant, 2004).

The importance of this case is twofold: the protection of indigenous property rights (art. 21 ACHR) and the collective right to access to justice (art. 25 ACHR). The Nicaraguan case is the first one brought before the Inter-American Court examining the property rights of an indigenous population. It is also the first legally binding decision of an international court to uphold the collective land and resource rights of indigenous peoples (Anaya and Grossman, 2002: 2). The Awas Tingni community lived in constant uncertainty as Nicaragua recognized communal ownership in principle but also limited such recognition in practice, since it lacked proper demarcation. The Court has resolved this gap, construing the right to *private* property as applying to *communal* ownership, recognized even in cases where legal title is absent (VanderZee, 2009: 24; Medina, 2009: 498; Anaya, 2009b: 294).

Second, the protection for procedural rights is upheld since Nicaragua violated the right to judicial protection (art. 25 ACHR) which is connected to arts.1 and 2 of the Convention obligating states to adopt measures necessary to secure the enjoyment of fundamental rights (Anaya and Grossman, 2002: 11). In doing so, the Court makes reference to procedural rights in an expansive manner. The right to access to justice has a communal character, as it steers away from the conventional individual proof of harm to seek judicial redress (VanderZee, 2009: 24). The Inter-American Court, arguing that Nicaragua did not adopt “the adequate domestic legal measures to allow delimitation, demarcation, and titling of indigenous community lands nor did it process the judicial remedy filed by members of the Awas Tingni Community within a reasonable time” (IACtHR, 2001: para. 137), creates a collective right to access to justice for indigenous peoples (VanderZee, 2009: 24).

The Inter-American Court has found violations of procedural rights in relation to the environment. In *Claude-Reyes et al. v. Chile* case (IACtHR, 2006) about the

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<sup>6</sup>Brazil violated the right to life, liberty and personal security (Article I); the right to residence and movement (Article VIII); and the right to preservation of health and to well-being (Article XI) of the American Declaration on the Rights and Duties of Man (IACCommHR, 1985).

failure to release information of a deforestation project, the Court considered that Chile violated Article 13 – right to freedom of thought and expression - as it did not comply with its positive obligation to provide information to the public regarding environmental impact of government-approved projects (VanderZee, 2009). Chile also violated the right to judicial guarantees (art. 8 ACHR) because it did not meet lawful requirements to provide information.

The judgement of the Inter-American Court on the *Saramaka People v Suriname* case (IACtHR, 2007) is probably the most comprehensive and expansive one on procedural rights. The Saramaka people accused the state of violations of the Saramaka people's fundamental rights in granting timber logging and mining concessions within Saramaka territory without prior consent and consultation.

The Court emphasised the right of the Saramaka people to access to information, prior consent, right to consultation “in accordance with their traditions and customs [...], with regards to development or investment projects that may affect their territory” (IACtHR, 2007: 62, Operative para. 8). In addition, the state has the obligation to reasonably share with the tribal community the benefits that such projects might generate (IACtHR, 2007: 62, Operative para. 8). The Court used this wording in order to expand the notion of the right to obtain just compensation for deprivation of property: tribal people have the right to share the benefits of activities that limit their right to use and enjoy their traditional land and essential natural resources that they would otherwise need for their physical and cultural survival, development and continuation of indigenous and tribal peoples' ways of life (IACtHR, 2007: para. 139; IACommHR, 2010).

There are various elements of this case that are particularly relevant to this research. First, the judgement reinforces the link between human rights and the environment, with particular reference to the right of indigenous and tribal people to land and natural resources which their survival depends on (Orellana, 2008).

Second, the Court encounters clear difficulties in valuing environmental damage for compensation. In the Saramaka case, the Court considered the material environmental damage caused by the logging concessions. Experts highlighted how logging produced not only material loss in terms of number of cut down trees but also in terms of consequences over the regeneration capacity of the land and forest survival (IACtHR, 2007: para. 150-152; see also Orellana, 2008). This could be considered a possible practical interpretation of the rights of nature.

Third, the distinction the Court made between “consultation” and “consent” is undoubtedly important (Orellana, 2008). Consultation is required to be culturally tailored to traditional decision-making process so that it facilitates discussions within the community. As per international standards, it should take place at the earliest possible stages of project development. The state must also ensure access to information about environmental impact and related health risks. According to the Court statement, in the case of large scale development that might produce a greater impact on the tribal territory and might pose a threat to the traditional use and enjoyment of land, the state has the obligation to consult and to obtain free and prior

informed consent from the Saramaka people. The Court therefore distinguished between projects that might directly affect, limit or impede the Saramaka collective use of natural resources essential for their social, cultural and economic survival, and projects that do not pose an immediate threat to traditional living. For instance, logging concessions negatively affect Saramaka people as trading timber is one of their traditional economic activities, therefore the state would need their consent to grant any additional logging license. In contrast, permission to open a mine within Saramaka territory would only require consultation, not their active consent as it involves the exploitation of non-essential natural resources for tribe survival (i.e. gold mining) (Orellana, 2008; Alcalá, 2009). Orellana (2008: 846-847) notes that the Court's approach is inconsistent: on one hand, the Court suggests that interference with traditional land rights and natural resources is a threat for survival, on the other it allows limitations of rights enjoyment upon consultation and/or consent and compensation, implicitly pricing a group's survival. Orellana further suggest a broader interpretation of the term 'survival' rooted in the right to life which would definitively preclude concessions negatively affecting natural resources essential for an indigenous or tribal group's survival.

The Saramaka judgement questions the right of the state to exploit natural resources and imposes three safeguards (Orellana, 2008: 841) or a "three pronged test" (Alcalá, 2009: 5) to decide the modalities and the limits of natural resources exploitation. The state must abide three rules: 1) to carry out consultations in any event and to receive free and prior informed consent in the case of high impact development projects; 2) to share benefits of projects; and 3) to ensure an independent environmental and social impact assessment.

This judgement, in other words, promotes access rights – or procedural environmental rights - for the Saramaka people. The Court advocates for active public participation, imposing a duty on the state to seek such participation in the form of consultation and eventually free and prior informed consent. It imposes an obligation to the state to release and disseminate environmental and health risks information to the interested public, promoting the active role of the state in the access to information. It advocates for independent environmental impact assessment which is an internationally recognised instrument to guarantee access to information and to facilitate public participation. Finally, urging the state to take any necessary legislative and administrative measures to guarantee access to effective judicial remedies, the Court is promoting access to justice.

The Inter-American system addresses environmental rights mainly in cases of indigenous peoples and natural resources exploitation, establishing that environmental quality directly affects the right to life, health and food. The focus on minority rights allowed for the recognition of the collective character of environmental procedural rights, especially access to justice. However, it has not been extended to non-indigenous peoples. The Inter-American system has also stressed that the obligations imposed on the state are not limited to actively promote and protect access rights but extend to sharing the benefits of resources exploitation.

It is to be noted that the role of the Inter-American system of human rights protection that favourably contributed to the protection of indigenous rights and environmental rights mentioned above has been subjected to criticisms on the wake of the recent Belo Monte dam case (2011) and the confrontational behaviour of Brazil as it will be explored later in Chapter 6.

### 3.2.3 African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights enshrines solidarity rights with a cluster of provisions on collective rights that complements the Right to Development with concrete dimensions (Scheinin, 2010: 346). Within this cluster Article 24 is included, affirming that "All peoples shall have the right to a general satisfactory environment favourable to their development". Thus, the African Charter represents the first regional instrument to explicitly guarantee the human right to a healthy environment. It affirms environmental rights in broadly qualitative terms (Boyle, 2010: 3). Atapattu (2002) suggests that Article 24 seems not to provide an absolute environmental right: in fact, it rather limits the potential reach of the RHE as it is linked to the concept of development. So, economic development could act as a 'trump' to environmental protection in case of a stand-off between the two. It can be argued that the RHE is seen as a precondition or the basic background for development.

In terms of protection of human rights, despite being defined as "the least developed or effective, the most distinctive and the most controversial" (Steiner and Alston, 2000: 920) of the three existing regional human rights systems, the African system constitutes the more progressive system (Osofsky, 2010), incorporating in one binding instrument economic, social and cultural (ESC) rights as well as civil and political rights and recognizing the collective rights of peoples (Chirwa, 2002; Chowdury et al., 2010). Indivisibility is a clear theme emerging in the African Charter preamble, stating that "civil and political rights cannot be dissociated from economic, social and cultural rights from their conception as well as universality" (ACHPR, preamble). Ouguergouz (2003: 57) suggests that the construction of this relation implies also that the satisfaction of ESC rights guarantees the enjoyment of civil and political rights, going past the orthodoxy about rights 'generations' (see Wellman, 2000). The African Charter differentiates itself from other binding international instruments as it designates people as the sole holder of rights (Steiner and Alston, 2000: 355; Ouguergouz, 2003: 201; Chowdury et al., 2010). In fact, the *communal aspect* (Hill et al., 2004: 379, cited in VanderZee, 2009: 29) is given to all the rights included in the Charter. However, its weak enforcement mechanism (Chowdury et al., 2010), based on a more diplomatic and bilateral settlement approach (Chirwa, 2002), and the lack of funds prevents both the Commission and the Court to work at their maximum capacity (Odinkalu, 1998: 398).

The *Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria* (SERAC case, 2001) – environmental contamination due to oil resources

exploitation - is the only environmental case that came before the African Commission based on Article 24. This case represents a landmark decision, directly applying a range of economic, social and cultural rights.

The Commission found that Nigerian Government did violate the right to a clean environment, besides many more violations<sup>7</sup>. The Commission, citing Alexandre Kiss' (1993: 553) statement that environmental degradation is contrary to satisfactory living conditions and human development, noted that the right to a clean environment is "closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual" (ACHPR, 2001b: para. 51). Thus, it imposes a clear obligation on states to take reasonable measures "to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources" (ACHPR, 2001b: para. 52). This expansive reading of Article 24 obliges the state to facilitate procedural rights and provide opportunities to promote affected communities' participation in development decision-making. Even though the Commission recognizes to the Nigerian government the right to produce oil as a source of income to fulfill the economic and social rights of Nigerians, it recognizes also the positive obligation to ensure that such activity does not harm the environment or violate citizens' rights.

The Commission in this case placed great emphasis on environmental degradation and its effect on the people, offering a "blueprint for merging environmental protection, economic development, and guarantees of human rights" (Shelton, 2002a: 942). The importance of the *SERAC* case is twofold: it sets a precedent for the judicial enforcement of ESCRs, demonstrating that the ESCRs are justiciable to the international community; and it is the most important environmental case so far, being also cited by the Inter-American Commission in a ruling on indigenous property case. Shelton (2002a: 942) observes that the Commission substantiates the RHE since it requires states to adopt several affirmative actions towards environmental protection.

The African system has the huge task to address environmental issues against the demands of economic development in a continent where ecological problems are diffuse and development issues are causes and effects of ecological damage. The task of the African system is to demonstrate whether it is able to address violations of the rights enshrined in the ACHPR (VanderZee, 2009). Specifically for the purpose of this research, the question is whether the progressive environmental norm of Article 24 can address adequately violations of environmental rights that have a repercussion on general human rights. The additional value of the *SERAC* case is the fact that environmental concerns were directly addressed with a special attention to the correlated development and community issues. Other Nigerian cases with a strong environmental component that were filed to national courts had very different

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<sup>7</sup>Nigerian Government violated also the right to shelter, due to forced displacement and use of violence to suppress any kind of social uprising (ACHPR, 2001b).

outcomes (Shelton, 2002a; Osofsky, 2010). Even if violations of human rights were recognized, the environmental right violation was not considered to be a core matter, failing therefore to address the violations as single parts of a interconnected complex issue (Osofsky, 2010).

### **3. 2. 4 European Convention on Human Rights and Aarhus Convention**

The European Convention on Human Rights neither guarantees a Right to a Healthy Environment, nor is the environment considered to have rights of its own (Weber, 1991). The European system does reflect a developing pattern towards increased awareness and sensitivity to the links between human rights and environmental protection. The Convention did not explicitly consider the protection of the environment as a legitimate interference with the enjoyment of other rights, nor could established rights be limited even if the exercise of such rights causes environmental degradation (Weber, 1991). Nevertheless, jurisprudence over the years has proved that European Court of Human Rights (ECtHR) now recognises environmental quality as a component underlying enjoyment of human rights (Desgagné, 1995: 265). It also recognises environmental protection as a legitimate public interest that might justify limitation of individual rights (Desgagné, 1995: 265). Environment is, therefore seen, rather weakly, as a precondition for the enjoyment of other rights.

As Steiner and Alston (2000: 786) describe it, the European System is a model for the other regional systems to confront with since it is the most judicially developed of the human rights systems and has generated an extensive jurisprudence. However, its judicial developments on the environment are different from, and arguably more limited compared to, the American and African systems described above. Shelton (2010a) argues that the liberal interpretation of individual rights within the European system protects environmental rights without formulating a specific right. Its dynamic and evolving approach, interpreting rights in the most practical and effective way, benefits environmental rights which are not included in specific agreements and treaties (Shelton, 2010a: 94).

The European regional system, however, also includes a specific Convention to develop the legal provisions for the implementation of Principle 10 of Rio Declaration. The Aarhus Convention establishes the right to a healthy environment and reinforces the procedural rights of access to information, public participation and access to justice.

#### **3. 2. 4. 1 European Convention on Human Rights**

Most environmental cases at the European Court are claims of pollution and are brought on the base of Article 8 which states that: 1) Everyone has the right to respect for his private and family life, his home and his correspondence; 2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the

country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Broad interpretations of Article 8 are applied to environmental cases. The state may be considered in violation of its duties when it directly causes pollution or it fails to regulate private sector activities which cause environmental harm. In addition, the state has a positive duty “to take reasonable and appropriate measures to secure the applicant’s rights [...] or in terms of interference by a public authority to be justified” (*Leon and Agnieszka Kania v. Poland*, 2009: para. 99). To determine public interference, the Court conducts a balancing test, which consists in evaluating to what extent the state has been able to strike a fair balance between public interest, mainly in economic terms, and the private interest of individuals to enjoy their right to home, family or private life. As explained in *Giacomelli v. Italy* case, breaches of the right to home are not only the material violations such as unauthorised entry but include broader, non-material violations “such as noise, emissions, smells or other forms of interference” (ECtHR, 2006: para. 76).

The first case brought before the European Court of Human Rights (ECtHR) was *Arrondelle v. United Kingdom* in 1980, in which the applicant complained of stress created by the noise pollution of Gatwick airport and the road leading to it. The Court did not consider it admissible.

A decade later, the ECtHR decided on *Lopez Ostra v. Spain* case (1994), in which the applicant alleged a breach of Article 8 because of polluting fumes released by a waste treatment plant, alleging negative health effects on the local population. The Court decided that Spain did violate Article 8 in failing to balance the interest of the town’s economic well-being against the applicant’s enjoyment of her privacy rights. The Court in fact observed that “that severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life” (para. 60; cited in Shelton, 2002d: 21).

Interestingly, in 2001 the Court noted that noise pollution from Heathrow airport from flights between 4 a.m. and 6 a.m. - *Hatton and Others v. The United Kingdom* case - was violating the applicants’ rights to respect for their home and family life, alongside the right to a remedy (Article 13). The Court also affirmed that the state failed to balance individual rights and country’s welfare, and that the UK could not simply “refer to the economic well-being of the country in the particularly sensitive field of environmental protection” (Shelton, 2002d: 19). Judge Costa in a separate opinion refers directly to the Right to a Healthy Environment, noting that the judgments of the Court are following the world tendency towards an increasing awareness of environmental issues and their influence on peoples.

A land mark case is represented by *Anna Maria Guerra and 39 others v. Italy* (1998), where the applicants alleged that the government violated the right to freedom of information (Article 10), failing to inform the public of the pollution and risk of accidents resulting from the operation of a chemical factory near their town of residence. The case was first reviewed by the European Commission of Human Rights (ECommHR), which found that the right to information implies a positive

obligation on the government “to collect, process and disseminate such information, which by its nature could not otherwise come to the knowledge of the public” (ECtHR, 1998: para. 52). The ECommHR recognized that public information is “one of the essential means of protecting the well-being and health of the local population in situations in which the environment was at risk” (ECtHR, 1998: para. 52). The case was then heard before the European Court that found a violation of Article 8, citing the *Lopez Ostra* case (ECtHR, 1994), but reversed the Commission statement on Article 10, affirming that it only prohibits government from interfering with a person’s freedom to receive information (Shelton, 2002d: 21). Nevertheless, eight out of ten judges stated that positive obligations to disseminate information might exist in some circumstances (Shelton, 2002d: 21).

Article 6 on the right to Liberty and Security of Person, providing judicial guarantees and including the right of access to justice (art. 6 (1)), has also been used in several cases<sup>8</sup>, but not with the same outcomes. It is important to mention the *Balmer-Schafroth and Others v. Switzerland* case, where the applicants claimed that the fact the “Federal Council would consider the application for an operating permit for a nuclear power plant as an authority of both first and last instance” (ECtHR, 1997: para. 9) brought a violation of the right of access to justice and to life. The applicants also affirmed that the nuclear power plant had considerable risk of an accident to occur since construction defects impeded meeting certain safety standards. The Court did not consider the case admissible on the base of a violation of Art. 6 (1), because the applicants “had not established a direct link between the operating conditions of the power station and their right to protection of their physical integrity, as they had failed to show that they were personally exposed to a serious, specific and imminent danger” (ECtHR, 1997: para. B). Interestingly, seven judges dissented, affirming that the likelihood of the risk and damage should be considered as a sufficient base to admit the case, applying the Precautionary Principle (Shelton, 2002d: 22; see also VanderZee, 2009).

The European Court also noted that certain activities which severely affect the environment could reduce the value of property. However it also found that the right to peacefully enjoy one’s possessions (Article 1 of Protocol 1) does not guarantee in principle free enjoyment of property in a pleasant environment (CoE, 2006: 43, cited in VanderZee, 2009: 19). This right imposes positive and negative obligations on states to ensure its citizens’ right to peacefully enjoy their property, but the Court leaves to the state an extensive margin of appreciation (VanderZee, 2009: 19).

Case law demonstrates that the European system has approached environmental cases through the right to family home and private life, with a special attention on the balancing test between state’s economic interests and the individual’s enjoyment of rights. Other rights based approaches have not proved adequate. For instance,

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<sup>8</sup>*Oerlemans v. Netherlands*, ECHR (1991), Series A, No. 219; *Zander v. Sweden*, ECHR (1993), Series A, No. 279B; *Balmer-Schafroth v. Switzerland*, 1997-IV ECHR, Judgment of 26 Aug. 1997; *Zimmerman and Steiner v. Switzerland*, ECHR (1983), Series A, No. 66.

environmental cases have also been brought on the base of a violation of Article 2, the right to life, but the Court has not found violations of the right to life unless state's action or inaction resulted in death. Using a strict definition of life (Veinla, 2007) implies that unless the link between environmental harm and life loss is clearly proven, the right to life is not a viable approach to seek redress for environmental harm.

The right to information approach illustrated by the *Guerra* case is likely to be changed in the near future, as the Court ruling is definitely limiting the scope of this right to non-interference. Other European instruments, such as the Aarhus Convention, do entail the positive obligation on states to voluntarily disseminate information to the public. Bearing in mind that information is considered to be a fundamental environmental right, it is fair to question whether this obligation is complied with by the states, in which manner and if it effectively reaches the interested population.

### 3. 2. 4. 2 The Aarhus Convention

The UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998, hereinafter Aarhus Convention) is widely recognised as the most authoritative instrument as it creates “a unified legal framework that guarantees a powerful set of rights to the citizens” (UN/ECE, 2006: 3). Its goal is to promote the right to a healthy environment through the promotion of access to information, public participation in decision-making and access to justice in environmental matters. Its twofold significance lies in the Convention being the first legally binding supranational instrument on access rights (McCracken and Jones, 2003; Morgera, 2005; Ebbesson, 2011) and, although regionally negotiated, it is an international agreement open to accession by states members of the United Nations pending acceptance of the Meeting of the Parties (UN/ECE, 2014), establishing a new benchmark in environmental democracy (UN/ECE, 2006). It stands out from other legal documents and declarations previously mentioned since it recognises that “every person has the right to live in an environment adequate to his or her health and well-being” (Aarhus Convention, 1998).

The procedural approach of access rights - access to information, access to justice, participation - promoted in Principle 10 of Rio Declaration is elaborated as the only means to assert the Right to a Healthy Environment. Citizens need to access environmental information, to participate in decision-making in order to improve the quality and implementation of decisions and effective judicial mechanisms should be accessible. Access rights, when asserted, contribute to public awareness of environmental issues, enabling public to express concerns and obliging public authorities to take into account such concerns. For the first time it is mentioned that access rights enable transparency and accountability in general governmental decision-making, pushing for the integration of environmental considerations via the mechanisms of public participation. It draws from the Convention the unambiguous

idea that without access rights there cannot be a substantive RHE. The RHE is a right to be asserted by citizens and it is a duty to be observed. This is a right which requires an active involvement of the civil society; it does not depend solely on public institutions to grant it. As Kofi Annan highlighted, “members of the public and their representative organizations can play a full and active role in bringing about the changes in consumption and production patterns which are so urgently needed. The active engagement of civil society [...] is a prerequisite for meaningful progress towards sustainability” (UN/ECE, 2000: V).

Hayward (2005: 154) notes that even if the Convention advances environmental rights, it does not provide a strong compliance mechanism or “means for citizens directly to invoke” the RHE. Similarly, Boyle (2010) indicates that the Convention remains short of providing the public with means to participate in decision-making processes of policies where the balance of economic, social and environmental goals is at stake. He specifically critiques the limited substantive implications of Article 7 that provides the public with the right to participate in decision-making processes concerning policies relating to the environment (Boyle, 2010: 7).

The Aarhus Convention contains instructional guidelines on what are public participation, access to information and access to justice, setting minimum standards for citizens’ rights in the field of environmental decision-making (UN/ECE, 2006). Considerable impediments of the Convention are: first, the clause that makes reference to the possibility to comply with the norms according to the provisions in force in national legislations; and the general flexibility of the text that leave signatory states discretion to comply with public participation and access to justice provisions (McAllister, 1999). These two elements narrow access rights’ impacts for multiple reasons. Considering that domestic law is the ultimate guarantor of rights (Castellino, 2010: 41), the main problems of access rights are those national legislations that may not comply entirely with Convention articles, so that important provisions are only partially implemented. In addition, complex bureaucracy, the non-existence and/or inefficiency of dedicated environmental institutions and, in some cases, lack of governmental will to adhere to Convention principles, constitute barriers that prevent access rights to be enjoyed.

#### **i. Access to Information**

In the Aarhus Convention, the right to know and to gain access to information is related to environmental matters and it considered the first step for the people to actively enjoy their RHE, enabling them to get involved into the decision-making process and to be heard by a corresponding authority.

Access to information has two sides: a passive one, which is related to the right of the public to seek information and the obligation of public authorities to provide information upon request; an active access, which concerns the right of the public to receive information and the obligation of authorities to collect and disseminate information without any request (UN/ECE, 2000: 6, 49). The text of the convention states that any person, regardless his interest, can claim access to any type of

environmental information, unless deemed confidential<sup>9</sup> by the state actor, to any agency serving a public function. On the other hand, public authorities should supply the information as soon as possible and might impose a charge that must not exceed a reasonable amount (eg. charge for copying paper or any digital copying support).

The Aarhus Convention's definition of the right to access information is particularly valuable and broader than the standards of most national freedom of information laws because of two reasons: the definition of 'environmental information' is broader than that typically provided for by national freedom of information laws; and the definition of 'public authorities' includes national as well as regional bodies (Jendroska, 1998, cited in McAllister, 1999: 190). These entities are required to release information requested within one month, unless the nature of the request itself would justify an extension that cannot exceed two months. The material must also be released in the form requested, unless it is already publicly available, or it is easier to release it in another format. In this latter case, a written explanation must be provided.

To be able to access information is highly dependent on the ease of access itself. Governments have the "responsibility of supporting the public interest by making it easy to access that information" (UN/ECE, 2006: 5) and have the responsibility to produce, compile and maintain public information. But it is often very difficult to gain access to environmental information. Common situations include: 1. the government does not have adequate information; 2. the government either voluntarily or involuntarily impedes the access; 3. the public does not seek environmental information. As previously said, civil society is the first agent that needs to seek information; nevertheless, governments have a greater power to decide whether to grant access and in which modalities.

In 2003, parties to the Aarhus Convention adopted the protocol on Pollutant Release and Transfer Registers (2003, hereinafter Kiev Protocol) regulating information on pollution. It is the first legally binding international instrument on pollutant release and transfer registers (PRTRs) which are inventories of pollution from industrial sites and other sources. Its objective is "to enhance public access to information through the establishment of coherent, nationwide PRTRs". Protocol provisions aim to contribute to reduction of environmental pollution and to facilitate public participation, providing complete, consistent, credible and accessible environmental information. PRTRs, a legally binding instrument for corporate environmental responsibility (Morgera, 2005: 144), are hailed as a good practice in access to information and are being promoted internationally. Ebbesson (2011: 81) notes that while PRTRs "generally enhance" the right to access to information, they

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<sup>9</sup>The release of information is not required if it would have an adverse effect on (1) the confidentiality of the public proceedings, (2) international relations, (3) national defense, (4) public security, (5) the fair administration of justice, (6) intellectual property rights, or (7) confidential commercial information. All request refusals must be in writing, ideally within one month of the request. Finally, these exemptions should be narrowly construed "taking into account the public interest served by the disclosure" (Art. 4, (3)).

do so by imposing a duty on polluters to report on specific activities rather than directly supporting information requests from the public.

## **ii. Right to Participate**

Public participation is an important instrument to force public authorities to be transparent and accountable in environmental decision-making with the aim of improving the quality of environmental choices and therefore better environmental quality. The Convention recognises three different areas in which public participation can be present: decision-making process on a specific activity; environmental planning, programmes and policies by public institutions; generation of law, regulations and binding norms (UN/ECE, 2000).

Public participation is also twofold, considering on one hand civil society, its interest and its awareness, on the other public authorities, their degree of transparency and their will to involve society. The interest of civil society cannot be standardised and controlled. On the other hand, governments' attitude towards public participation can be regulated and measured. While the convention does not specify "appropriate provisions" (UN/ECE, 2006: 12), it sets out five means to enhance public participation (Ebbesson, 2002: 3): authorities are required to (1) provide a reasonable time frame for participation to be meaningful and grant opportunities for early participation in the preparation of plans and programs that have significant environmental implications. (2) The methods of participation should rely on the inspection of relevant information, so that people can explore alternatives and (3) submit comments, which should be taken in (4) due account for the decision. (5) Authorities should finally justify the decisions. A critical issue is the unclear definition and implication of "due account" (Ebbesson, 2002). In general, the participation pillar of the convention has been highly criticised and regarded as incomplete because it does not specify the requirements for public participation in legislative and rule making decisions (Jendroska, 1998, cited in McAllister, 1999: 194). This flexibility that allows governments to determine the involvement of the public in legislative decisions regarding environmental matters highly impairs public access to governmental entities that make important environmental decisions (Jendroska, 1998, cited in McAllister 1999: 194).

Public participation is highly dependent on the other two procedural rights - access to information and access to justice. The relation between the access to information and public participation is directly proportional: more access to information enables more public participation. Citizens can better exercise their right to participate if they are informed. The same applies in reverse.

If information is vital to allow citizens to participate, access to justice allows citizens to seek redress in case of breaches of their right to information or participation. Access to justice ensures that public participation is a central part of the decision-making process, rather than just a requirement to fulfil (UN/ECE,

2000). It gives the public the opportunity to challenge governments' decisions and attempts to foster accountability.

### **iii. Access to Justice**

The third leg of the convention, access to justice, provides a mechanism for the public to enforce environmental law directly (UN/ECE, 2000). It is a means to challenge authorities' decisions so that access to information and public participation, and ultimately the implementation of this Convention, are ensured (UN/ECE, 2006). When the access to any environmental information is denied with a poor justification, when participation is not facilitated or is openly impeded, whether the violation is a positive action against law or it is a misuse of the procedures, access to justice is the only remedy to challenge decisions (Ebbesson, 2011).

Essential in this component is, therefore, the positive will of governments to incorporate the Aarhus Convention's principles into national legislations, to promote capacity building for public agents and strengthen the appropriate national institutions competent in environmental issues.

The access to justice pillar, as the participation one, has also been highly criticised because the convention leaves the signatory parties a certain discretion that might undermine the provisions. Civil society organizations have criticized it for being weak and narrow (McAllister, 1999; Poncelet, 2012). The problem refers to the access to the judicial appeals that can be limited by signatory parties to citizens whom the country determines to have a "sufficient interest" or to those whose rights are recognized as having been violated (UN/ECE, 1998: Art. 9 (2); Ebbesson, 2011; Poncelet, 2012). On the other hand, a positive and innovative element of the Convention resides in the broader definition of 'public authority' which is characterized by the public administrative functions, rather than the juridical status of any entity involved in environmental decision-making processes (Ebbesson, 2011).

### **iv. A Bottom Up Approach to Access Rights Implementation: The Access Initiative**

The Aarhus Convention legitimizes the role of the general public in environmental decision-making and it enables civil society to develop its own tools to demand governments' transparency and accountability. The Access Initiative (TAI) is a global civil society coalition promoting access to information, public participation and access to justice in environmental governance. Recognizing the failure of countries in addressing challenges of access rights, TAI aims to accelerate the implementation of Public Participation Principle (P. 10) of the Rio Declaration. TAI's strategy consists in a civil society driven assessment of government policies and practices; assessments are conducted at the national level using legal research and case study analysis using an internationally recognised methodology. TAI

strategy differentiates itself from other human rights mechanisms because of the greater role accorded to the civil society in carrying out the assessments and the country tailored approach, promoting benchmarks and progress of individual countries rather than universal solutions.

TAI methodology is a universally applicable set of research questions to evaluate a government system regarding access rights. It generates over 100 indicators of country performance in terms of law and regulation, effort and effectiveness of public institutions. Research indicators constitute a hierarchical but flexible structure divided into four categories: 1) access to information; 2) public participation; 3) access to justice; 4) capacity building. This process leads to a reliable understanding of a country legislative and judicial framework as well as the actual implementation conditions.

The TAI approach can be used to reach different goals and can be flexibly adapted to the necessities of the coalition using it. The analysis of access issues, the development of indicators to monitor implementation and/or identify gaps are primary objectives of the national assessment. The assessments' findings are used by TAI partners to build their advocacy strategy for legal, institutional and practice reforms, to raise public awareness, and to engage their governments in a constructive dialogue to create positive and authentic change within their countries.

The TAI network has been a critical platform for the proposal of a regional instrument on access rights for Latin America. The experience and expertise amassed by TAI members has led to the inception of the Economic Commission for Latin America and the Caribbean (ECLAC) process of Rio Principle 10 Implementation and the launch of the Environmental Democracy Index (EDI), a database of countries' environmental laws and regulations ranked on the base of compliance with UNEP Bali Guidelines (2011b). Both the ECLAC process and EDI are described in Chapter 6.

### 3.2.5 Conclusion

Atapattu (2002) is uncertain whether regional instruments can contribute to create an environmental customary principle in international law. VanderZee (2009) believes that in order to achieve greater environmental protection, it is more appropriate to leave to regional systems the capacity to define, interpret and enforce environmental law rather than to develop a universal human right to a healthy environment. Each regional system seems to adopt a different and somewhat successful approach when it comes to resolve cases of environmental law violations.

The case law of the ECtHR shows that existing human rights law can guarantee, in Boyle's words (2010: 30), "everything a right to a *healthy* environment would normally be thought to cover". The ECHR remains designed to deal with violations of the right to health, to private life, to property or to civil rights if individual human victims of violation are identifiable. The European Convention itself is not designed

to deal with environmental protection in general terms (ECtHR, 2003: para. 52; Boyle, 2010). While the Aarhus Convention broadens the legal standing to allow environmental civil society organizations to participate actively in the environmental decision-making process (McCracken and Jones, 2003; Morgera, 2005; Boyle, 2010; Ebbesson, 2011), the European system has lagged behind, effectively barring them from bringing cases before regional courts (Poncelet, 2012).

IACtHR jurisprudence demonstrates that there is a willingness to guarantee environmental rights in terms of environmental degradation affecting the enjoyment of economic, social and cultural rights (Sands, 1995). It shows also that there is a consensus in relation to the collective character of environmental rights. However, this recognition is limited to indigenous peoples and it is not extended to individuals or non-indigenous peoples<sup>10</sup>. In addition, the recent case of Belo Monte dam (2011) points towards a limitation of the Inter-American system to review national development policies of member states (see Chapter 6).

The ACHPR and the Nigerian case indicate that environmental degradation is a “human rights violation in itself because of its impact on quality of life” (Shelton, 2002a: 942). In addition, it substantiates the RHE by requiring states to adopt affirmative actions and environmental protection procedures (Shelton, 2002a).

There are problematic issues with each regional approach and these still remain to be addressed: the narrow application of the minority framework in the Inter-American system; the failure to adopt a collective and precautionary approach in the European system; and the dilemmas of environmental and human rights protection against economic growth. The African and American regional approaches seem to take a more progressive stand on collective rights, spurred and intrinsically limited by their own history as colonized territories. Thus, the appeal of an international norm for the environment does not fade. A separate right would provide an additional avenue to seek redress (Atapattu, 2006) and widen the legal standing for human rights and environmental organizations. It will allow peoples whose rights have been violated because of poor environmental quality to seek redress through international human rights petition procedures, so that governments will bear increasing international pressure to adhere to their obligations to respect and protect human rights (Shelton, 2009b). Existing human rights are designed to engage with definite categories: ‘proof of violation’, the ‘individual’ and the ‘state’. Environmental matters transcend these categories. Environmental issues might have a global or transboundary dimension, interest a wide range of actors and affect the enjoyment of inter and intra-generational equity (Atapattu, 2006).

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<sup>10</sup>A claim on behalf of all the citizens of Panama to protect a nature reserve from development was deemed inadmissible. *Metropolitan Nature Reserve v. Panama*, Case 11.533, Report No. 88/03, Inter-Am. C.H.R., OEA/Ser.L/V/II.118 Doc. 70 rev. 2 at 524 (2003).

### 3.3 National Constitutions and Law

So far international instruments and regional systems have been explored to understand the origin and the development of the RHE. Since access rights depend on how national legislations comply with international human rights standards, it is necessary to consider how states have dealt with environmental issues in their national judicial system and which kind of norms and regulations they have developed. International mechanisms to seek redress might be inaccessible so that grassroots organizations or groups operating at a local level find it difficult to bring their cases and have to rely instead on the legal remedies established in their own country (Liebenberg, 2001). Domestic law has the most concrete potential to develop the content of rights, especially of economic, social and cultural rights (ECSRs). In general, ESCRs are more effectively advanced and enforced through domestic mechanisms, because the range of factual circumstances that arise in a country lead to a regular application of these rights, providing tailored interpretations (Liebenberg, 2001).

There are several countries that have incorporated a right to a healthy environment, imposed a duty to prevent environmental harm or mention the protection of natural resources (Shelton, 2002d: 22) either in the constitution or in the body of legislation. Countries have chosen different formula to express the RHE and have been inspired by international declarations principles especially after the Rio Declaration, but each national concept has been developed with varying scope, wording and at various judicial levels (UNEP, 1997a). Boyd (2012) has compiled a comprehensive database with all constitutions either incorporating a right to a healthy environment or environmental provisions. Therefore, it is only necessary to examine one example from each region in this chapter, focusing on the most progressive examples.

#### 3.3.1 Bolivia

The most ecocentric and radical law has been elaborated by Bolivia in 2010. The *Ley de derechos de la Madre Tierra* (Law of the Rights of Mother Earth) recognizes the rights of Mother Earth and specifies obligations and duties of the state, individuals, public and private moral entities, and society as a collective to guarantee the respect of these rights. The revolutionary approach of this law lies in the assignment of rights to Mother Earth, considered as a collective subject of public interest (art. 5). Since the subject is the whole system of life and of living creatures including human beings, this shift entails several others. First, the state is the primary, but not the only, guarantor of these rights. All members of society, as individual and collective subject, have the duty to protect and respect the rights of Mother Earth from their own as well as third party actions. Individual rights are subordinated to collective rights and to collective good (art 6). However, noting the importance of Mother Earth for ‘*vivir bien*’, living well, the effective protection of

the rights enshrined in this provision are understood as paramount to enable future generations to enjoy their right to '*vivir bien*'.

This law does contain notions previously employed by international environmental declarations, such as precaution and Common But Differentiated Responsibility (CBDR), with additional meanings.

The concept of precaution is translated into an approach to be adopted throughout public policy development by the state alongside prevention, early warning mechanisms and protection. Such an approach to policy planning aims to prevent human activities causing extinction and irreversible alteration of life processes. In fact, cultural practices are seen as factors that influences the life systems – all living (animal and vegetal) creatures (art. 4) - that should be protected being part of the wider dynamic living system which is Mother Earth (art. 3).

This precautionary approach is also evident in the recognition of environmental limits introducing the right to equilibrium (art. 7(5)) of Mother Earth which refers to the need to maintain intact Mother Earth's regeneration capacity.

The principle of CBDR is interpreted/framed in terms of climate debt. Climate debt is the quantification of historical responsibility, developed countries have due to their over-consumption common atmospheric space, contributing to 90% of the increase in temperatures and two thirds of global emissions (Goodman and Kamat, 2009). The recognition of the climate debt imposes the obligations of transfer of financial resources and clean technology from the developed countries to developing ones in compatibility with the rights of Mother Earth (art 8, comma 5). The transfer of financial resources does not simply translate in monetary obligation, as Angelica Navarro, chief climate negotiator for Bolivia, explained (Goodman and Kamat, 2009). It primarily requires developed countries to comply with Kyoto Protocol obligations to reduce domestic emissions. Only secondary obligations are formulated in monetary terms for finance and technology transfer. In addition, developed countries should be obliged to pursue "negative cuts", which Navarro explains is "to liberate atmospheric space they have occupied unrightfully, for developing countries to develop" (Goodman and Kamat, 2009).

The Bolivian Law of the Rights of Mother Earth has to be viewed in light of a specific political context. Bolivia is one of the most assertive countries regarding indigenous rights not simply because of the high percentage (62%. IADB, 2014) of indigenous population but since Evo Morales came to power in 2006 as the first indigenous president. The political attitude of the government has been characterized by poverty reduction, promotion of indigenous rights, promoting South-South cooperation and environmentalism. The solidary concept of *vivir bien* (living well) underpins the political approach of Morales. It is opposed to the exploitative and individualistic *vivir mejor* (living better) that is the aim of "irrational development" and "unlimited industrialization" (Goodman, 2009). Bolivia presented a proposal of the Universal Declaration of the Rights of Mother Earth in 2009<sup>11</sup> before the UN

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<sup>11</sup>Bolivia presented the resolution that led to the declaration of the International Mother Earth Day (22 April 2009).

General Assembly and again during the ‘World People’s Conference on Climate Change and the Rights of Mother Earth’ in 2011 and the UN Conference on Sustainable Development (Rio+20) in 2012. In this context, the differences between the predominant international approach to environmental rights and Bolivarian approach are evident. While the international debate on the RHE cannot resolve the contestations on definition, the Bolivarian Law defines Mother Earth (art. 3), its judicial character (art. 5) and the corresponding rights (art. 7). The apparent contradiction between individual and collective rights is resolved presenting Mother Earth as a “collective entity of public interest” (art. 5) that imposes subordination of individual rights to collective rights.

### 3.3.2 South Africa

The South African constitutional provision Article 24 (1996) guarantees the RHE within the framework of sustainable development. International environmental principles are used to substantiate the right (Shelton, 2010a:102), stating:

Everyone has the right (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

In the case of *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* (2007: para. 59), the Court identified the need to reconcile environmental protection with social and economic development adopting the international principle of sustainable development defined as “the integration of social, economic and environmental factors into planning, implementation and decision-making for the benefit of present and future generations”.

### 3.3.3 Portugal

Portugal’s Constitution (2005a) enshrines the right to a healthy, ecologically balanced human living environment (art. 66). It imposes the duty to defend the environment upon everyone and it charges the state with precise obligations. It places the enjoyment of the right to the environment within the framework of sustainable development and emphasizes the role of public participation and appropriate institutions (art. 66 (2)). It also requires the state to use natural resources with respect of the principle of inter-generational solidarity (art. 66 (2; d)) Portugal’s Constitution is considered a pioneering document by Boyd (2012: 216) as it “designates protection of the environment and conservation of natural resources as being among the essential tasks of the Portuguese state” (OECD, 2001: 41-42). In

addition, the constitutional right to environment provides a procedural right to stand in court defending the environment to everyone, citizens, State and environmental NGOs (Martins da Cruz, 2007: 54-55).

### 3.3.4 Conclusion

Pedersen (2008) notes that the number of constitutions containing substantive as well as procedural provisions compel the use of rights to environmental protection and influence the debate on a substantive environmental norm in international human rights law. Reinforcing this claim, Boyd (2012) affirms that the constitutionalization of environmental rights is proof that the environment has become a human right and that it does lead to better environmental performance when translated in environmental laws and regulations. For instance, South African's 1996 constitution significantly influenced the development of national environmental laws (Kotze, 2007b, cited in Boyd, 2012: 149) and led to the National Environmental Management Act in 1998 and judicial enforcement. The Bolivian constitutional law set new standards for, but also new understandings or interpretations of, development policies. The *Framework Law of Mother Earth and Integral Development for Living Well* was promulgated in October 2012. This framework law allows the implementation of the principles endorsed at the constitutional level. It aims to "establish the vision and the foundations of integral development in harmony and balance with Mother Earth to Live Well" - as opposed to 'live better' - "guaranteeing the continuity of the regenerative capacity of the components and systems of life of Mother Earth, recovering and strengthening local knowledge and ancestral knowledge in the framework of complementarity of rights, obligations and duties; and the objectives of integral development as a means to achieve the Living Well, the bases for planning, governance and investment and strategic institutional framework for its implantation" (Art. 1). The Portuguese constitutional provision assigns a protective function to the state and guarantees access to justice in its largest expression (Martins da Cruz, 2007: 55) enabling individuals and NGOs to protect collective rights (Boyd, 2012: 216).

Although the RHE is recognised in a constitution, this does not guarantee automatic protection (Liebenberg, 2001) as will be seen in Chapter 5 with the case studies from Panama. The willingness of national institutions to enforce rights in political programmes is critical to effective implementation.

## 3.4 Human Rights Mechanisms: Universal Periodic Review

The review of the main soft and hard law documents in the preceding sections show that international law is moving towards the incorporation of environmental concerns. This section will examine the Universal Periodic Review (UPR) as a general human rights review mechanism providing a bottom up approach to human rights at the country level (complementing the legislative focus that pushes HRBA down to the national level).

The international human rights system provides different mechanisms to assess human rights conditions in countries or in determinate situations, to monitor rights implementations, and to evaluate countries in their capacity to fulfil human rights obligations. Some monitoring mechanisms are universally applied, while others have a more specific target and, therefore, are applied only in certain occasions and by dedicated agencies. Human rights mechanisms are ultimately a means to compare the real manifestations of human rights with the idea of human rights as affirmed in the conventions. The importance of human rights mechanisms lies in their capacity to address realities on the ground and find the gaps and weaknesses in the implementation of a human rights system, so that discrimination and vulnerability are reduced. They provide a horizontal understanding of human rights, shedding light on the actions that respect, protect and fulfil human rights.

The Universal Periodic Review (UPR) consists in a review of the human rights records of UN member states once every four years. The UPR is a state-driven process in which states are reminded of their responsibility to fully respect and implement all human rights. They have the opportunity to declare what actions they have taken to improve the human rights situations in their countries and to fulfill their human rights obligations. The Human Rights Council is the body responsible for this process. It ensures the universal coverage and the equal treatment (A/RES/60/251, A/HRC/RES/5/1) of every country when their human rights situations are assessed. Established in 2006, the UPR process had, within the five-year cycle of 2006-11, reviewed the human rights record of every country and it is currently in its second cycle of reviews (2012-2016). The ultimate aim of this human rights mechanism is to address human rights violations and therefore to improve the human rights situation on the ground (A/HRC/RES/5/1). The UPR provides technical assistance to enhance states' capacity to deal with human rights challenges. It also shares best human rights practices around the globe (A/HRC/RES/5/1). From a civil society perspective and according to this researcher's experience, the UPR process is an end in itself as it catalyzes local and national efforts, positively impacting on the capacity of civil society to formulate claims and coordinate actions, both at national and international level. The UPR final document comprising of assessment and recommendations is a useful advocacy tool to engage with foreign donors and governments for international pressure rather than with one's own government. However, this might lead states to regard the UPR mechanism as confrontational 'name and shame' tool which might serve to deepen polarization between civil society and governments.

The review process is however, not designed to be confrontational, but as a cooperative form of 'peer review' between states, enabling an interactive dialogue (A/RES/60/251, A/HRC/RES/5/1). The documents on which the review is based are: 1) a state report (national report) with information provided by the government; 2) a compilation prepared by the Office of the High Commissioner for Human Rights (OHCHR) of the information contained in the reports of treaty bodies, special procedures, including observations and comments by the State concerned, and other

relevant official United Nations documents; 3) a stakeholders report, which is a compendium of reports submitted by civil society representatives providing credible and reliable information (A/HRC/RES/5/1). Any UN member state can pose questions, comments and make recommendations.

The review processes culminates with the preparation of the so called outcome report by the troika –a group of three States who serve as rapporteurs - with the involvement of the State under review and assistance from the OHCHR. It consists of a summary of the proceedings of the review process; conclusions and/or recommendations, and the voluntary commitments of the State concerned (A/HRC/RES/5/1). The outcome report serves to monitor the eventual progress or failure of the state to address human rights issues highlighted during the UPR process.

A document search using the search term ‘environment’ in UPR stakeholders reports of mainland Central and South America (including Mexico) shows that in 16 out of 21 countries<sup>12</sup> environmental concerns are pressing. Stakeholders’ reports are divided into sub-headings and specific themes (i.e. right to education, minorities and indigenous peoples, etc.). Environmental concerns are present across the various themes, demonstrating how the state of the environment affects the basic enjoyment of several human rights. Land rights and indigenous peoples are highly affected by environmental exploitation and degradation. Procedural environmental rights are evident especially within the theme of ‘Administration of justice’ and ‘rule of law’ as well as the implementation of international human rights standards. Environmental degradation affects quality of life, causing a violation of the right to an adequate standard of living. Internally Displaced Persons (IDPs) for environmental conflicts or for climate change are also recognized as a human rights concern. The UPR report contains also a sub-heading “Right to Development and environmental issues”, which suggests a definite and agreed perspective that development and environment cannot be separated. It is evident in the stakeholders’ submissions that civil society identifies environmental degradation as a human rights violation.

A selective survey of North American and European region’s countries UPR produced an interesting result from the perspective of justice and responsibilities of non-state actors, specifically corporate liability for human rights violations (A/HRC/WG.6/13/BRA/3, para. 74). Amnesty International recommended that Italy adopt a law requiring “oil companies headquartered or domiciled in Italy undertake human rights due diligence measures in respect of all their overseas operations and ensure that people whose human rights are harmed by these companies can access

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<sup>12</sup>Chile, Suriname, El Salvador, Haiti, Honduras, Paraguay, Argentina, Belize, Ecuador, Guatemala, Nicaragua, Bolivia, Brasil, Panama, Peru and Mexico.

effective remedy in Italy” (A/HRC/WG.6/7/ITA/3, para.4)<sup>13</sup>. Similarly, Canada was recommended to adopt legislation and monitoring mechanisms enabling accountability of Canadian companies and their subsidiaries for human rights and environmental abuses perpetrated abroad (A/HRC/WG.6/16/CAN/3: para. 88-90). The concern about corporate liability for third countries operations is presented in the UPR as a need for states to take affirmative action to control and prevent human rights violations outside their territories, which reflects the claims of solidarity rights as well as the possibility of imposing obligations for non-state actors falling within a state’s jurisdiction.

The UPR together with human rights treaty bodies’ periodic reporting mechanisms can be extremely useful to identify the relation between apparently distant issues. Concerning human rights and the environment, the UPR suggests that development issues are key to this relation. In addition, the stakeholders’ submissions represent a bottom up approach to the identification of existing as well as new human rights violations. This advances the understanding of existing human rights to address new threats but also inspire the creation of new human rights if current approaches are failing to deliver justice.

### **3.5 Conclusion**

At international level, there is a tendency towards the recognition of the RHE which is also reinforced by other UN documents. The UN General Assembly Resolution 45/94 (A/RES/45/94) recognises that “all individuals are entitled to live in an environment adequate for their health and well-being” and it stresses that “a better and healthier environment can help contribute to the full enjoyment of human rights”.

The Commission on Human Rights Resolution 1991/44 (para. 1) recognised that “all individuals are entitled to live in an environment adequate for their health and well-being”, giving the Special Rapporteur Ksentini the mandate to conduct a study on human rights and the environment. Subsequently, her reports contributed to the recognition that environmental violations constitute a serious threat to the human rights to life, good health and a sound environment for everyone (E/CN.4/RES/1999/23, E/CN.4/RES/2000/72).

The Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development examines the relationship between environment, sustainable development and human rights. It states that “the right to a healthy environment provides a focus to guide the integration of environment and development. Development is sustainable where it advances or realizes the right to a healthy environment” (CSD, 1995: para. 31). This report importantly acknowledges that respect for life, broadly interpreted as having ecological as well as human dimensions, is the fundamental premise of human rights.

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<sup>13</sup>Amnesty International refers to the specific case of the Italian oil company ENI and its subsidiary which operated in a third country and that violated right to food, water and livelihood due to environmental pollution. A/HRC/WG.6/7/ITA/3.

The “Promotion of a democratic and equitable international order” resolution (E/CN.4/RES/2001/65) links human rights and environmental protection, explicitly referring to the right to a safe and healthy environment. The Commission affirms that a democratic and equitable international order requires, *inter alia*, the realisation of the RHE for everyone

The UN Declaration on the Rights of Indigenous Peoples, adopted in 2007 contains, beside several provisions on environmental procedural rights, a specific article on the environment (Shelton, 2010b: 7). Given the strong dependence of indigenous people on environmental resources for their livelihoods and survival, Article 29 provides a right to conservation and protection of the environment and its productive capacity.

These UN resolutions and documents reflect a trend favorable to further recognize the relation between human rights and the environment and legitimize efforts to advance the understanding of this relation in theory and practice as seen in this chapter. The Stockholm and Rio conferences positioned the environmental concerns within the sustainable development framework. With the other soft law instruments, they facilitated the identification of core issues that bind together environment, human rights and development. This led to a reassessment of the relationship between peoples, nature and natural resources. Civil society mobilization across the world has resulted in environmental degradation being identified as a human rights violation. International human rights law has not responded with enthusiasm to the idea of environmental claims as human rights claims. However, an analysis of international binding instruments has shown that even if there is a certain cautiousness and contention around the notion of environment as a human right, environmental issues clearly affect people and have direct implications for the enjoyment of their human rights. Regional approaches to environmental protection are currently the most used and continuing to develop rapidly. The fact that there are different takes on technical matters, such as legal standing and proof of violation, to more substantive ones, such as the collective character of environmental rights and the principle of intergenerational equity, prove that the environment is not only a human rights matter, but key to the interpretation of the scope of human rights themselves. Universal standards could provide the better protection for all. Hard law instruments lack flexibility and adaptability to different contexts and changing needs. Now that climate change is recognized as a human rights issue affecting world’s poor and exacerbating their vulnerability (A/HRC/RES/7/23), the same questions return with a vengeance. What does the substantive RHE entail? What does it add to existing human rights in terms of justiciability?

UN human rights treaty bodies consider environmental protection as a pre-requisite to the enjoyment of internationally established human rights (Shelton, 2010b: 10). Law on its own, though, cannot address issues of access to resources and social justice. As Ksentini (1994: para. 37) recalls, many instruments provisions are “intended to be implemented from an ecological standpoint”, in order to achieve that international order “in which the rights and freedoms set forth in this Declaration can

be fully realized” (1994: para. 5) as stated in the Universal Declaration of Human Rights.

This chapter has described and analysed soft and hard law instruments, at the international, regional and national level, which have contributed to the general environmental debate with several approaches to environmental issues and related human rights violations. The positions adopted may be more ecocentric, or more anthropocentric; reductionist or expansive. The following chapter (Chapter 4) provides an analysis of the environment as a human right. It explores different rights based approaches (RBAs) to environmental conflicts which highlight the intrinsic and contradictory dualities of RHE. Each RBA utilizes a particular interpretation and implementation of environmental protection in relation to human rights.

## Chapter 4 The Right to a Healthy Environment

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The Right to a Healthy Environment (RHE) as a universal human right is heavily debated and criticised from both a theoretical and an operational perspective. There are numerous disputes regarding the definition of the right, the critical points being whether this right can be justiciable and enforceable at international level. While a universally binding instrument operationalizing a RHE does not yet exist, the previous chapter has shown considerable progress has been made through the avenues of access rights or procedural rights – information, participation and justice – and constitutionalization measures to guarantee environmental rights.

Law experts have objected that the RHE has no operational definition that allows its enforcement (Boyle and Anderson, 1996). However, in the last two decades, strong linkages between human rights violations, development issues and environmental degradation were established, identifying environmental protection as a gap in the human rights discourse. Human rights and the environment are, therefore, two fields in constant movement towards one another with positive effects on both sides (Gearty, 2010). Human rights discourse has managed to respond to environmental claims to a certain extent. On the other hand, environmental contestation contributes to reinvigorate the human rights movement as it can address issues that underlie human rights violations (Gearty, 2010. See also Olagbaju and Mills, 2004).

The UN Special Rapporteur on Human Rights and the Environment John Knox (Knox, 2013b, 2014a) states that the protection of the environment is a human right and that something must be done to address the environment as a legal standard at international level. In his view, human rights law imposes certain procedural and substantive obligations upon states in relation to the enjoyment of a safe, clean, healthy and sustainable environment.

This chapter provides an analysis of the debates around the environment as a human right. First, it presents the Right to a Healthy Environment (RHE) as a stand-alone right and the challenges it presents. It then explores different Rights Based Approaches (RBAs) to environmental conflicts which show how established human rights have been used as an alternative to the RHE to address environmental violations. Thirdly, it presents the procedural approach as the predominant RBA in the field of environment and human rights.

### 4.1 The Right to a Healthy Environment: a ‘new’ human right?

Environmental rights have found fertile development at national level, as demonstrated by the number of constitutions that have enshrined the RHE. Boyd (2012) suggests that the constitutionalization of environmental rights is leading towards a global environmental rights revolution and to the international recognition of a right to a healthy environment. The constitutionalization phenomenon is,

therefore, bypassing the mechanism of international treaties for human rights establishment and creating an alternative base for a worldwide recognition of a 'brand new' human right. Some authors, though, suggest that constitutional environmental rights might encounter problems of justiciability since they work on the basis of endorsing principles and directives rather than substantive rights and obligations (Van Dyke, 1994; Atapattu, 2002).

Even without explicit environmental rights, governments have a public trust obligation to preserve natural resources and ensure their common access and (sustainable) use for the present and future generations. The property doctrine of public trust to protect public domain natural resources is based on Roman civil law's concept of *res communis* (Barresi, 2012: 47). Navigable waters, the sea, and seashore land, and subsequently wildlife and public lands (Anton and Shelton, 2011: 30; Kirsch, 1997: 1175-76, Barresi, 2012: 53) are considered common property for the use of all. The public trust doctrine has been utilized in the elaboration of constitutional environmental provisions which have been criticized for being unable "to reflect current environmental concerns" (Lazarus, 1986: 710-12 cited in Kirsch, 1997: 1176) and to guarantee a democratic decision-making process (Huffman, 1986: 583 cited in Kirsch, 1997: 1176). However, Kirsch (1997: 1196) argues that constitutional provisions can expand the traditional concepts of public trust. In turn, public trust doctrine features, such as the "presumption of innocence for the natural world" that poses the burden of proof upon "the changer" (Reed, 1986: 108) and the requirement of an environmental impact assessment, offers opportunities for proactive environmental protection (Reed, 1986).

The RHE is not recognized in any universal, legally binding instrument and the capacity of the right to a healthy environment to be universal is often challenged. The notion of universality implies that rights are located beyond society and history (Koskenniemi, 1999: 32), and their "protection transcends cultural, social, religious, economic and political context" (Rajamani, 2010: 413). Since the environment is perceived by many as a value judgement (Boyle, 2009), it seems to be a concept highly prone to cultural relativism. Human rights institutions have accepted that universal human rights standards ought to be interpreted differently in different cultural contexts (Freeman, 2002: 104): regional interpretations based on jurisprudence are thought to be a more pragmatic way to vindicate the universality of rights, especially for what concerns the environment. It should be possible to identify a core idea of the RHE that can be universally valid and can be subsequently 'framed' (Merry, 2006), to be understood, used and claimed by different social groups. The objective is that universal rights can resonate with the local social forms and expand individual and collective choices (Ensor, 2005), bridging the gap between the universal and regional level. The fact that each regional system, namely European Union, the Organization of American States and the African Union, has adopted a different approach when it comes to resolving environmental cases, contributes to the belief that regional systems can be more effective in defining,

interpreting and enforcing environmental law rather than to focus on the development of a universal human right to a healthy environment (VanderZee, 2009). The advantage of a regional approach is that environmental rights can be tailored according to culture, environment specifications and social needs. It is to be seen if regional approaches can provide sufficient normative base for global environmental guidelines and cooperation.

It might also be more viable for the RHE to be developed within domestic jurisdictions rather than the international one. Considering the experience with economic, social and cultural rights, Liebenberg (2001) notes that national norms might provide wider access to justice than international ones. Domestic courts, applying rights on a regular basis to a wide range of factual circumstances, can develop the normative content of these rights to the advantage of groups that might not be able to access international redress mechanisms (Liebenberg, 2001).

Despite the optimism showed in environmental rights constitutionalization, doubts still remain on the RHE since it does not fit with the commonly accepted features of human rights. The chronic vagueness of the formulation and interpretation of the RHE poses both opportunities and challenges.

Boyle (2009) suggests that “what constitutes a satisfactory, decent or ecologically sound environment is bound to suffer from uncertainty” (Boyle, 2009: 33). Several authors relate the vagueness of the RHE to the general vagueness of all human rights, which are purposely worded in vague terms to allow meanings and interpretations to be shaped by historical, cultural and political contexts (Freeman, 2002; Boyd, 2012). The vagueness, or “substantive ambiguity” of RHE (Anderson, 1996b: 225) is generally taken to be considered a positive feature since it allows flexibility to fill gaps in regulations and can address complex and indirect environmental issues (Anderson, 1996b). This flexibility enables the right to adapt to social and environmental necessities (Van Dyke, 1994: 355). Similarly, this flexibility of the RHE is a “*chameleon-like quality*” (Alston, 1984: 613; see also Alston, 2001) of new solidarity rights that allows consensus building and support.

This uncertainty around the content of the right raises concerns not only over its universality but also over its scope for justiciability. The individualistic nature of human rights and the narrow categorizations of ‘rights holder’ and ‘duty bearer’ become a limiting framework for the RHE. The multiple understandings and values of ‘environment’ and its multidimensional relations with human rights are problematic to codify in a legal definition. The following sections present the principal controversies on the Right to a Healthy Environment which revolves around the questions of definition, scope and enforceability within the current human rights discourse and practice.

#### 4.1.1 Two views of the environment: anthropocentric and ecocentric concerns

Uncertainty and ambiguity are common features in the articulation of most human rights and the RHE is particularly prone to critiques in this sense due to its multidimensional content and problematic definition. The right to a healthy environment encompasses a compendium of rights constructed in the various efforts to protect the environment (Rodriguez, 2001). As seen in chapter 3, the different possible definitions that have been formulated over time and the approaches applied to unravel the relation between environment and human rights cover a broad spectrum from anthropocentric to ecocentric views. Focusing on the substantive content of the right, a substantive anthropocentric right can be distinguished from an ecocentric right that serves non-human purposes.

The substantive component of the RHE includes a human right to live in an environment which at its minimums allows for the realization of a life of dignity and well-being. This ‘right to environment’ is thought to incorporate “the substantive standards of recognized economic, social, and cultural rights indispensable for the realization of human dignity, such as the right to a standard of living adequate for health and well-being, the right to the highest attainable standard of mental and physical health, and the right to safe and healthy working conditions” (Rodriguez, 2001: 12). This view is similar to Shelton’s (1991) definition based on independent criteria of health and safety, which should be elaborated to address changing threats to humanity. However, this understanding is affected by ambiguity: is it realistic to define a minimum standard of environmental quality that allows for a life of dignity and well-being, given scientific uncertainty? Is it possible to postulate environmental rights in qualitative terms? And what constitutes a decent environment?

In contraposition to the substantive right to environment, Rodriguez (2001) describes the ‘right of environment’, based on the notion that the environment possesses rights derived from its own intrinsic value. This is an ecocentric approach that takes into consideration elements of ecology, including biodiversity protection (Shelton, 2009a). In this view, the RHE should be enjoyed by all organisms and entities in the ecosphere which are “equal in intrinsic worth” (Devall and Sessions, 1985: 67, cited in Gibson, 1990: 13).

Shelton (2008: 45) argues that the utilization of existing human rights in order to protect the environment is rightfully deemed as anthropocentric because international human rights mechanisms “cannot be used on behalf of the environment or to prevent threats to other species or to ecological processes”. Nevertheless, human rights based approaches to environmental protection could consider polluting activities and environmental degradation, such as deforestation, liabilities to human rights. Indirectly, these human rights based approaches may contribute to environmental conservation aims through remedial procedures alternative to environmental law ones (Shelton, 1991). Desgagné (1995: 264) notes that “environmental damage can be translated into a violation of a protected human right; a claim to the protection of the environment may be asserted as a corollary to

that right” (citing Schwartz, 1993: 359-68). The intrinsic value of the biosphere can be therefore integrated within the concept of a substantive environmental human right (Kiss and Shelton, 1991: 11).

The right to a healthy environment encompasses both human-centered and ecocentric aspects since it aims to an environment that is healthy in its own right and healthy for humans (Collins, 2007; cited in Boyd, 2012: 246). The recognition of a RHE offers the advantage of providing another remedial avenue for individuals and people to seek justice for environmental wrongs that affect them. The RHE as a legal human right, but also as a moral human right premised on the principles of universality, indivisibility and interdependence (Rajamani, 2010: 411-413), could be viewed as a complementary tool alongside traditional mechanisms for environmental protection established by environmental law and international environmental agreements (Atapattu, 2002).

#### **4. 1. 2 An alternative view: collective and solidarity concerns**

Human rights approaches are sometimes deemed inappropriate to be used in developmental and environmental discourse because of claims about their over individualistic character. Unlike many human rights issues which are individual in nature, environmental violations often involve groups and communities, are global in dimension, and affect future generations. The creation of a brand new right reflects a progressive and expansive understanding of human rights that place the RHE within the category of solidarity, or third generation, rights.

Solidarity rights are a response to new human rights threats caused by increased global interdependence, which requires not only international cooperative actions but also joint obligations of states, peoples and non-state actors (Wellman, 2000: 642-643). Alston (1984) reflects on the need and the opportunity for new rights and identifies the challenge on these rights in being considered authoritative and legitimate as they should respect the integrity and credibility of human rights tradition.

There is consensus over the statement that the right to a healthy environment combine both individual and collective aspects (see Van Boven, 1982). Some commentators address potential contradictions by arguing that the RHE is inherently an individual right as it is the individual who benefits from a healthy environment (Steiger et al., 1980: 2-3, Sohn, 1982: 48, cited in Downs, 1993: 366). On the other hand, recognising the right to a healthy environment as a solidarity right raises several questions: who has the obligation to ensure the realization of this right (Downs, 1993); how to distinguish the individual from the collective aspects; how to define the group that can claim a collective right (Freeman, 2002).

Collective rights normally refer to the rights of minorities (Van Boven, 1982): their aim is to protect certain characteristics that distinguish them and might be reasons for discrimination. Defining the RHE as a collective right therefore raises the problem of defining the collective or group that can claim such a right (Freeman,

2002: 120). A group is recognised as a collective of persons which has special and distinct characteristics and/or which finds itself in certain situations or conditions (Van Boven, 1982: 55). The aim of human rights is to bring about change when those situations or conditions are caused by discrimination and create vulnerability (Van Boven, 1982). Asserting that the RHE is a collective right similar to the right to self-determination limits the range of action to traditionally defined groups to claim the right. Moreover, since environmental issues affect future generations, there is the need to think about how one generation might be seen as discriminating the next. The notion of collective is therefore expanded in the RHE to include the future generations as a category of rights holder.

The question of individual and collective aspects of the RHE is particularly relevant to the justiciability of the right. In fact, a court has to be able to identify the claimant or the claimants and their legal standing before the court. For instance, the IACtHR extended the application of the right to judicial personality (art. 3) to indigenous groups, enabling them to bring before court cases in the name of their collective identity (VanderZee, 2009). Within the European system, a contradiction can be observed between the narrow focus of the ECHR on the rights of individuals and the broader public interest approach of the Aarhus Convention (Boyle, 2010) as described in the chapter 3.

Vasak coined the term third generation rights to refer to a group of policy goals achievable only through concerted effort based on the French Revolution's ideal of fraternity (Downs, 1993: 362; Wellman, 2000). This 'generation' categorization is considered misleading and detrimental by several authors (Shelton, 1985; Scheinin, 2009; Jaichand, 2010). Wellman (2000) argues that the division of human rights into generations should not reflect a hierarchy, but rather recognise that human rights are in nature dynamic and they can be proclaimed as human needs change or threats evolve (Downs, 1993). Third generation human rights are far from being hierarchically inferior to first and second generation rights; instead, their aim is to enhance and facilitate the fulfilment of first and second generations rights (Downs, 1993: 358). Scheinin (2009) addresses the third generation or solidarity rights in terms of international acceptance. They are problematic because of this 'generations' characterization but also because it is disputed whether these rights are true human rights *per se*. Scheinin (2009) argues that solidarity rights should be viewed in relation with, rather than in isolation from, existing human rights. He exemplifies that the RHE can be broken down in specific environmental rights that are addressed within the context of other rights, such as the right to privacy, health, participation, property (Scheinin, 2009: 25). It can be argued that RHE can be derived and attached to existing human rights. It can be also argued that the RHE, being a policy-oriented umbrella concept similar to the Right to Development, might act as a vector to channel the realization of existing rights. The RHE might be seen as a means to mend the factual human rights division: as a vector it promotes the exercise of civil and political rights for the fulfilment of economic, social and cultural rights.

In addition, Vasak indicated that solidarity rights can be realised only through the concerted efforts, consensus and commitment of all the actors on the social scene:

the individual, the state, public and private bodies, and the international community (Downs, 1993). These rights imply a broad sharing of purposes and a strong commitment on the modes of action to achieve them (Marks, 1981 cited in Wellman, 2000: 644). The RHE contains these requirements which respond to the complexity, collective and transboundary nature of environmental threats that cannot be otherwise addressed.

Talking about the Right to Development, Shelton (1985: 526-527) argues that the typology of this right adds to the human rights discourse because it is a synthesis of the entire catalogue of human rights and it contributes to the internationalization of human rights obligations. The RHE as a solidarity right might add value to the current human rights regime, providing an alternative space for the realization and protection of all human rights, bridging both domestic and international level.

#### **4. 1. 3 Enforceability of the RHE**

The RHE faces enforcement and justiciability concerns due to its multidimensional content and difficulty with definition. Various authors come to the conclusion that its existence as a stand-alone right is unnecessary for justiciability purposes, since international courts have used well-established human rights to provide redress for environmental violations.

Enforceability is compromised by the lack of unanimous definition and clarity of meaning and content, which reflects the failure to achieve a global consensus (Apple, 2004). Osofsky (2004: 30) poses the problem of justiciability as a problem of characterization: situations where environmental harms occur “do not fit neatly into existing categories of international law”. Therefore, enforceability is not achievable until environmental wrongs are considered violations of customary international law of “sufficiently specific, universal, and obligatory” (Apple, 2004: 34) character.

Taillant (2004) argues that enforcement of environmental rights could be achieved if a development approach to environmental protection is adopted. Considering environmental issues as development issues, Taillant suggests that a rights based approach that prioritize people and communities’ protection would facilitate human rights and environmental claims to be heard.

Kirsch (1997) identifies a justiciability issue in the failure of environmental constitutional provisions to have a substantive effect, since courts often do not deem such provisions to be self-executing. This could be considered a reason why pro-environmental litigants do not rely on constitutional provisions to bring a claim but rather on other more established human rights.

#### **4. 1. 4 Advantages and limitations of a universal RHE**

It is apparent that a brand new, separate right to a healthy environment presents various difficulties that must be overcome. First, the lack of definition and the intrinsic vagueness are mostly criticized as leading to weak enforcement and justiciability. However, many authors demonstrate that the definition of a right is an important component but not a critical one, and that certain flexibility is beneficial

rather than detrimental for rights' enforcement. Second, the anthropocentric perspective that requires environmental violations to be identified as being damaging for human purposes encounters critiques from those activists and scholars who prefer the non-human environment and other species that live within it to have their own intrinsic rights. Third, the issue of enforceability of the right and the possibility to generate human rights claims are dependent on the possibility of recognizing the RHE at either universal or regional level, as well as the capacity to identify individuals or collectivities as claimants of the right.

It would be helpful to identify the core content concept of the RHE. For Coomans (2007), the core content concept refers to the essence, to the intrinsic value and the substantive significance of a human right. The core content should be the universal basic meaning and the absolute minimum entitlement of a human right. It is the universal concept that is translated and operationalised at the national and regional level, determining states' obligations and guiding peoples' needs towards the realization of the right itself. As it will be described more in detail in the concluding section of this chapter, the UN Special Rapporteur Knox (2014a) has identified substantive environmental rights, but they are only limited to the obligation of the state to have in place the necessary legislative framework for access rights to be claimed.

Human rights, together with constitutional rights, inarguably occupy the highest place in the legal hierarchy. Human rights represent the most fundamental claims on society and the moral weight they carry implies that environmental policies must be accepted and enforced. Therefore, recognizing a right to a healthy environment will imply that environmental claims are raised to the highest level and are given precedence over other non-rights based norms (Shelton, 2010b). To recognize a constitutional environmental right is to ensure that the environment has the same constitutional protection as political rights (Kury, 1987: 85-87; cited in Kirsch, 1997: 1170). In addition, it could prevent volatile political trends to affect the constitutional value granted to the environment via non-environmental provisions. This would establish more firmly that environmental protection is seen as a matter of public policy (Howard, 1972: 229, cited in Kirsch, 1997: 1170) and also a commitment towards future generations.

The existence of an RHE will reduce the over reliance on economic cost-benefit evaluation for implementation measures of environmental protection. The RHE might be said to give priority to the preservation of the environment for the collective benefit in the long run, rather than the economic costs environmental protection might involve in the short term (Shelton, 2010b).

For what concerns justiciability, a rights based approach to a healthy environment might provide alternative avenues of redress in international human rights mechanisms not only to seek justice for rights violations but also to make government accountable to international scrutiny. Governments might be unwilling, or merely incapable of, protecting the environment failing in turn to protect human health and well-being from environmental threats; the role of peoples' petitions is to individuate the problems created in the environmental protection process and who is

to be held responsible. The role of the international community is to become a witness of environmental and human rights violations and to exercise its political pressure on governments and third parties, such as foreign companies, which use gaps in the law to escape environmental obligations (Pring and Pring, 2009).

Recognizing a new human right to a healthy environment would sanction that environmental issues are inherent to human rights. The ‘environment’ would be considered as an entity with its own rights to be protected and preserved. In doing so, it would question the relation between human rights, development and environment and advocate for a more fluid and fair interaction. The RHE could add value with the integration of environmental law principles into human rights practice, imposing more definite entitlements and obligations.

In the current of state affairs, the RHE is not recognized as a universal human right and alternative legal avenues are used to address environmental issues. The following sections concentrate on how rights based approaches to the environment have been applied as well as their advantages and limitations.

#### **4.2 Approaching environmental protection through non-rights-based approaches – public regulation and market mechanisms**

Outside the human rights framework, other legal approaches might be alternatively pursued through public environmental regulation and market based mechanisms. These environmental regulatory mechanisms regulate the relation between the state and the polluter.

Public environmental regulations comprise environmental policies and administrative rules that aim to prevent environmental harm. The aim of imposing standards is to regulate the operations of hazardous activities, the use of certain substances or the manufacturing of certain products. If a great likelihood of environmental risk is proved, there is the possibility to restrict or prohibit a process or substance. Public environmental regulations guarantee environmental quality standards that other approaches, such as cost-benefit or balancing, cannot achieve, giving a substantive component to this approach (Schroeder, 2002). Public regulations mechanisms also aim to ensure a more equitable distribution of polluting activities and the application of environmental law regulation (Anton and Shelton, 2011: 36), through its procedural, remedial and substantive components (Schroeder, 2002: 583). The procedural component facilitates a more democratic process through which environmental regulation, and environmental quality standards determination, can reflect public opinion rather than private decisions. The remedial component of this approach privileges prevention rather than liability, making it potentially superior to tort law (Hylton, 2002). The environmental regulation approach can achieve a desirable degree of deterrence and it raises the likelihood of detection of polluters in cases where polluters are unknown or legal costs are too high for individuals (Hylton, 2002).

Public environmental regulations tend to be well-defined but narrow: they focus on environmental standards (e.g. water quality) and technical, quantifiable considerations but fall short of taking into due account social considerations and appreciating the complexity of the environment (Anton and Shelton, 2011). Yang (2002) argues that environmental regulatory systems do not necessarily manage to distribute benefits and burdens of regulation in a proportionate, just manner. Since they aim to prevent harmful consequences for the majority, they might fail to “to provide adequate substantive environmental protections for minorities and the poor” (Yang, 2002: 610). In doing so, they exacerbate existing inequalities and contribute to environmental injustice (Yang, 2002).

Market based mechanisms, or economic incentives, are driven by the economic rationale that believes in the capacity of the free market to address environmental problems, and might be more effective and efficient than dense regulatory networks (Anton and Shelton, 2011: 53; Ebbesson, 2011: 73). Market based mechanisms are legal procedures relying on economic reasoning and on the assumption that property rights achieve the best possible allocation of resources (Anderson and Leal, 1992). Proponents of the ‘free market environmentalism’ argue that market based incentives might be desirable as they use the maximization of private interests for achieving public environmental objectives (Anderson, 1997; Schroeder, 2002): a market that produces wealth can turn the environment from a liability to an asset to the resource owner, or in Anderson’s words “a negative externality is really only an uncaptured benefit” (1997). Anderson and Leal (1992) recognize that free market environmentalism encounters a challenge when polluters cannot be identified and damages cannot be assessed, but modern technology can provide solutions.

Critics suggest that market based mechanisms are not adequate to address the moral, aesthetic, cultural and political value of a clean environment (Sagoff, 1992; Brennan, 1993). Market based mechanisms encourage privatization and regulation procedures that raise allocative efficiency concerns in terms of stigmatization of environmental pollution and ability to account for environmental harm (Brennan, 1993; Shelton, 2010b; Anton and Shelton, 2011), distributive justice and privatization of public goods (Anton and Shelton, 2011; Ebbesson, 2011), and the erosion of the right of public participation (Ebbesson, 2011).

The environmental regulatory mechanisms above described might contribute to limit and regulate the use of harmful substances. However they fall short of addressing human rights violations product of poor environmental quality. A clear connection has been made between environmental protection and the right to life, right to an adequate standard of living, right to health and right to privacy (Atapattu, 2002; Shelton, 2010b). The seventh paragraph preamble to the Aarhus Convention (1998), affirms that a healthy environment is a precondition to enjoy basic rights. Shelton (2010b) refers to environmental protection as a precondition to the enjoyment of cultural rights. In the Inter-American Commission on Human Rights Ecuador report (1997), it is specified how the enjoyment of the right to life and the right to health depends heavily on environmental conditions (see also Shelton, 2009b). In fact, if the physical environment is degraded, human life and health as well as

physical security and integrity are persistently threatened, implicating a violation of the above mentioned rights (IACommHR, 1997). Vice-President Weeramantry, in a separate opinion on *Gabcíkovo-Nagymaros Project* case (1997) said that “the protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments” (ICJ, 1997b: para. 104).

There is an international consensus that environmental degradation posing a threat to guaranteed human rights can be challenged through human rights mechanisms (Shelton, 2010b; Knox, 2014a, 2014b). These Rights Based Approaches (RBAs) follow the assumption that, despite representing “different but overlapping social values” (Shelton 1991: 138), human rights and environmental protection can enhance each other’s sets of objectives since they strive for the same ultimate goal: the achievement and the maintenance of the highest quality of human life.

The following section describes the most common RBAs that have been used to provide redress for environmental wrongdoings that affect human rights enjoyment.

### **4.3 Rights Based approaches: an introduction**

Several Rights Based Approaches (hereafter RBA/s) to matters of environmental contestation (Shelton, 1991; Atapattu, 2002) have been elaborated in order to address environmental protection as a human rights issue. On the basis of the extensive analysis carried out by Nyamu-Musembi and Cornwall (2004a; 2004b; 2005), this thesis intends for RBA a set of approaches, instruments or principles with a normative content which invokes certain ideals and represents certain visions of “what ought to be” (Hausermann, 1998, cited in Nyamu-Musembi and Cornwall, 2004b: 2).

As it will be described in the following sections of this chapter, the defining characteristics of RBAs are to widen access to justice and remedial redress, providing alternatives means to address issues of equity, justice, entitlement and fairness (Eyben, 2003, cited in Nyamu-Musembi and Cornwall, 2004b: 26). RBAs to environmental protection pose attention on “the detriment to important, internationally protected values from uncontrolled environmental harm” (Boyle, 2010: 33). The environment, being a global public good with transnational effects, is framed as a political issue. The lack of an international instrument establishing the RHE emphasizes the international character of RBAs to RHE as enshrined in national constitutions. This section examines whether the use of RBAs and established rights mechanisms can resolve or evade the problems of definition, enforceability and justiciability of RHE.

This thesis argues that RBAs have several advantages compared to environmental regulatory mechanisms as it emphasizes individual and collective entitlements to a

certain quality of environment (Shelton, 2010b: 4). RBAs do not reduce problematic situations in terms of human needs or development requirements, but they provide obligations a society must comply with to guarantee individuals inalienable rights (Annan, 1998). In this aspect, Gready (2009: 387) argues that the indirect use of the law of RBA, privileging processes, has crystallized human rights in a set of terms - participation, empowerment, accountability, equality and non-discrimination, and transparency – favouring the application of civil and political rights for the achievement of substantive outcomes. Scholars argue that RBAs’ promotion and application of principles and explicit obligations of law - respect, protect, fulfil – provides a framework for enforcement and delivery of human rights outcomes (Cornwall and Nyamu-Musembi, 2004a; Gready, 2009; Gready and Phillips, 2009). This integrative character allows RBAs to facilitate the construction of a more comprehensive frame of analysis and engage with qualitative and political processes and contexts of environmental disputes (Gready, 2009).

The main critiques towards the RBA concern the capability of human rights to set quantitative standards in an area where there is still debate over what might constitute a violation and what might constitute an adequate response to a certain violation (Gready, 2009). RBA might also fail to understand the social and economic factors underlying environmental degradation (Anderson, 1996a: 22-23) and to take into consideration that environmental issues often affect multiple human rights at once. The fragmented approach of most RBAs towards environmental issues, in fact, defeats the purpose of promoting the universality and interdependency of human rights. While the different RBAs complement each other and contribute to the evolution of the human rights discourse to incorporate the environment, each RBA manages to serve a human rights protection function isolated from the others. The broad and holistic ‘underpinning’ aspect of the relation of human rights and the environment is hard to specify and to be translated in environmental rights. The literature on RBAs reflects this tendency to fragmentation and does not provide any effort to tackle the complexity of the field of human rights and the environment. A more holistic approach that employs notions of solidarity rights and sustainable development tries to overcome this tendency of fragmentation, but does not resolve some problems of legal definition and justiciability.

#### **4.3.1 RBAs: channelling human rights principles for processes and outcomes**

As noted above, RBAs are a set of approaches with normative content that inform more or less specific interventions. In other words, RBAs are all those approaches that see human rights being applied in practice. A wide range of approaches could be identified as RBAs might be human rights used as guiding principles, standards for assessment, goals of policies or justifications for institutional programmes (Nyamu-Musembi and Cornwall, 2004b; Gready, 2009; Gready and Phillips, 2009). As Gready (2009) notes, RBAs use law either in a direct or indirect manner, depending on whether RBAs are applied with the objective to inform the outcomes or the

processes. RBAs apply established legal standards for legal enforcement and monitoring of outcomes (ie. human rights are respected, protected and fulfilled) but apply human rights principles to guide and evaluate those social and political processes that have a transformative potential. This researcher adds to Gready's view arguing that a further distinction can be observed within human rights principles applied by RBAs, distinguishing principles that have a more substantive, overarching quality from those that have a more practice/implementation type of quality.

RBAs aim for an active engagement of human rights in social and political processes that require an interdisciplinary perspective, reinterpreting and expanding the meaning of the core principles of human rights - universality, indivisibility and interdependence, equality and non-discrimination - as set forth in the Universal Declaration of Human Rights (1948). People are entitled to rights by virtue of being human hence the principle of universality conveys the notion that everyone is entitled to human rights in equal manner (Article 1 UDHR, "All human beings are born free and equal in dignity and rights"). Human rights are indivisible as they are inherent to the dignity of every human being (UNDG, 2003) and "they cannot rank above the other on a hierarchical scale" (Van Boven, 1982: 43). For this reason, human rights are also interdependent meaning that the enjoyment, or violation, of a specific right proportionally affects the ability of an individual to exercise other rights. These three principles – indivisibility, interrelatedness and interdependence – are the basic characteristics of human rights according to the Vienna Declaration. Yet they remain aspirational because of the historical fragmentation of human rights (Freeman, 1994; Wellman, 2000) and their inherent limitations as a universalist doctrine under globalization (Langlois, 2002). The social and political processes related to environmental contestation present an additional challenge as environmental issues might entail problems of cross-cultural and transboundary application, as well as socio economic differences (Anderson, 1996a). RBAs have the potential to provide flexible and creative methods to ensure enjoyment as well as universal, indivisible and interdependent realization of human rights despite the contested nature of environmental issues.

The principles of non-discrimination and equality are operationalized by RBAs in order to address issues of power, injustice and discrimination. Article 7 of the Universal Declaration of Human Rights (1948) affirms the principle of non-discrimination, being all equal before the law and entitled equal protection of the law against any discrimination, understood as "any distinction, exclusion, restriction or preference [...] which has the purpose or effect of nullifying, or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms" (HRC, 1989: para. 7) by both purposeful acts and discriminatory effects of policies. Both the International Covenant on Civil and Political rights (ICCPR, 1966) and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966), affirm the principle of non-discrimination (art. 2 and art. 26 ICCPR; art. 2.2 ICESCR) and gender equality (art. 3 ICCPR and ICESCR), stating that the rights enunciated in the covenants should be exercised and enjoyed regardless race, colour, sex, gender, language, religion, political or other opinion,

national or social origin, property, birth or other status<sup>14</sup>. Employing the specific language of the principles of equality of rights and non-discrimination, RBAs convey the urgency to challenge injustice (Gearty, 2010) and might contribute to the progressive expansion of notions of equality of treatment, equal protection of the law, equality of opportunity, and substantive equality towards positive affirmations (Leckie, 1998: 104-105).

The principles of human rights described above tend to be applied through RBAs with the aim to contribute in clarifying substantive content of rights or identifying possible manifestations of violation or enjoyment of rights. On the other hand, the principles of participation, accountability and transparency are more political as they directly relate to the process of human rights implementation and the effects of human rights norms on the distribution and exercise of power (Steiner, 1988: 84). Especially in the environmental and development fields, RBAs that use mainly these principles are geared towards making a “contribution to the solution” of issues rather than just pointing out the problem (Gready, 2009: 382).

Participation is both a means through which rights can be claimed (UNDG, 2003; Cornwall and Nyamu-Musembi, 2005) as well as an ideal and a right with intrinsic worth (Steiner, 1988; UNGD, 2003). Everyone is entitled to active, free and meaningful participation in contribution to, and enjoyment of, a political context in which human rights and fundamental freedoms can be realized (UNDG, 2003). Citizens have the right to participate in decisions that may affect their rights. Both the UDHR and the ICCPR (1976) express a vague right “to take part in the government of his country” (art. 21.1, UDHR) and “to take part in the conduct of public affairs” (art. 25.a, ICCPR) in addition to indicate periodic and genuine elections as the main instrument to exercise this right (Steiner, 1988). The value of participation rests in its fundamentally instrumental character: it is a means to influence public policy and governmental action. According to Steiner (1988: 132), the right to participation, and specifically its “to take part” clause, can be better understood as having a programmatic character which “nourishes a vital ideal and serves important purposes” for the fulfilment of other rights. The ability to participate in decision-making is directly related to the forms of institutionalization and governmental obligations. He goes so far to affirm that “the content of the right must be open to experimental reformulation” as societal changes will require governments to adapt to emerging needs and possibilities, elaborating new forms of institutionalizations (Steiner, 1988: 132).

The principle of accountability expresses a fundamental purpose of the human rights framework, which is the enforcement of duty (McInerney-Lankford and Sano, 2010: 34). States are accountable for the observance of human rights as duty bearers (UNDG, 2003) as well as other actors which actions might affect peoples’ rights in its broader notion (OHCHR, 2002, cited in Cornwall and Nyamu-Musembi, 2004a:

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<sup>14</sup>Considering the newer human rights treaties, the list of discrimination has seen few additions: race, colour, sex, ethnicity, age, language, religion, political or other opinion, national or social origin, disability, property, birth or other status as explained by the human rights treaty bodies (UNDG, 2003).

1417). The principle of accountability favours a process of creating effective and appropriate redress mechanisms, specifying obligations of effort on the part of the states (McInerney-Lankford and Sano, 2010: 34). It is strictly connected to the principle of transparency, which demands governments to be open, facilitating access to, and dissemination of, information on any decision-making process that might have an impact on human rights. Thus, a normative basis provided by RBAs (Gready, 2009: 385) promotes accountability since it contributes to diagnose and remedy a problem (Gready and Phillips, 2009: 2), identifying right holder and duty bearer.

The value added of RBAs lie in their distinctive feature of the indirect use of law (Gready, 2009: 387) and their potential to incorporate the principles of human rights law into social and political processes in order provide transparent, participatory and inclusive procedures for the enforcement and justiciability of universal, interdependent and indivisible human rights.

The following sections will describe the most commonly used RBAs to environmental protection and highlight the functions which distinguish them and add value in comparison with technical quantitative approaches typical of environmental regulatory schemes and strict environmental protection policy measures. The reactive and preventive properties of RBAs (section 4.4), for instance, are particularly apparent in the use of tort law and criminal law to solve environmental conflicts. The increased accountability promoted by RBAs (section 4.5) through the identification of right holders as well as the clear identification of positive and negative obligations of duty bearers, is highlighted in the tailored interpretation of economic, social and cultural rights to issues of environmental contestation. The application of human rights principles related to processes with an emphasis on participation is a feature of procedural RBAs (section 4.6).

#### **4.4 Reactive and corrective character of RBAs**

Environmental wrongdoings might be dealt with RBAs that concentrate on identifying violations that can be redressed through tort or criminal law. These RBAs are characterized by a reactive, or corrective, quality (Gready, 2009) and work as a remedy and deal with existing consequences of environmental harms and seek redress for violations. In this view, the tort and criminal law approaches to environmental protection might contribute to provide alternative avenues to seek redress and supporting legitimate claims that might fall through judicial and legislative gaps. Identification of violations through tort law or criminal law might also contribute indirectly to have a latent systemic impact since they both have a deterrence function. These legal RBAs could be considered to be characterized by a reactive and preventive feature.

The tort law approach might contribute to achieve greater environmental protection because it promotes the interests of individuals and provides compensatory remedies (Yang, 2002). If environmental damage can be properly quantified, tort law might have the capacity to compensate and remediate

environmental damage and could send a valid deterrence signal to polluters (Abraham, 2002; Anderson, 2002). Despite these potential positive outcomes, several authors consider that this approach might be ill-suited to deal with environmental torts as they are characterized by multiple plaintiffs and defendants, direct and often indirect causation links, long latency of environmental harms and poor access to environmental information (Brennan, 1993; Abraham, 2002; Cane, 2002). The capacity of tort law to deliver compensatory remedies is also challenged on economic reasoning: polluters will continue to pollute as far as the compensation does not exceed the cost to not pollute (Brennan, 1993).

Another approach to provide redress for environmental harms is the use of criminal law, which imposes criminal liability on polluters in case of “the existence of danger or harm to public interests traditionally protected by penal law, such as life, health and property” (Anton and Shelton, 2011: 38; see also Kiss and Shelton, 1997: 148). Though, criminal law has limited capacity to deliver corrective justice because the nature of environmental cases is qualitatively different and it is not reducible to establishing individual and direct relation of the perpetrator to the victim. In order to serve the purposes of environmental protection, some scholar (Anton and Shelton, 2011: 38; see also Kiss and Shelton, 1997: 148) argue that this approach should be tailored to developing “new offences against the environment, protecting independent natural elements without requiring an element of provable harm to specific victims”.

Tort and criminal law approaches, being characterized by a narrow interpretation of the categories of violation, harm and victim, are ill-equipped to deal with the complexity of environmental cases. Both approaches are limited as they are unable to identify rights holders and duty bearers in a progressive way.

The following sections present RBAs that use tailored interpretation of established human rights to provide remedies to issues of environmental contestation. First, section 4.5 describes those RBAs that use economic, social and cultural rights, specifically the right to life, health, indigenous rights and privacy and family life, to address violations derived from environmental wrongs (ESC RBAs). These RBAs consider environmental protection a precondition to the enjoyment of human rights (Shelton, 2009b) and have the same reactive quality of tort and criminal law approaches. However, since they tend to identify rights holders and characterize positive and negative obligations of duty bearers, they have a stronger preventive purpose through the promotion of justiciability.

Section 4.6 presents RBAs that views the exercise of civil and political rights (CP RBAs), particularly the right to information, participation and justice, as a means to enhance environmental protection (Shelton, 2009b). In comparison with other approaches, these CP RBAs present the additional qualities of promoting accountability translating human rights into political processes (Gready, 2009) and challenge the systemic causes of environmental violations.

The main, more apparent difference between ESC RBAs and the CP RBAs is their level of judicial application. ESC RBAs are more commonly applied in international

or regional judicial mechanisms, while CP rights, being applied in national context, reflect a bottom-up approach to solve issues of environmental contestation.

#### **4.5 Interpreting economic, social and cultural to address environmental issues**

The contestations around the international recognition of a stand-alone Right to a Healthy Environment has brought about the need to find alternative methods to seek redress for human rights violations related to environmental wrongdoings. International and regional jurisprudence indicates one avenue to seek redress for environmentally related violations is to re-interpret and expand existing human rights in order to incorporate environmental protection. These RBAs, as mentioned above, view environmental protection as possibly enabling or disabling context for the enjoyment of other rights. Shelton (2009b) argues that these RBAs see environmental protection as a precondition for other human rights realization. In practice, these RBAs allow international and regional human rights enforcing and monitoring mechanisms to address issues of environmental contestation without upholding a right to environment. Economic, social and cultural (ESC) rights have been particularly relevant to address the consequences of environmental wrongdoings as well as to respond to the debates over the justiciability of the right to a healthy environment. In fact, ESC rights are conceptually close to environmental matters since they relate directly to human well-being and capacity building (Anderson, 1996a: 6). It is also agreed that the inception of the right to a healthy environment is to be found in Article 12(2b) of the International Covenant of Economic, Social and Cultural Rights (ICESCR, 1966) asserting the right to health which includes the obligation to improve all aspects of environmental and industrial hygiene.

As discussed in Chapter 2, environmental issues have been addressed primarily through the right to health, the right to life, indigenous rights, and the right to private and family life. Violations of the right to health have been recognized if the damage is proved and a direct causal link between environmental quality and health affectation is established. Similarly, the right to life has been applied in a very narrow manner: violations due to environmental interferences have been recognized only when they resulted in death. In appropriate cases, indigenous rights have been successfully claimed to address issues of environmental contestation related to use and access to land and natural resources. In the European context, environmental issues are considered to interfere with the enjoyment of the private sphere causing a violation of the Right to respect for private and family life (art 8, ECHR). The following sections describe in a more detailed manner the potentials and limitations of protecting the environment through the protection of economic social and cultural rights.

#### 4.5.1 Right to health

The right to health generally encompasses an obligation to prevent environmental degradation that could negatively impact human health, even though the threshold of protection is undefined (Desgagné, 1995). Interpretations of this article explicitly affirm that a healthy environment is a socio-economic factor that directly influences the promotion of a healthy life (UN/CESCR, 2000b).

A good example of this approach in the jurisprudence of the African Commission for Human and People Rights is the decision of *Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria* case (ACommHPR, 2001b) over the violations of the right to health (art.16 African Charter on Human and People's Rights) and the right to a clean environment (art. 24, ACHPRs) due to contamination of water, soil and air in Ogoniland. The Commission noted that the right to a clean environment is “closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual” (ACommHPR, 2001b: para 51), imposing obligations (Chirwa, 2002) on the government to “take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources” (ACommHR, 2001b: para. 52). The Commission in this case placed great emphasis on environmental degradation and its effect on peoples’ enjoyment of ECS rights, merging environmental protection, economic development and guarantees of human rights (Shelton, 2002a: 942).

#### 4.5.2 Right to life

International and national courts have used the right to life to give redress for environmental injustices since environmental degradation and hazards threaten directly the quality of life and undermine the realization of an optimal lifespan (Weber, 1991). The traditional scope of the right is limited to the protection of physical integrity. For instance, the European Court of Human Rights tends to interpret in a narrow manner Article 2 of the European Convention, meaning that it has not found any violations of the right to life unless state’s action or inaction resulted in death (Desgagné, 1995; Eaton, 1997; Atapattu, 2002) and there is sufficient evidence of a causal link (LCB v. UK 1998; cited in ENELO, 2011: 3). The Court, in fact, recognizes a relation between the right to life and the environment exclusively when environmental interferences are established. The main concern of Article 2 ECHR, therefore, is deprivation of life rather than threats.

On the other hand, a liberal approach could interpret the right to life as a wider right to subsistence, which could include environmental positive obligations on the state to prevent situations of environmental hazards that can result in danger for, and deprivation of, human life interpreted as livelihoods (Weber, 1991; Desgagné, 1995; Atapattu, 2002; Shelton, 2002d). For instance, the Supreme Court of India demonstrated that the right to life approach is viable (Atapattu, 2002) stating that the right to live (art. 21 of the Constitution) “includes the right of enjoyment of pollution

free water and air for full enjoyment of life” (*Subhash Kumar v. State of Bihar* case SCI 1991: para. 7). This expansive interpretation therefore asserts the importance of quality of life, meaning that the right to life, in fact, includes, among other ESC rights (Jaichand, 2010), the right to live in a healthy environment. However, the Indian Supreme Court’s approach sets a high, and possibly impossible to reach, bar in terms of environmental protection as it might be difficult, if not impossible, to achieve a state of pollution-free environment.

Despite its consistent narrow interpretation of the right to life, in *Soering v. UK* (ECtHR, 1989: para. 90) the European Court acknowledged that a potential violation may amount to an actual violation if the risk of harm is foreseeable and of a serious and irreparable nature. The Court noted also that there is an increased awareness of state’s obligations related to the environment as the right to life “can be envisaged in relation to environmental issues relating [...] to other areas liable to give rise to a serious risk for life or various aspects of the right to life” (ECtHR, 2004c: para. 64). Therefore, states are required to establish procedural requirements to ensure the right to life as well as to provide an unbiased justice system with impartial official investigation procedures (ECtHR, 2004c; ENELO, 2011). In addition, state must meet the substantive requirements of the right to life, not only by not depriving lives, but also by taking preventive measures to safeguard lives, such as implementing a legislative and administrative framework which deters threats, taking appropriate actions in life threatening situations and providing information to the public (ECtHR, 2008; para. 132). For instance, in *Oneryildiz v. Turkey* (ECtHR, 2004c: para. 22, 51, 62) – nine slum dwellers died because of a methane gas explosion of a waste dump - authorities failed to take any preventive measures to protect the life of the slum dwellers not complying with the obligation imposed by Article 2. The Court recognized that the incident was the result of authorities’ negligence in securing the multiple hazards posed by the rubbish tip, finding a violation of the right to life in its procedural aspect. Drawing from the *Oneryildiz* judgement, the Court recognised a violation of Article 2 in the case of *Budayeva and Others v. Russia* (ECtHR, 2008) – eight deaths caused by a mudslide - since the government did not take appropriate measures to prevent nor limit the damage of a known imminent natural disaster (para. 116, 146) and also failed to provide information to the public regarding the emergency evacuation order and mudslide alert (para. 28, 30, 132). The European Court has therefore interpreted the obligation of the state to safeguard lives to encompass substantive and procedural aspects. The substantive aspect requires the State to put in place appropriate legislative and administrative framework to protect the right to life. The State has to ensure adequate protection of citizens’ life through the adoption of preventive measures geared towards both natural and man-made disaster risk management. Among these preventive measures, the Court has highlighted the importance of informing the public and providing adequate judicial avenues for investigation and redress (ECtHR, 2004c: para. 89-118; ECtHR, 2008: para. 128-137).

The narrow application of the right to life makes this RBA mainly reactive in character, responding to gross violations but failing to address their systemic causes in Gready's words (2009). Even if the European Court cases pose questions of administrative accountability and positive obligations under the right to life, core issues of poverty, marginalization and vulnerability remain lingering in the background. Other RBAs, especially the CP or procedural approach, address these issues providing procedures. However, the outcomes might not be substantive enough to change the status quo.

The UN Human Rights Committee and the Inter-American Commission for Human Rights have indicated that environmental degradation can lead to a violation of the right to life. The UN Human Rights Committee jurisprudence points towards the possible consideration of environmental harm as a violation of the right to life (Eaton, 1997: 294), raising concerns over state's obligations to protect human life under Article 6 (1) of the International Convention on Civil and Political Rights (1966) in *E. H. P. v. Canada* case (UN HRC, 1984). The Inter-American Commission in the *Yanomami Community vs Brazil* case (IACCommHR, 1985) concluded that ecological destruction causes human rights violations (Sands, 2003: 304), and it established a link between environmental quality and the right to life (Shelton, 2002d).

#### 4.5.3 Indigenous rights

In the American regional system, issues of environmental contestation have found redress through the application of property rights of indigenous peoples. In this particular region, indigenous issues are paramount in human rights discourse. The unique connection to their lands is what defines indigenous peoples (Scheinin, 2005: 3, cited in Havemann, 2009: 261). Because of the regional history of settler colonization (Imai and Buttery, 2013), the affirmation of human rights of indigenous peoples is the product of multiple struggles for territorial and cultural autonomy (Escobar, 1995), for access to land and against forced displacement (Uvin, 2004). Therefore, the case law concerning indigenous rights emphasizes the right to use and enjoy traditional land and natural resources. The interpretation of the Inter-American Court of indigenous rights, such as the right to property and the right to access to justice, led to important understandings of the substantive content of environmental rights.

As noted in Chapter 2, the Inter-American system has progressively adopted an expansive interpretation of the right to access to justice. First addressed in *Awasi Tingni v. Nicaragua* case (IACtHR, 2001) on state's failure to title communal lands and provide a judicial mechanism for collective action, the Court has affirmed the "need for collective capacity to access the judicial or administrative mechanisms" (IACCommHR, 2009: para. 372), what VanderZee (2009) refers to as right to communal access to justice, derived from the collective nature of the indigenous right to property (IACCommHR, 2009). The recognition of collective juridical

personality (IACommHR, 2009: para 374) would allow collective actions for the protection of the enjoyment of communal rights rather than individuals seeking redress for violation of individual rights (IACtHR, 2007: para. 169)<sup>15</sup>. It would also prevent debates over the identification of group representative before national and international authorities. Collective juridical personality would exclude the possible conflict between individual and communal property rights (IACommHR, 2009: para 374).

In the case of *Saramaka people v. Suriname* (IACtHR, 2007), a dispute on logging and mining concessions granted by the state on ancestral Saramaka territory, the Court outlined three rules of conduct in natural resources exploitation that are comparable to the application of what are considered procedural environmental rights. It found that the state failed to protect the right to property, to use and enjoy ancestral land, beside the right to judicial personality and the right to judicial protection of Saramaka people, the judgment elucidated the three rules of conduct in natural resource exploitation that the state should follow. These include: (1) to ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development within their territory; (2) to guarantee Saramaka people reasonable benefits sharing of natural resources exploitation; and (3) to carry out independent social and environmental impact assessments prior to concessions (IACtHR, 2007: para. 129).

These rules of conduct offer an expansive interpretation of procedural rights, incorporating substantive issues of communal access to benefits sharing.

Because of their nature of addressing specific communities which have a social, cultural and economic structure which differs from the wider national population (IACtHR, 2007), indigenous rights have, therefore, a limited reach. The indigenous rights RBAs described above fill a gap in the debate of environmental and human rights that has to do with peoples' rights and access to resources. Indigenous rights perspective highlights the collective character of the environment as a human right, which otherwise struggles to fit in the individualistic framework of traditionally interpreted human rights. Secondly, it pushes to the forefront development matters of resources ownership and access, which are political and relate to the right to participate in the decision-making process.

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<sup>15</sup>“Any individual member of the Saramaka people may seek judicial protection against violations of his or her individual property rights, and (...) a judgment in his or her favour may also have a favourable effect on the community as a whole. In a juridical sense, such individual members do not represent the community as a whole. The decisions pertaining to the use of such individual property are up to the individual and not to the Saramaka people in accordance with their traditions. Consequently, a recognition of the right to juridical personality of the Saramaka people as a whole would help prevent such situations, as the true representatives of the juridical personality would be chosen in accordance with their own traditions, and the decisions affecting the Saramaka territory will be the responsibility of those representatives, not of the individual members.” IACtHR, *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, para. 169.

#### 4.5.4 Right to respect for private and family life: the ECtHR jurisprudence

While the European Court of Human Rights (ECtHR) acknowledges that an explicit right to “a clean and quiet environment” (ECtHR, 2009b: para. 98) is not present in the Convention, it does recognise infringements to the right to respect for private and family life.

The European Court differentiates the negative from the positive aspect of the compliance with Article 8 (ECtHR, 2004a: para. 115). The negative obligation imposed on the state is to refrain from public interference of the private sphere, to balance state’s economic interests and individuals’ enjoyment of rights, and to prove that public actions are legitimate and reflect pressing social needs (Desgagné, 1995; Shelton, 2002d). The positive obligations are determined by the particular circumstances of Article 8 being allegedly violated (Desgagné, 1995). Even if Article 8 does not contain an explicit requirement for the state to take positive measures, it does refer to the obligation of the state to guarantee a fair decision-making process that “affords due respect for the interests of the individual as safeguarded by Article 8” (ECtHR, 2004a: para. 118; ECtHR, 2006a; ECtHR, 2006b).

In landmark decisions such as *Lopez Ostra v. Spain* case (1994) on health impacts caused by waste treatment plant pollution, and *Hatton and Others v. The United Kingdom* case (2001b) on airport noise pollution, the Court found in both cases that the state had failed to balance individual rights and country’s welfare allowing environmental pollution to prevent individuals from enjoying their private and family life (Shelton, 2002d: 20).

Direct environmental interferences must therefore reach a sufficient level of severity to trigger a violation. For instance, environmental nuisances that clearly exceed domestic and international norms and that are not inherent to life in a modern town are considered a direct interference with the individual right to enjoy his home. Also intensity and duration of environmental nuisances are to be taken into consideration as they might affect negatively physical and mental health as well as the quality of life (see for instance noise pollution cases of *Moreno Gomez v. Spain*, 2004b; *Mileva and Others v. Bulgaria*, 2010a; *Oluic v. Croatia*, 2010b).

On the other hand, violations of Article 8 can be recognized if authorities do not comply with their positive obligation to take necessary steps to protect such right and to enact adequate legislation (ENELO 2011; *Fadeyeva v. Russia*, 2005a; *Tatar v. Romania*, 2009a; *Okyay v. Turkey*, 2005b; *Dubetska and Others v. Ukraine*, 2011). However, the Court’s rulings also show that significant state’s interferences with the enjoyment of Article 8 are admissible if, they are legitimate and represent a fair balance between public and individual interests (ENELO, 2011).

Article 8 upholds a high degree of involvement of individuals in decision-making processes especially in relation to environmental matters as well as the judicial review of public policies. The ECtHR shows an evolution in relation to its own

capacity to question governmental policy choices (Boyle, 2010). While in the *Hatton* case (2001b) a reluctance of the Court can be noted where it is seen to be a forum for appeals against the policy judgments of governments, from *Taşkin* case (2004a) onward the Court evaluates the procedural aspects of governmental decision-making (Boyle, 2010: 34). The Court recognizes that Article 8 imposes procedural guarantees related to the right to information of the public. In the particular cases regarding mining operations, the Court indicates the duty of the state to disseminate information and release environmental impact assessment studies to the public.

In *Taşkin and Others v. Turkey* (ECtHR, 2004a: para. 125), a case challenging state licensing process for gold mine operations, the Court decided that Turkish authorities failed to comply with their obligations under Article 8 because they deprived the public of the relevant procedural guarantees in the decision-making process related to a gold mine operating permit. The Court upheld this decision in the subsequent *Öçkan and Others v. Turkey case* (ECtHR, 2006b) on cyanide use in gold mine operations, finding that procedural guarantees were not being safeguarded when the government decided to grant a new operating permit to reopen the gold mine.

Similarly, in *Tatar v. Romania case* (2009a) on polluting effects of cyanide in gold mine operations, the ECtHR, recalling the Aarhus Convention, found the violation of procedural guarantees of Article 8 due to the inaction of the state over the possible environmental and health risks of the use of cyanide sodium of a gold mine, despite clear indications from environmental impact assessments.

Even though Article 8 has particularly been used to deal with some environmental issues that violated individuals' rights, it does not substantially expand the scope of environmental rights (Shelton, 1993). First, this might be due to the lack of justiciability of environmental claims or the fear of environmental damage claims throughout the European continent (Shelton, 1993). Second, the individualistic approach of the convention system of rights protection limits the scope of human rights litigation to push forward environmental protection. The notion of 'private sphere' may protect the area of personal health, physical integrity and well-being but not the larger environment (Desgagné, 1995). Arguably, there is no defined distinction between human and non-human surrounding so that it is unclear to which extent the notion of 'private sphere' might extend to the quality of life outside private home (Desgagné, 1995). Third, claims are valid under Article 8 either if the applicant "can establish the likelihood of adverse exposure" (ENELO, 2011: 37) or can submit hard evidence to prove violation (i.e. noise level test. *Borysiewicz v. Poland*, 71146/01, 1 July 2008, cited in ENELO, 2011: 43). Consequently, Article 8, requiring a certain degree of direct effect on the applicant, is not effective regarding protection from the general deterioration of the environment (for instance see *Ivan Atanasov v. Bulgaria*, 2010c on water pollution in the context of a governmental reclamation scheme of disused copper-ore mine tailing ponds).

The violations approach of the Convention is not compatible with the preventive approach, necessary in the realm of environmental protection. The issue of legal

standing and the limited applicability of the notion of potential interference hinders stronger efforts of environmental protection through guaranteed human rights (Desgagné, 1995).

There are several aspects of environmental protection and human rights violations within the context of environmental contestation that are not adequately addressed by this RBA. The focus on the identification of individuals fall short of capturing what is often a blurred distinction between collective and individual entitlements. This RBA does not grant sufficient consideration of environmental quality on its own, but rather it values environmental degradation against the economic benefit of the state. This perspective might, therefore, raise questions of equality and environmental sustainability. Finally, the Court's use of Article 8 points to issue of governance, questioning the states' decision-making processes, but falls short of outlining rules of conduct as done, for instance, by the Inter-American Court of Human Rights, as seen in the previous section.

#### 4.5.5 Other rights and their environmental dimensions

Several other rights have been recognized to have an environmental dimension, for example the Right to a fair trial (art. 6, ECHR), Right to Freedom of Expression (art 10, ECHR) and Right to protection of property (Article 1, Protocol 1, ECHR).

The right to a fair trial (art. 6, ECHR) is the most relevant to environmental issues since it determines civil rights and obligations, as well as criminal charges, relating to the environment and it refers to the justice component of the RHE. The right to a fair trial requires a reasonable time frame to resolve judicial proceedings that must be fair. It also calls for independent tribunals and the effective enforcement of courts' judgments. As it could be seen by the case presented, most of these requirements are not fulfilled in environmental cases (see *Okyay v. Turkey*, 2005b , *Kyrtatos v. Greece*, 2003). In order to trigger a violation of Article 6, "a dispute must be "genuine and serious" and involve a right that is arguably recognized under domestic law" and the "outcome of the dispute must also have a direct effect on the right in question" (*Balmer-Schafroth and Others v. Switzerland*, 1997, cited in ENELO, 2011: 18). As the jurisprudence shows, there is an evident difficulty for claims under Article 6 to be admissible especially when they refer to potential environmental disasters that threaten civil rights and obligations but the lack of imminence (ENELO, 2011). This means that the principle of prevention is not taken into consideration. However, in a dissenting opinion it is noted that threats do not need to be serious and imminent, as long as the applicant can establish a "genuine and serious" dispute with a likelihood of risk and damage (*Balmer-Schafroth and Others v. Switzerland*, 1997, cited in ENELO, 2011: 18).

Concerning the right to freedom of expression (art 10, ECHR), it guarantees the freedom to receive and impart information in general (Weber, 1991). It relates to the environment in term of ensuring individuals the capacity to assemble and to express in environmental matters, therefore protecting a democratic public debate (ENELO,

2011). This thesis argues that it is particularly relevant to the RHE as this right applies to all forms of expression and includes the right to impart and to receive information (ENELO, 2011). There is a notable difference, though, between Article 8 and Article 10 ECHR in relation to the obligation to disseminate information. If Article 8 imposes on the state the positive obligation to release information, under Article 10 governments do not have the positive obligation to actively disseminate information (*Guerra v. Italy* 1998, *Hashman and Harrup v. The United Kingdom*, 1999, ENELO, 2011; Weber, 1991; Desgagné, 1995).

The European system also utilised in an environmental context the right to protection of property (Article 1, Protocol 1, ECHR). The aim is to minimize arbitrary interference by the state (Grgiae et al., 2007, cited in ENELO, 2011: 67) in the individual's right to peacefully enjoy his or her property. The violation of this right relates to material dispossession (deprivation) in the public interest (Desgagné, 1995), loss in value of the property (Weber, 1991; Desgagné, 1995) and all those property rights which constitute the property's enjoyment and meaningful use (substance of ownership) (Shelton, 1993). Environmental protection has been recognised as a legitimate aim of general interest to interfere with the right to property (Desgagné, 1995)<sup>16</sup>. Various activities could be considered within the realm of environmental protection such as natural resources management and territorial planning and general interest would override private interests (Desgagné, 1995).

A violation of the right to property has been interpreted as the disproportioned burden on individuals to oppose government decisions (*Chassagnou and Others v. France*, 1999b). The European Court has also indicated that governments have the positive duty to protect individual property, even if the property is in an illegal area, as seen in *Öneryildiz v. Turkey* case (Roldán Ortega, 2004) in section 4. 5. 2. Court's decisions are also based on the need to strike a fair balance between community interest towards environmental protection and individual enjoyment of property rights (see *Fredin v. Sweden*, 1991, *Hamer v. Belgium*, 2007b, ENELO, 2011; Shelton, 1993; Weber, 1991). The state retains a wide margin of appreciation in its activities as long as they are lawful and with a legitimate aim (Shelton, 1993: 568) and they reasonably protect the right to property, especially in the eventuality of natural disasters (*Budayeva and Others v. Russia*, 2008).

#### 4. 5. 6 Summary of ESC RBAs

The interpretation of economic, social and cultural rights in a more, or less, flexible manner within the context of regional human rights systems have contributed to the justiciability of environmental issues, but only to a certain extent. It is undeniable that these ESC RBAs contributed to a greater understanding of

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<sup>16</sup>He differentiates between the notion of "public interest" which refers to benefits for a relatively small part of the population; and the notion of "general interest" which concerns benefits for a large part of the population (Desgagné, 1995).

political accountability (Jones and Stokke, 2005) in virtue of the identification of positive obligations imposed on duty bearers.

The application of the right to life and the right to health to provide judicial remedies for environmental degradation is testimony to the centrality of the environment in human rights. These RBAs indicate that the state has obligations to prevent environmental harms that may carry a burden upon human health and quality of life. However, these RBAs are applied upon violation, with proof of harm and established direct causal links, which do not accommodate the features of environmental claims.

Indigenous rights are claimed mostly in relation to claims of use of and access to land and natural resources. The merit of this RBA lies in the fact that it consistently identified procedural obligations imposed on the state for greater accountability and it refers to substantive equality in development. Even though this RBA has been moderately successful, it fails to articulate a more substantive relation between environmental and development claims. The minority focus reduces the scope of who can claim use of and access to natural resources, ultimately questioning the capacity of human rights based approaches to be universal and indivisible.

In the European context, the Right to respect for private and family life (art. 8, ECHR) contributes to define positive obligations imposed on states with an emphasis on the public's right to information. Even though it questions the decision-making process of the state, the procedural aspects of Article 8 fall short in substantiating further requirements for legitimizing decision-making. This RBA to the environment is limited because of its individualistic, anthropocentric and violation-based character. Environmental wrongdoings have a collective character and a strong precautionary requirement which do not fit with the European human rights framework. This particular ESC RBA falls short to evaluate whether substantive environmental standards are at satisfactory level, which Sands (1995) considered a possible potential of ESC rights, neither to take into due account the value of the environment *per se*. It is to be noted that the European Social Charter (1961) understands the right to a healthy environment to be included in the provision of the right to protection of health (Article 11).

The RBAs presented above, particularly the indigenous RBA and Article 8 ECHR RBA, pose great attention on a key feature of the enjoyment of human rights: the identification of right-holders and duty bearers. This identification allows RBA to carry out two complementary functions: to promote positive state's obligations to create the conditions to exercise human rights (Cornwall and Nyamu-Musembi, 2004a); and to legitimize citizens as participants (Jones and Stokke, 2005) in the decision-making process. However, these RBAs fall short in addressing environmental issues in a holistic manner as they do not challenge the political status quo and power dynamics (Cornwall and Nyamu-Musembi, 2004a; Gready and Ensor, 2005) in environmental decision-making processes.

The attention on procedural guarantees is the main characteristic of the procedural approach, presented in the following section. This is the predominant RBA to the environment that views the exercise of civil and political rights as a means to strengthen environmental decision-making processes and increase environmental protection.

#### **4.6 Procedural rights**

Procedural rights are those rights that guarantee civil liberties of thought, conscience, expression, assembly and association and due process. These rights provide procedures for transparency and democratic governance by allowing interested persons to seek and receive information about, and participate to, decisions that affect their environment, or to seek redress for environmental harm (Shelton and Kiss, 2005: 26). For this reason, they are fundamental means to protect and enhance democracy through the exercise of citizenship (Gearty, 2010). RBAs that apply procedural rights, often referred as procedural approach, represent a narrow but definite approach to the definition of environmental rights.

Civil and political rights have two main qualities to offer to the cause of environmental protection: first, they are accepted within each culturally specific context; second, political rights can be more justiciable as they offer defined legal venues available to seek redress (Gearty, 2010). While substantive rights give an individual the power to possess or do certain things, procedural rights allow individuals to use the administrative machinery to enforce rights and duties recognized under substantive law (UNITAR, 2008: 1).

In comparison with the original civil and political rights they derive from, environmental procedural rights provide a greater range of rights and obligations that stem from the nature of environmental conflicts, questioning the notion and practice of good governance which is peculiar to this approach.

Environmental procedural rights include: (1) the right to information, related to the environment and activities that might have an impact on the environment or public health; (2) right to participation, within the environmental decision-making processes; (3) access to justice, which is the right to seek judicial remedies at any level (Shelton, 1991; Desgagné, 1995; Atapattu, 2002). Procedural rights are dependent of several factors: institutional infrastructure, government capacity, capacity in civil society, media attention and public scrutiny, and international community (Petkova et al., 2002).

As seen in the previous chapter, Principle 10 of the Rio Declaration (1992) set the basis for transparent, equitable and accountable decision-making and for sound environmental governance. The Aarhus Convention (1998) constitutes the international normative framework of reference for procedural rights setting minimum standards for environmental democracy. However, the research carried out by The Access Initiative, an international civil society led coalition on environmental access rights, remains the most comprehensive and in depth assessment and analysis

of access rights on a world scale (see Box 1 for TAI methodology). In the following sections, each right will be described in its aims, implications and challenges.

**Box 1 The Access Initiative (TAI) Methodology**

The Access Initiative (TAI) strategy consists in a civil society driven assessment of government policies and practices; assessments are conducted at the national level using legal research and case study analysis using an internationally recognised methodology.

TAI methodology is a universally applicable set of research questions to evaluate government system regarding access rights. It generates over 100 indicators of country performance in terms of law and regulation, effort and effectiveness of public institutions.

Indicators are divided into four major assessment areas - access to information, public participation, access to justice, capacity building - and subcategories with law and practice indicators. Each indicator results in a value or score statement. The latter are qualitative measurements of access, tailored to evaluate weak or strong performances of the country under review.

Only the most recent and typical case studies - anything from events, decision-making processes or institutions practices – are chosen so that data collecting results easier and current state of examined country is more accurately reflected.

A successful assessment is driven by a coalition of researchers from NGO representatives, lawyers, academics, university students, journalists, other experts and consultants. TAI strategy recommends also the establishment of an advisory group, a panel of environmental, legal, public interest, academic, and government experts, to provide guidance and oversight to the assessment process.

#### 4.6.1 Access to Information

The right to access to information is guaranteed in ICCPR Article 19 (2)<sup>17</sup>. It is not only part of freedom of expression and basic of a democratic way of life, but is “a right in and of itself” (Ligabo, 2003: para. 41). Several countries include Freedom of Information Act in their legislation which requires public authorities to allow the public to access information.

The right to information can be understood as a cluster of rights (Douglas-Scott, 1996: 115) that carries negative as well as positive obligations for the state. The narrow interpretation of the right encompasses the right to seek as well as to access and to receive information, which are the essential elements of freedom of speech and expression (Ligabo, 2003: para. 38). In fact, state’s obligations can be limited to refraining from interfering with the public attempts to obtain information. But it can also be understood to comprise an expansive positive obligation imposed on State and public authorities required to actively disseminate relevant information to the public (Shelton, 1993). In particular, this right imposes positive obligation “to ensure access to information by freedom of information legislation, which establishes a legally enforceable right to official documents for inspection and copying” (Ligabo, 2003: para. 39).

<sup>17</sup>‘Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice’. Equally, the right to freedom of opinion and expression is enshrined in Article 19 of the Universal Declaration of Human Rights (1948); Article 13 of the American Convention on Human Rights, and Article 9 of the African Charter on the Rights and Duties of Peoples.

In the environmental context, the positive obligation of state and public authorities to actively disseminate environmental information, which is of general importance or is important to numerous persons (Weber, 1991: 182), has the capacity to create “the broadest basis for informed decision-making” (Shelton, 1993: 570) in relation to environmental impact assessment of projects, either public or private. The definition of access to information is “the ability of citizens to obtain environmental information in the possession of public authorities” (Dresang and Gosling, 1999, cited in Petkova et al., 2002: 15). While the exact definition of environmental information depends on the legislation, environmental information can be generally understood as any available information on the state of the environment (i.e. quality of air, soil, water), on factors affecting or likely to affect elements of the environment (i.e. pollutants release), and state of human health and safety, human life and cultural sites (Brisman, 2013). States need to establish procedures of environmental information disclosure, and exemption from disclosure, and mechanisms for dissemination (UNITAR, 2008: 4). An example of a mechanism through which the state can comply with the positive obligation of access to information is the Pollutant Release and Transfer Registers (PRTRs), established with the European Kiev Protocol (2003) within the framework of the Aarhus Convention as seen in chapter 3. PRTRs, which are inventories of pollution sources, can provide complete, consistent, credible and accessible environmental information in relation with toxic emissions and discharges (Shelton and Kiss, 2005).

Access to environmental information is thought to enhance environmental protection, public participation and accountability (Shelton, 1993; Petkova et al., 2002; Shelton and Kiss, 2005).

Access to environmental information is believed to be a critical instrument for environmental protection since it facilitates decision-making processes through the identification of problems to be addressed (Petkova et al., 2002: 35). This view is based on the assumption that people who are provided with reliable environmental information about risks and environmental hazards might be more inclined to raise environmental quality standards in order to increase welfare (Somanathan, 2010: 275) and ensure long term solutions to environmental problems (Petkova et al., 2002: 35). In the wider context of governance, access to information promises to deliver: (1) increased transparency and accountability of public authorities, becoming a critical tool in fighting corruption (Blanton, 2002, cited in Petkova et al., 2002: 34); (2) increased public pressure on polluters to reduce their pollutant capacity (Florini, 1998; Stephan, 2002, cited in Petkova et al., 2002: 35); and (3) promotion of equity through inclusion in environmental decision-making process (Che and Earnhart, 1997; Grant, 1997; Stephan, 2002; cited in Petkova et al., 2002: 35).

#### **4. 6. 2 Public participation**

The right to participation is recognised in various binding texts internationally and it acquires expansive meanings in environmental contexts. Several authors consider

public participation as the main instrument through which individuals and group of individuals can influence the decision-making process (Shelton, 1993), providing timely and informed input on strategies, policies, plans and individual projects that have an impact on the environment (UNITAR, 2008: 4). It stems from the right of political participation, freedom of association (Article 20 UDHR) and assembly and freedom of expression (Foti et al., 2008: 24). It also promotes the notion that different stakeholders should be involved in environmental decisions on equal footing (UNITAR, 2008). Principle 10 of the Rio Declaration (1992) recognizes that extending participation in decision-making processes to all concerned citizens represent the best way to handle environmental issues. Widely available information and effective access to judicial and administrative proceedings are prerequisite for public awareness and participation.

Dresang and Gosling (1999) define access to participation as “the opportunity for citizens to provide informed, timely, and meaningful input and influence decisions on general policies, strategies, and plans at various levels and on individual projects that have environmental impacts” (cited in Petkova et al., 2002: 15). The Aarhus Convention emphasizes that public participation requires minimum standards of effective notice, adequate information, proper procedures and taking into account the outcome of participatory processes (UN/ECE, 2000). Public participation therefore requires mechanisms for the public to participate at different levels and in different type of decision-making (Petkova et al., 2002: 18). Public authorities have the obligation to enable individuals and environmental nongovernmental organizations to comment on any proposal affecting the environment in both positive and negative manner (Brisman, 2013). They should also provide information regarding the final decisions as well as the reasons for those decisions (Brisman, 2013), explaining how and to what extent public participation outcomes have been taken into consideration.

Authors identify two complementary and mutually reinforcing functions of public participation. Its primary goal is to make governments accountable, enhancing the capacity of people to challenge power and to make it accountable (Gready and Phillips, 2009). On the other hand, it enhances institutional accountability, through the implementation of the Principle of Transparency in administrative procedure (UNEP, 1997b). Increased accountability, in turn, increases public’s capacity to influence decision-making (Cornwall, 2001).

While promoting accountability and challenging power, public participation aims to identify and channel public interest into the development of public policies (Beierle and Cayford, 2002, cited in Petkova et al., 2002: 66) and laws. Meaningful public participation, which contributes substantively to defining the parameters and the outcomes of decision-making process, improves the overall quality of resulting decisions (Petkova et al., 2002: 5). It adds value since it can ensure that wide ranging relevant issues are addressed, contributing to balance social, economic and environmental costs and benefits of decisions. In this sense, it can be considered as a tool to integrate, coordinate and reconcile environmental and social concerns as well as economic objectives into the decision-making process. This process facilitates the

adoption of decisions that are in line with sustainable development objectives and providing legitimacy of the whole decision-making process through deliberation (Zhao, 2010: 89). Public participation can be distinguished in *ex ante* participation which refers to participation that takes place in decision-making and *ex post* participation in benefits sharing (Cohen and Uphoff, 1980). An inclusive decision-making process, since it contributes to consensus building, can be a mechanisms to manage, reduce and avoid potential social conflicts and litigation (Petkova et al., 2002: 66; see also Zhao, 2010: 89). In fact, a discussion that involves stakeholders can improve outcomes of decision-making by reflecting the range of values cherished by different sectors of society (Holder, 2006). There are several mechanisms to facilitate public participation: non-deliberative mechanisms for obtaining information from and to the public, public hearings, citizen advisory committees, regulatory negotiations and stakeholder mediations, citizen deliberations (including citizen juries and consensus conferences) (Skanavis et al., 2005).

#### 4. 6. 3 Access to justice

The right to access to justice derives from the right to an effective remedy by a competent tribunal for acts violating rights granted by the constitution or by law (see, for example, Art. 8 UDHR) (Foti et al., 2008: 24) and the right to a fair trial and public hearing by an independent and impartial tribunal (art. 10, UDHR; art 6, ECHR) or the right to review procedures before a court of law to challenge decisions (Brisman, 2013), the right to judicial review. It is a right that aims to counterbalance the margin of appreciation left to administrative authorities in taking up activities that interfere with individual enjoyment of rights (Desgagné, 1995).

Access to justice in environmental matters refers to “the ability of citizens to turn to impartial arbiters to resolve disputes over access to information and participation in decisions that affect the environment” (Dresang and Gosling, 1999, cited in Petkova et al., 2002: 15). It is an essential component in the enforcement of procedural as well as substantive environmental rights (UNITAR, 2008).

Access to justice in the environmental context depends on numerous factors: the existence of constitutional guarantees for access to justice; broad interpretation of legal standing; impartial and several redress mechanisms; affordable legal services (Petkova et al., 2002: 18). Although these are basic requirements of the justice system structure, they pose a challenge to the effective exercise of access to justice. First, a lack of clarity regarding legal framework can constrain access to justice. Instead, a comprehensive legal framework comprising constitutional guarantees of access to justice as well as provisions for access to information and participation can enhance access to justice (Petkova et al., 2002: 95). Second, citizens should be able to access several redress mechanisms, such as alternative dispute resolution ones (eg. mediation), administrative court and formal judicial review (Petkova et al., 2002: 92-93). The problems with availability of these mechanisms affect the guarantees of access to justice. In order to allow people to be able to complain before a court of law, interpretation of the rule of legal standing should be as broad as possible. In

practice, legal standing is most often the reason for inadmissibility of complaints. The costs of justice, specifically legal representation costs, are another limiting factor for the right to access to justice (Petkova et al., 2002: 7).

The right to access to justice can be divided in three strands: access to justice for violation of access to information; access to justice for violation of public participation; and access to justice for human rights violation in environmental context. In the first two cases, access to justice can be limited by the lack of legal definition of ‘public’ or the ‘public concerned’ (Petkova et al., 2002: 6). Therefore, the more defined the procedures and obligations, the higher the possibility for the public to access justice (Petkova et al., 2002: 92). Some authors advocate for dedicated environmental courts or tribunals, which are multifaceted and multi skilled (Woolf, 1992) combining judicial and scientific expertise, in order to be better suited to resolve environmental disputes (Gill, 2010).

According to the research of Pring and Pring (2009), access to justice is guaranteed and widened where the justice system presents specific characteristics, namely independence, visibility, flexibility and enforcement. The ideal environmental court should be independent from “substantive and procedural control” of any other environmental agencies whose decisions it reviews (Pring and Pring, 2009: 25). It should be composed by individuals that are trained in the subject of environmental law, to guarantee legal expertise and consistency in decisions. It should be characterized by certain flexibility in procedures, for instance widening legal standing, but also in conflict resolution approaches, providing creative methods to address cases where the environment is just an aspect of the greater conflict.

#### **4.6.4 Environmental Impact Assessment: environmental protection and human rights mechanism**

Public participation in environmental decision-making is usually a requirement within the environmental impact assessment legislation. This renders the Environmental Impact Assessment (EIA) effectively the legal procedure of decision-making process (IAIA, 2009) for projects authorizations as well as the human rights mechanism for environmental procedural rights.

The EIA is an analysis of the type and magnitude of possible consequences of development projects that influence the natural and human environment (IAIA, 2009). It is a technical tool for decision makers that includes biophysical components and also widens the analysis to social and economic components, as well as visual and cultural ones (IAIA, 2009)<sup>18</sup>.

Reference to EIA can be found in Principle 17 of Rio Declaration (1992), where EIA is considered as a national instrument that “shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority”.

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<sup>18</sup>The International Association for Impact Assessment (IAIA) defines the EIA as the “the process of identifying, predicting, evaluating and mitigating the biophysical, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made” (IAIA, 2009: 1).

Different provisions of EIA serve the purpose to ensure that decision-makers take into due considerations environmental consequences of a given project before proceeding with its development. Environmental consequences include biophysical, social, economic and institutional ones, which require transparent and participatory decision-making process to evaluate, address and monitor them before, during and after the proposed project development. The EIA should aim ultimately to guarantee sustainable development. While all countries should carry out EIA processes, these are particularly important in those countries heavily reliant on extractive and environmentally damaging industries, such as mining.

The EIA process is first and foremost an environmental regulatory process (see section 4.2 of this chapter) which should serve the environmental law principles of prevention and precaution (IUCN, 2010). The EIA process is not explicitly a human rights mechanism. However, due to its function to integrate environmental matters in decision-making (IUCN, 2010), EIAs are in practice a tool to exercise procedural rights. EIAs can also be considered a tool to evaluate procedural rights: in fact, the right to information and right to participation can be implicitly evaluated by the public nature of EIAs. All the EIA procedures have to be made available to the public: the transparency of EIA processes should guarantee institutional accountability and should create opportunities for citizens to exercise their procedural rights (IUCN, 2010). As it will be explored further in this research using case studies, the EIA processes may not reach full transparency and even if they are made public, they may not include the concerned peoples. The EIAs might not be the most adequate spaces for the exercise of procedural rights.

The World Resources Institute in its 2002 pilot studies on environmental procedural rights identified that “improvements in practice lag behind improvements in law” (Petkova et al., 2002: 4). Lee and Ghanime (2005) suggest that EIA processes should be consolidated so that environment is mainstreamed in government policies. The case studies in Chapter 5 show how, despite the existence of dedicated legislation and environmental institutions, EIA processes are seen as a barrier to economic growth not as an opportunity for public participation, rights realization and environmental protection.

#### **4. 6. 5 Summing up procedural rights**

The procedural approach to the environment is the preferred human rights based approach to environmental issues. The UN Special Rapporteur Knox (2013b) has confirmed in his first report that environmental procedural rights constitute the procedural components of the interest of human rights in environmental issues.

The assumption underlying the procedural approach is that an informed, meaningful and inclusive participatory process can lead to sustainable and equitable choices. The requirement of negative and positive access to information should be fulfilled to guarantee informed decision-making. Participation should be meaningful, in the sense that it contributes substantively to defining the parameters and the outcomes of decision-making process. Participatory processes should be inclusive so

that participation can recognize and ameliorate social exclusion and power differences for more effective negotiation and conflict resolution (Colletta et al., 2001, cited in Petkova et al., 2002: 66).

The advantages to focusing on the protection and respect of procedural rights are multiple. They advance environmental protection while protecting, promoting and advancing universal realization of human rights through the promotion of good governance. Results of decision-making process are better when information is widely distributed in a usable format. In turn, wider access to information can increase participation and ‘sustainable’ decisions to environmental problems. The sustainability of environmental decisions is directly related to the tension existing between the three pillars of sustainable development. Procedural rights are viewed as a means to establish a balance between economic and environmental priorities while taking into consideration the neglected issues of social welfare. Access to information ultimately facilitates citizens in taking an active role in political choices and control over environmental protection (Petkova et al., 2002: 35). Access to justice requires a comprehensive legal framework to guarantee procedural transparency and to challenge government decisions.

Access rights contribute to the reintegration of rights’ generation (Wellman, 2000). In fact, these rights are based on civil and political rights, but they aim to fulfil and advance substantive economic, social and cultural rights (Foti et al., 2008: 22). Access rights are the common ground between the environmental movements with their concerns on environmental protection and natural resource management, the democracy movement, with its emphasis on transparency, inclusiveness, and accountability, and the human rights movement, seeking the universal realization of human rights (Foti et al., 2008: 14).

The three procedural rights comprise key characteristics of good governance (Petkova et al., 2002: 13) which is based on transparent, accountable and participatory decision-making process. The term ‘governance’ refers to those decision-making processes, values and institutions, rules and practices that manages social, economic and political choices. In particular, good governance should be characterized by the rule of law, effective State institutions, transparency and accountability in the management of public affairs, respect for human rights and participation (UN/ESCAP, 2002: 202). The concept of good governance refers to the capacities of the state to achieve the goals of sustainable development, through (1) the maximization of economic growth while using resources in a sustainable manner, (2) the promotion of democratic, participatory and inclusive decision-making process (3) to guarantee the equal enjoyment of economic, social and cultural entitlements to citizens (Khoo, 2013a). The procedural approach, therefore, constitutes the linkage between human rights, environmental protection and governance within the discourse of sustainable development.

Procedural rights might present challenges in their implementation even though relevant procedures are established. Lack of government capacity constrains public

access. Many lapses in providing access to information, participation, and justice can be attributed to a lack of government capacity, including staff, equipment, procedures, and training (Petkova et al., 2002: 7). At the same time, the lack of capacity of civil society to play an active role in environmental decision-making also constrains procedural rights and relevant mechanisms.

The reliance of procedural rights on environmental impact assessment (EIA) procedures may pose an additional barrier. Because of the technical nature of the EIA, which will be discussed in depth in Chapter 5 and 6, procedural rights are limited in what substantial outcome might be achieved. As suggested by Hayward (2005: 180), procedural rights may be trumped by presumptions in favor of development and economic interests, sidelining environmental protection issues.

The promotion of access and public participation respond to the rationale that a transparent and accountable environmental decision-making process might also positively influence the development and implementation of national environmental policies as well as improve compliance with international obligations of environmental treaties (UNITAR, 2008: 1). Access rights are essential for citizens to claim the right to a healthy environment, to strengthen democracy and promote sustainable development. As the procedural approach promotes the use of measures of transparency and accountability, it directly strengthens the role of the public and its inclusion in the decision-making process. This should enhance social cohesion and environmental equity (ECLAC, 2013). In fact, it is characteristic of Rights Based Approach to call “for existing resources to be shared more equally and for assisting the marginalised people to assert their rights to those resources” (Cornwall and Nyamu-Musembi, 2004a: 1417). Since rights are based on legal and ethical obligations that make development process explicitly political (Jonsson, 2003, cited in Cornwall and Nyamu-Musembi, 2004a: 1417), human rights become political because they result in substantive demands for a reasonable share of available resources.

RBAs may guarantee a more transparent political decision-making process due to the emphasis of access rights of information, public participation and access to justice. Enforcing these access rights produces two main advantages: it may facilitate the approval of decisions favorable to environmental protection while, at the same time, the respect of human rights, the rule of law and democratic values (Shelton, 2010b).

The procedural approach to environmental issues contributed with several functions of RBAs: it promotes both a direct and indirect use of the law; it promotes accountability in terms of identifying right holders and duty bearers but also accountability as transparent decision-making that can be challenged. If properly conducted, it promises an inclusive, non-discriminatory political space of confrontation on needs and rights. Procedural rights could be superficially seen as a mere reinterpretation of civil and political rights. However, environmental access rights offer a more comprehensive legal framework that aims ultimately at the

promotion of ‘good governance’. Access rights provide expansive positive obligations, according the state the duty not only to refrain from interfering but also to take positive steps for the facilitation of rights enjoyment and fulfillment. Procedural rights aim to enhance institutional accountability and offer a method to balance public and private interest contributing to the development and legitimization of public policies. Access rights are not only about the enforcement of procedural guarantees but also of substantive ones. Judicial enforcement can act to legitimize the political process with a precautionary and early remediation character as well as remedial and compensating collective or individual litigants in cases of rights violations.

The procedural RBA channels the inherently political character of human rights which engage with processes of power and resources use and allocation (Uvin, 2004; Cornwall and Nyamu-Musembi, 2004a; Nyamu-Musembi and Cornwall, 2004b; Cornwall and Nyamu-Musembi, 2005; Gready, 2009; Gready and Phillips, 2009). Thus, the application of procedural rights to matter of environmental contestation aims to reduce vulnerability and discrimination promoting transparent processes for fairer outcomes.

The following section consider selected principles of environmental law that applied within the procedural RBA to issues of environmental contestation might contribute to render the RBA less anthropocentric and a means to channel broader issues of equity.

#### **4.7 International principles of environmental Law informing the RHE**

Principles of international environmental law are extremely valuable to inform the substantive RHE and might contribute to the enhancement of a RBA to the RHE. This thesis places special emphasis on selected principles - the Precautionary Principle and the Common but Differentiated Responsibility (CBDR) principle - which are routinely used in international agreements and become relevant in the application of rights based approaches to the environment, as it will be described in the following sections. The Precautionary Principle is of utmost importance in the context of Environmental Impact Assessment (EIA) and deciding development choices that have effects on the environment but also on benefits and burdens’ sharing in relation to environmental goods and bads. CBDR principle facilitates decisions that respect equity and reinforces the RBA character of redressing power imbalances and discrimination.

The concept behind the Precautionary Principle is that society should strive to avoid environmental damage by taking a precautionary approach, planning beforehand and terminating, or not allowing, potentially harmful activities (Tickner et al., 1999). The core of the different existing principle formulations is that “action should be taken to prevent harm to the environment and human health, even if scientific evidence is inconclusive” (Myers, 2000, cited in Feintuck, 2005: 376). The consequence of such formulation is the shift of the burden of proof on activity

proponents rather than the public. Formulations then vary, bringing in details of application or new dimension to the principle.

A weak version of precaution is represented by Principle 15 of Rio Declaration (1992) which states that “in order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”. In this wording of the precautionary principle, scientific evaluation is a prerequisite to implement precaution which is in turn limited by the cost-effectiveness of precautionary measures (Feintuck, 2005).

A stronger version of the precautionary principle has been formulated in the Wingspread Consensus Statement on the Precautionary Principle (1998), as the conclusion of a three day conference where a diverse group of professionals from USA, Canada and Europe defined and discussed the implementation of the Precautionary Principle for environmental and public health protection. It affirms that precautionary measures should be applied “when an activity raises threats of harm to human health or the environment, [...] even if some cause and effect relationships are not fully established scientifically”. The proponent of an activity should bear the burden of proof and the “process of applying the Precautionary Principle must be open, informed and democratic and must include potentially affected parties. It must also involve an examination of the full range of alternatives, including no action”. This statement was a critique of those policies characterized by risk assessment and cost-benefit analysis which failed to adequately protect the environment and people. The Wingspread Statement is considered as detailing one of the strongest versions of the precautionary principle, since the merest suspicion of harm may trigger precautionary action (Feintuck, 2005: 378-379).

The scope of the precautionary principle is somewhat questioned, as its application can be intended for environmental protection, resource conservation or human health protection. It is still to be proved the precautionary principle’s cost effectiveness, its ability to avoid ill consequences as well as its capacity to influence distribution of risks and benefits equally (Ellis and FitzGerald, 2004), being a vector of environmental justice. Hey (1992) regards the precautionary concept as a policy-making strategy: its scope is to indicate a specific behavior for policy makers to apply science, technology and economic knowledge to protect the environment.

The RHE and the PP could be viewed as complementary in informing and guaranteeing a democratic and inclusive decision-making process. On a substantive level, favouring the adoption of environmentally sustainable options and striving towards equal distribution of risks and benefits, the Precautionary Principle might benefit the RHE.

The relevance of the Precautionary Principle to the RHE is the fact that the precautionary principle is a legal standard applicable to all aspects of environmental decision-making (Barton, 1998). The reach of the Precautionary Principles depends on, and can contribute to, the quality of environmental decision-making processes. The application of pPrecautionary Principle suggests that decision makers, in case of

uncertainty over the impact of a substance of activity on health and environment, should follow a certain course of action. Though, the pPrecautionary Principle does not specify to decision makers what to do in the above mentioned eventuality, “it does not reverse the burden of proof [...] and it does not place environmental concerns ahead of social and economic ones” (Ellis and FitzGerald, 2004: 782). The PP can strengthen the procedures of decision-making, providing ground for shared vocabulary, understanding and guidelines for decision-making as well as contributing to procedures’ and decisions’ evaluation and monitoring (Ellis and FitzGerald, 2004: 800). The RHE that embodies a stronger version of the precautionary principle can support claims to ecologically sustainable development across policies and legislation (Barton, 1998).

Since the Precautionary Principle is relevant in the event of a potential risk (EC, 2000: 13), claims to RHE must identify what is risk and what is the threshold of risk, as policy rather than exclusively scientific matters (Ellis and FitzGerald, 2004: 793; EC, 2000). The new generations of risks connected with emerging technologies as well as the cumulative effects of risks, and the growing concern over the distribution of bearing such risks constitute a sufficient justification for applying the Precautionary Principle (Stone, 2001).

The sufficient constitutive element of the Precautionary Principle is the concept of risk tolerance, which is the degree of risk we are willing to tolerate, since all the formulations have in common is to demand action in the face of uncertainty to prevent possible harm to the environment and/or the resulting harm to people (MacLeod, 2004). Risk tolerance is a very difficult concept since it is subject to cultural and geographical differences that are, in turn, influenced, for instance, by education, political structure, and economic development. How much risk to the environment and to ourselves are we willing to accept in case of uncertainty? The identification of risk tolerance is a policy matter and an outcome of environmental decision-making process in projects, programmes and legislations. The substantive RHE, through the application of the Precautionary Principle, might contribute to the identification of risk tolerance and guide environmental policy making accordingly.

The substantial component of the Precautionary Principle is the product of the recognition of indeterminacy of scientific knowledge. This indeterminacy pushes for questioning not only science capacity to accurately quantify possible harm, but also the social benefit that a determinate substance or activity might generate (Hunt, 1994). The possibility to ask so many different questions about the risks we are willing to accept and “ultimately what kind of society we want (and how much choice we have in creating it)” is the innovative element of the Precautionary Principle (Hunt, 1994: 122), that does not limit itself to weigh possible material harm, but aims for a more broadly legitimate use of science involving the evaluation of competing interests within a democratic debate (Feintuck, 2005).

The principle of Common But Differentiated Responsibility (CBDR) is widely used as the basis of an argument for equity measures (Cullet, 2010), in some form or another, in international treaties and agreements. It is particularly used in

environmental related agreements in the hope to respond to concerns about substantive equity (Cullet, 2010) and environmental justice (Stone, 2004).

The core concept of the CBDR is that the global environment is a physical common (Brown Weiss, 2002). Environmental hazards might have adverse consequences on any country, therefore the responsibility for environmental protection must be borne commonly by all countries. However, obligations might be differentiated, depending on factors not dependent on formal legal equality and reciprocity in the current time frame (Cullet, 2010), so that a group of countries would carry a heavier burden or would be subjected to advantageous standards as opposed to another (Brookman, 2000, cited in Weisslitz, 2002: 484).

Drawing on the dependency theories of development, historical legacies of colonialism and uneven development underpin the key arguments for differentiation. The principle of Common But Differentiated Responsibility as formulated in the Rio Declaration (principle 7<sup>19</sup> 1992) is the result of many currents of thoughts (Rajamani, 2010: 411). The Declaration preamble calls for the establishment of a new and equitable global partnership and the respect of the interests of all, and the differential treatment implied in Principle 6<sup>20</sup> which affirms that priority should be given to meet the needs of developing countries, basing differentiation on the degree of economic development or consumption capacity (Rajamani, 2010: 411). Principle 7 formulation revolves around commonly used justifications, or normative positions (Stone, 2004), for differentiated responsibilities in order to reach the overarching objectives of sustainable development and encouraging the participation of hesitant states to sign and implement environmental agreements.

There are two main reasonings for differentiation in responsibilities. First, it highlights the need for differentiation on the basis of states' contribution to current environmental degradation. Second, it establishes a differentiation based on countries capabilities, namely financial and availability of technology resources. Principle 7 of the Rio Declaration reinforces that developed countries have additional responsibility: the present effects their societal production and consumption patterns have on the environment give rise to a duty as well as historical wrongs that allowed their present level of development achieved by depleting common environmental resources and incurring pollution.

Embedded in Principle 7 is the notion of justice that not only contributes to its legitimacy in an international law context but also emphasizes the acknowledgement of unequal resources and power distribution between states (Cullet, 2010). CBDR

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19“States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command”. Princ. 7, Rio Declaration (1992).

20“‘The special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority. International actions in the field of environment and development should also address the interests and needs of all countries’”. Princ. 6, Rio Declaration (1992).

therefore contains in its formulation differentiated conceptualizations of environmental justice which might facilitate the integration of the principle with the RHE.

The general justifications that call for differentiated obligations are based on the following: states contribution to environmental damage; states respective capabilities to remedy; economic needs of countries identified as 'worse off' (French, 2000). Differentiated obligations therefore guarantee a realization of substantive equality that considers the historical and political nature of states' relations as well as acknowledging existing inequalities (Cullet, 2010).

The principle of CBDR is further correlated to the demands for intragenerational equity, taking into account the historical contribution of a state to current environmental degradation (Brown Weiss, 2002). Historical and current production and consumption patterns have created an imbalance between countries where natural resources are exploited and countries that benefit and profit from those resources. Implementation of a differentiated responsibility of this type, implying that developed countries have unfairly gained from resource exploitation, is bound to be difficult. This requires the most responsible countries to take the leadership (French, 2000) and contribute more to remedy to environmental harm resulting from natural resource exploitation. Such differentiation based on contribution to environmental degradation might be justified by the notion of corrective and distributive justice (Cullet, 2010), recognizing the two time dimensions of responsibility, present and historical, as well as the economic inequalities between countries. In fact, corrective justice can be applied both on past and current environmental wrongdoings that have left a historically negative legacy. In addition, it is the justification for the developed states, or states that have been enjoying advantages, to share a greater burden, "asserting a duty for moral reciprocity" (Cullet, 2010: 167). Distributive justice aims to guarantee substantive equality analysing current distribution of benefits (Cullet, 2010).

An RBA to RHE would be greatly deepened and expanded from the CBDR principle with its notion of substantive equality as well as corrective and distributive justice. CBDR allows an understanding of the RHE to emerge as a solidarity right with a novel dimension: it extends the RHE backwards into historical reparation and forward into intergenerational solidarity, envisaging a global solidarity right to address both past wrongs and future needs. In addition, the application of differentiated obligations, coupled with the responsibility for international assistance borne by developed countries, in the spirit of cooperation, might contribute to prevent future environmental harms and to boost the idea of global partnership and related efforts towards sustainable development (French, 2000).

In some views, CBDR might be considered a principle advancing the Right to Development, clashing with the content of Precautionary Principle (Boyle, 1996) and therefore potentially being counterproductive for the recognition of the human right to a healthy environment. In fact, it is a principle that promotes a remedial approach for past environmental as well as economic wrongdoings using as a measure states'

degree of fault rather than proof (Berwock, 1998: 279-274, cited in Weisslitz, 2002: 491). In addition, the CBDR might not consider sufficiently the notion of intergenerational equity which is both part of the reasoning of the Precautionary Principle as well as a factor in the decision-making of international policies (Weisslitz, 2002).

The CBDR principle may act to enhance the goal of progressive realization, recognizing the different value that environment might hold for different societies based on their cultural, social and economic realities but maintaining common concern of environmental protection as a human right protection. This is the strongest advantage of the CBDR if the common overarching aim is to advance human rights and prevent gross violations to happen (Robinson, 2002), making it a facilitator for the RHE.

The CBDR principle can benefit from the RHE in terms of transparency and accountability, as well as participatory mechanisms. So far, the CBDR is a principle applied at international level, but could be made more effective by measures to improve transparency and accountability between states, as well as within each state, utilizing and reinforcing national accountability mechanisms. The use of environmental procedural rights to guarantee transparency and accountability of the CBDR might constitute an option at the national level that would bring in the CBDR within a human rights framework and providing means to resolve conflicts of interest between development and environment.

#### **4.8 Conclusion**

The UN Special Rapporteur on Human Rights and the Environment John Knox (2012, 2013a, 2013b) affirms that the protection of the environment is a human right and that something must be done to address the environment as a legal standard at international level. However, in an address to an ECLAC meeting in 2013, he placed the greatest emphasis on procedural aspects, stating that “even without an explicit recognition of a right to a healthy environment, States have obligations under human rights law to protect the environment in order to safeguard other human rights, including rights to life and health” (Knox, 2013a: 2), which include:

(a) To respect and protect the right to seek, receive and impart information and to provide information on and for assessments concerning environmental impacts on human rights;

(b) To respect and protect the rights of freedom of expression, association and peaceful assembly, including by facilitating and providing for meaningful opportunities to participate in decision-making processes;

(c) To ensure access to effective remedies where human rights and fundamental freedoms are violated;

(d) To adopt and implement laws and other measures to ensure that human rights are respected and protected in the context of environmental policies;

(e) To protect against non-State human rights abuses, including by enforcing environmental laws that directly or indirectly contribute to the protection of human rights (A/HRC/25/L.31, Knox 2013b: para.44-46).

Within the realm of procedural duties, access rights are reaffirmed and expanded. The duty to disseminate information to the public is further reinforced with the duty to assess environmental impacts on the enjoyment of human rights. Similarly, the right to access to justice includes also the obligation to provide access to effective remedies for environmental harm that interferes with the enjoyment of human rights. In enumerating the substantive duties of the state, Knox focuses on the obligation (a) to adopt and implement legal frameworks to protect against environmental harm that may infringe on enjoyment of human rights; and (b) to regulate private actors to protect against environmental harm that may infringe on enjoyment of human rights (Knox 2013b: 46).

The protection against non-state human rights abuses respond to the expectation of RBA to render accountable private companies, aid donors, and international institutions (Hansen and Sano, 2006) in a globalized context. Procedural rights could be therefore seen as an instrument to render accountable power dynamics that extend to the economic structures (Cornwall and Nyamu-Musembi, 2004a; Gready and Ensor, 2005) and allow “positive transformation of power relations” (Cornwall and Nyamu-Musembi, 2004a: 1432).

The technical and legalistic approach that the newly appointed UN Special Rapporteur on human rights and the environment Knox is applying to the analysis of the RHE fails to provide substantive grounds to uphold the right and have the effect to downplay the importance of the most contested nodes between human rights, environment and development. As Douglas Scott (1996) described environmental rights as a mere statement of intention for public policy, Knox considers that the RHE has great advantages. It can “*send a signal, to the public, to government agencies and to all other stakeholders, that protection of the environment is at the same level of importance as other fundamental human rights*” (Knox, 2013a: 2). Knox extends the understanding of environmental protection to encompass safeguards of the right to life and the right to health (Knox, 2013a: 2), which was the original understanding of environmental rights and their relevance within the human rights regime (Shelton, 1991; Boyle and Anderson, 1996; Atapattu, 2002)

What this research will highlight is that human rights law on its own does not have the sufficient means to safeguard the environment nor to prevent the human rights violations that stem from environmental degradation and exploitation. This is due to the inability of courts to engage with the environment as a right in itself and clarifying with jurisprudence the content of the RHE. On the other hand, the lack of appropriate judicial remedies influence courts’ rulings on substantive rights to the point of “declining to recognize the substantive right at all” (Fallon, 2006: 684-685, cited in O’Connell, 2012: 12-13). This is evident in the complaints filed to regional human rights mechanisms as seen also in Chapter 3. The obligations of both the right

to life and the right to health to prevent environmental degradation that could carry a burden upon human health is a clear indication towards the centrality of the environment in human rights and impose direct responsibilities on the state for negative effects on the quality of life. However, their limited justiciability due to the requirement of the proof of health effects and establishment of direct causal link (Desgagné, 1995; Eaton, 1997; Atapattu, 2002; ECtHR, 2004c; ECtHR, 2008; LCB v. UK, 1998, cited in ENELO, 2011: 3) makes it inadequate for environmental issues that have long term and systemic consequences. The focus on violation rather than precaution disregards the essential features of environmental claims, which have a collective and not solely individual character, a strong precautionary requirement and the need to balance quantitative and qualitative judgements about risks and standards for the environment.

The procedural approach, or environmental due process (Hunter et al., 2002: 1312), within RBAs appears better suited to address environmental concerns within a human rights framework. Is the procedural approach to the environment enough to ensure environmental and human rights protection? Could procedural rights be able to mediate between economic, environmental and human rights interests?

The continuous tensions between competing interests and competing rights are difficult to analyse in abstract terms. For this reason, this research utilizes the analysis of the country experience of Panama with environmental protection, human rights and economic interests. The following chapter presents the Panamanian experience with case studies that exemplifies how the procedural approach has been applied in the country. Benefits, challenges and limitations of the procedural RBA will be described in an effort to respond to questions of adequateness of procedural rights in ensuring environmental and human rights protection while mediating between economic, environmental and social interests.

## Chapter 5 Cases of environmental procedural rights: Panama and the sustainable development challenge

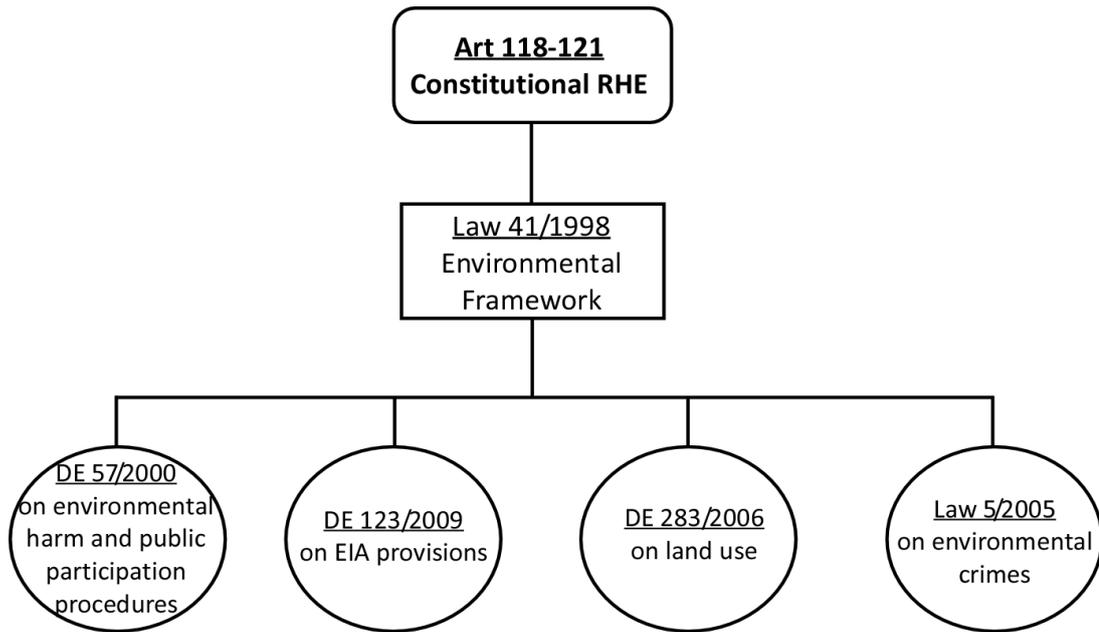
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Panama's development trajectory has been shaped by its strategic position as the isthmus forms a crossroads between North and South America, and symbolically at the centre of world economy trends and geopolitical interests.

Several authors have indicated Latin America as a region that has made particular progress in the protection of environmental rights (Aguilar, 1994, Repetto, 2003, cited in Boyd, 2012: 125) which Boyd (2012) defines as a rights revolution. While other countries in Central and South America have been commended for increased interest and efforts in environmental protection through the strengthening of environmental regulations, upholding the constitutional right to a healthy environment, Panama has lagged behind. The region's progress is symbolized by the innovative constitutions of Ecuador and Bolivia, but this research suggests that Panama has been ambivalent towards the emerging regional movements promoting environmental rights. Panama's Constitution (Art. 118<sup>21</sup>) provides for a provision of the "right to a healthy and free from contamination environment". This was included in 1972 in the aftermath of the Stockholm Declaration, subsequently modified in 1983 to its current version (Young, 2005). Even though constitutionalized, the RHE is not a self-executing norm, meaning that it remains a mere aspiration for further legislation rather than immediately establishing obligations (Vázquez, 1995). This norm, thus, provides programming guidelines, but these cannot be directly invoked in a judicial setting (Young, 2005: 62). The environmental legal framework is characterized by a framework law as well as executing laws and regulations which establish an environmental protection regime (see Figure 1). However, the strong economic interests in natural resources exploitation compete with environmental protection and the RHE, contributing to weak enforcement and upholding of environmental rights. The complexity of multiple and overlapping transnational and national laws regulating economic activities may lead to gaps in the protection and promotion of environmental rights.

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<sup>21</sup>Article 118 states "It is the fundamental duty of the State to guarantee that people live in a healthy and free from contamination environment, in which air, water and food satisfy the requirements for a development adequate to human life".



**Figure 1** Flow chart illustrating the hierarchy of the environmental legal framework in Panama.

This chapter provides a country's context of environmental procedural rights, Panama, a natural resource rich country experiencing steady economic growth and development.

A brief overview of the history, geography and socio economic characteristics of Panama will be outlined in the following section, providing the background context where human rights, sustainable development and environmental issues collide. Environmental procedural rights are described within the broader environmental legislative framework in the country and cases of environmental conflicts are used to understand whether procedural rights are effective and to what extent they contribute to the realization of the right to a healthy environment enshrined in the constitution.

### 5.1 Background to the Panama case-study

Panama occupies the end of the long isthmus forming the land bridge between North and South America. Independent since 1903, the country essentially functions as the bridge in between two oceans and it is the key to one of the principal world communication and transportation systems. It plays a prominent role in world economy, and is of great geopolitical value (Suarez, 1981). With about 3.6 million people (UNDP, 2013a: 194), Panama is scarcely populated, with a highly concentrated urban population in the main cities of Panama City and Colon and a highly dispersed rural population. Migration to the metropolitan region is a result of uneven development. High dispersion of the rural population and poor livelihood

standards and services access make it difficult for vulnerable groups to participate into the social and economic life of the country (Herrera Jurado, 2003).

The contrasts between the Pacific and the Atlantic sides of Panama in terms of population, environmental features, and development opportunities are marked (Herrera Jurado, 2003). The Pacific side is where indigenous and colonial settlements are located. This is also the region where tourism development projects are concentrated, attracting foreign investments. The Atlantic side has a less welcoming climate and the topography is characterized by a lower population density. However, it has been regarded as a strategic area for the economic development of the whole country, being rich in mineral resources (Herrera Jurado, 2003). Despite being only a minor percentage of the economy, mining is one of the strongest growth sectors with the country aiming to increase significantly mineral resources exploitation signing free trade agreement with Canada in 2010 (Redwood, 2011: 17) and reforming in 2011 the outdated 1963 mining code to increase royalties generation.

Panama's economy is largely based on services, accounting for 78% of the GDP (IDB, 2010; WB, 2011). The Panama Canal and the related maritime services are central and have been undergoing further expansion, and the Colon free trade zone make up most of the income of the Panamanian state. Tourism and healthcare are also growing sectors that actively contribute to the GDP growth. Panama's economy is one of the fastest growing of Latin America, and its economic growth has contributed to the overall decrease of extreme poverty, but inequality remains high and social services are not universally accessible, especially to indigenous communities (WB, 2011).

Being the principal function of the country as the communication hub for international trade, service sector development has been privileged over the years inducing an imbalanced model of development with a strong urban bias. This uneven development underpins the inequality between the metropolitan and the rural areas in terms of resources access and human development as well as unequal development policies of the various economic sectors (Herrera Jurado, 2003; Velásquez Runk, 2012). Due to the dispersed nature of the population, multiple unaddressed needs and lack of resources distribution, basic public services are not evenly accessed (Herrera Jurado, 2003; UNDP, 2008). Lack of education, poor water and sanitation access, low income, high mortality rate and malnutrition are the main challenges for indigenous and afro-descendant peoples. For example, the census carried out in 2010 indicates discrepancy in water access between the national average at 93.3% and indigenous territories (comarcas) at respectively, 28% in Ngäbe-Buglé comarca, 41% in Emberá comarca, and 77% in Guna Yala comarca (Anaya, 2014: para. 59). Similarly, only 5.5% of households do not have access to sanitation facilities at national level, but 94% of Gunas, 59% of Ngäbes and 42% of the Emberá do not have access to sanitation (Anaya, 2014: para. 59)<sup>22</sup>.

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<sup>22</sup>There are different spellings for the name of indigenous groups. Kuna people are also known as Cuna, or the current and legally recognized (2010/2011) Guna. Though references cited in this

The indigenous population shows higher level of poverty and worse human development status than non-indigenous population (UNDP, 2010: 31; see Map 1). Indigenous regions are significantly excluded from development processes especially in terms of education and quality of life. The UNDP estimates that if effective measures to reduce inequality were to be taken, Panama would see an increase of 13, 9% in its HDI (UNDP, 2010: 48).

Panama is not unusual in its model of uneven development and high inequality. Although the path in the region has been differentiated (Ferranti et al., 2004), this is a characteristic of the Latin America and the Caribbean region as a whole (UNDP, 2010). Inequality is observed across indexes - income, education, health – and across generations which suffer from low social mobility. Inequality is exacerbated in the context of political marginalization and weak institutions.

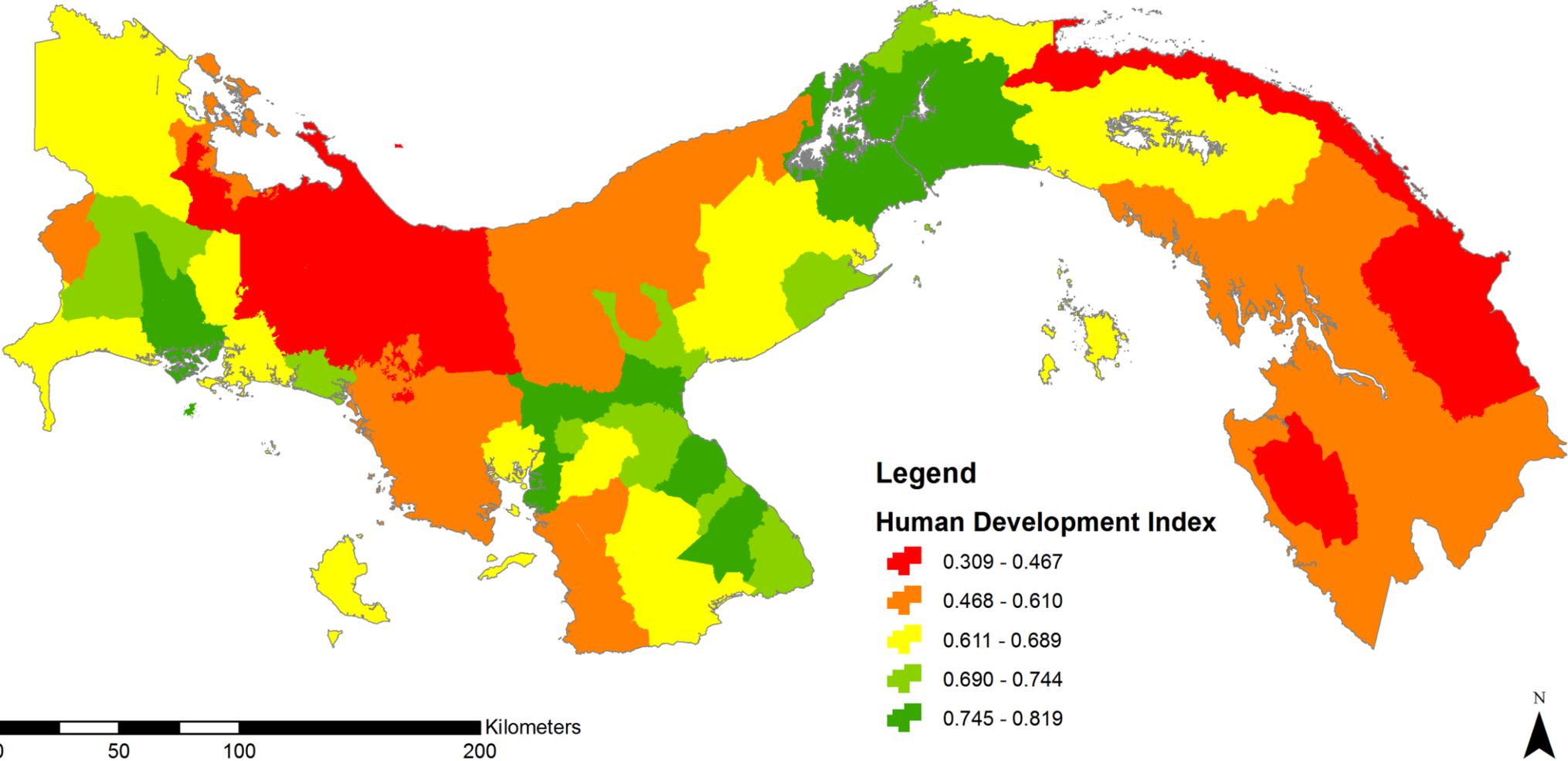
Panama's Human development Index has witnessed a significant increase between 1990 and 2012 (from 0.666 to 0.780; UNDP, 2013a). Despite being ranked as a high human development country (UNDP, 2013a), both the 2002 and 2008 national Human Development Reports concluded that poverty, and intergenerational transmission of poverty, are critical challenges. Poor access to education and poor impact of social policies directly influence the capacity of the state to tackle poverty and to facilitate sustainable human development (UNDP, 2008).

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research use the old spelling of Kuna, the researcher is going to adopt the new spelling Guna. Ngäbe are also known as Ngöbe and Ngobe. This research is going to adopt the wider used Ngäbe spelling.

# Panama: Human Development Index

Map 1



Indigenous groups constitute 12.3% of the total population and are divided in eight defined groups: Guna; Emberá; Wounaan; Ngäbe (which represent the 62.3% or 260,058 persons of the total indigenous population); Buglé; Bokota; Naso/Teribe; Bri Bri (SEN, 2013)<sup>23</sup>. Ngäbe and Buglé are distinct albeit similar indigenous groups which share a common territory and for this reason are referred as Ngäbe-Buglé as if they were a unified indigenous group.

Panama has established five indigenous *comarcas*<sup>24</sup>, category that identifies an autonomous administrative territory (special territorial units, ILO 2009: 79), which cover 20% of the national territory (Valiente López, 2002). The *comarcas* of Guna Yala, Emberá and Ngäbe-Buglé have a designated comarcial governor. The other two *comarcas*, Guna de Madungandí y Guna de Wargandí, are smaller and do not have the same degree of independence (SEN, 2013). The Bri Bri and Naso communities have been denied the request for the establishment of such an entity (UN/CERD, 2010: para. 12).

Indigenous rights in the Latin American and Caribbean context are extremely relevant as processes of colonization have severely threatened their survival due to natural resources extraction and the imposition of a legal system hostile to communal control over land and resources (Burton, 1999). Indigenous environmental discourses connect human rights of indigenous peoples with the natural environment, giving a specific value to indigenous cultures and identifying rights and entitlements pertaining to these communities on the base of broadly applicable human rights standards (Anaya, 1999). According to indigenous environmental discourses, an advanced indigenous rights legal framework is positively associated with an advanced framework for environmental protection. However, there are flaws with such protections. For instance, the International Labor Organization notes that Panama has demonstrated a great deal of commitment to indigenous rights establishing administratively autonomous *comarcas*, including special provisions for natural resources management, protecting and promoting traditional knowledge and intercultural bilingual education (Valiente López, 2002: 15; ILO, 2009). However, despite such protections (Velásquez Runk, 2012), Panama has failed to ratify ILO Convention 169 (ILO, 2009: 173) on Indigenous and Tribal Peoples which, affirming collective rights (Anaya, 2009b), recognises to indigenous peoples the right to survival, the collective aspect of the right to ownership and

<sup>23</sup>According to 2010 census, indigenous peoples in Panama are estimated as following: Ngäbe 260,058; Guna (kuna) 80,526; Emberá 31,284; Buglé 24,912; Wounaan 7,279; Teribe/Naso 4,046; Bokota 1,959; and Bri Bri 1,068. Around 196,059 indigenous peoples live within *comarcas*, while 221,500 live in other places (Anaya, 2014: para 6).

<sup>24</sup>*Comarcas* were established over the course of 50 years: Comarca Guna Yala in 1953 (Ley 16 de 1953); Comarca Emberá de Darien in 1983 (Ley 22, November 8, 1983); Comarca Guna de Madugandí in 1996 (Ley 24, del 12 de Enero de 1996); Comarca Ngäbe-Buglé in 1997 (Ley 10 del 7 de marzo de 1997); Comarca Guna de Wargandí in 2000 (Ley 34, del 25 de Julio de 2000). Laws for the establishment of the Comarca Naso Tjër Di were rejected in 2002 and in 2005. In 2013, the national ombudsman was called to intervene and facilitate land demarcation and recognition. Naso communities have since struggled against development projects and forced displacement (Herlihy, 1995; Rey Valentín Santana 2009; Rivas, 2009; Defensoría del Pueblo, 2013). To date, three indigenous territories seek official recognition: Dagarkunyala, Bribri and Naso territories (Vergara Asenjo and Potvin, 2014).

possession, as well as to access to resources (art. 14) (Swepston, 1990: 696). The cornerstone of ILO Convention 169 is the establishment of appropriate and effective mechanisms for the consultation of indigenous and tribal peoples regarding matters that concern them (ILO, 2009: 59). The goal is to ensure participation in political, administrative and legislative decision-making (ILO, 2009: 60). Participation and consultation are viewed as a right to propose, to decide and exercise control over economic, social and cultural development (ILO, 2009: 60). ILO 169 also recognizes the right of indigenous peoples to participate in decisions affecting their lands (art. 15) – with the term ‘land’ indicating “the total environment” (art. 13) - which imposes on the state the obligation to actively engage with indigenous peoples during decision-making processes and obtain free and prior consent (Swepston, 1990).

Despite having given favourable pronouncement for ratification in 2010, the UN Special Rapporteur on Indigenous Peoples has more recently indicated concerns over the government refusal to ratify ILO Convention 169 on the grounds of “constitutional, economic, political, administrative and social, judicial and environmental”<sup>25</sup> reasons (Anaya, 2014: para. 26). To date Panama remains bound to ILO Convention 107, which fundamental weakness lies in its underlying assumption that the only possible future for indigenous peoples is the integration into the larger society and that others should make decisions on their development (ILO, 2009: 173; Anaya, 2009b). On the interpretation of indigenous rights, which is fundamentally problematic due to its assumption of ‘integration’ as the only option, this assimilationist stance is at variance with the current accepted standard of the right to self-determination (Coulter, 1994; Imai and Buttery, 2013), set by the UN Declaration on the Rights of Indigenous Peoples adopted in 2007.

### **5. 1. 1 The colonial legacy: perception and use of environmental resources in Panama**

Panamanian geography has been profoundly affected by the colonial experience which brought both environmental and demographic changes. The abrupt decrease in number of indigenous peoples, the displacement of the population within the territory and the increase in the immigration patterns from the European and the African continents were the main causes of demographic changes. From the perspective of land use, the destruction of indigenous settlements and the foundation of new human settlements, and the construction of the canal affected the land use structure. Colonialism brought additional environmental changes with the introduction of foreign species both in the flora and in the fauna (Suarez, 1981).

Since 1947 the rate of deforestation has reached critical levels exceeding natural regeneration capacity. Factors such as population growth, agricultural practices, extensive livestock farming, poor urban planning and an increased demand for forestry products, associated with low level of education and environmental culture,

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<sup>25</sup>Carta de Fernando Nuñez-Fábriga, Ministro de Gobernación, a Patria Portugal, Defensora del Pueblo, A.J. No. 1495 (3 de junio de 2013).

are permanent causes of deforestation (Herrera Jurado, 2003; UNDP, 2013a; Vergara-Asenjo and Potvin, 2014).

The colonial legacy is not only evident in land and resources degradation. Western environmental science has paradoxically contributed to the continuation of colonial exploitation through environmental conservation measures. The implementation of certain environmental conservation and protection policies reproduces colonial power relations, with the systemic erosion of collective rights of communities traditional access to commons and right to determine for themselves a vision of the good life (Randeria, 2003a: 20). Based on Randeria's argument (2003a), Panama acts as a 'cunning' state which is an active agent in transposing processes of globalization into national political processes, even though it appears to be weak and not in control of the same processes it promotes.

There are multiple examples of environmental contestation in the Panamanian context that relates to the adoption of an adversarial framing of social and economic issues.

Western science has tended to devalue traditional practices and knowledge, blaming, for instance, 'slash and burn', or swidden, agriculture for environmental degradation. The slash and burn method for agricultural purposes, which involve the clearing of forest lands for crop production, has been indicated as the main cause for deforestation (Fischer and Vasseur, 2000, cited in Tschakerta, 2007: 808) and improper use of natural resources, blaming indigenous and rural communities. However, the slash and burn method is one of the oldest farming methods used regionally since 5000 BC by rural communities which have only access to machetes, axes and fire for subsistence farming of rice, yam, yucca, corn, banana, plantains and beans (Tschakerta, 2007: 808-809) in territories covered by thick tropical forest. As reforestation and protection of the existing vegetation cover have become a green economy business, a token in international environmental bargaining and a symbol of environmental protection within the climate change regime, it is appalling that the reasons behind such non-environmentally friendly practices are not analyzed for their social and economic context and in terms of the context for farmers' land use decisions (Tschakerta, 2007: 808). Only recently has subsistence farming practice been partially rehabilitated and considered a potential pathway for sustainable development and enhanced livelihoods for rural communities (Tschakerta, 2007: 808). However, the government of Panama and projects' developers continue to stigmatize this method for cultivation, while they promote an increasing number of high impact development projects.

Environmental protection policies are often used instrumentally for the state to acquire land so that it can dispose of it freely, disregarding and displacing problems of people and access to common resources (Randeria, 2003a: 20). For example, land in the protected area of Bosque de Palo Seco in Bocas del Toro (1983), or the protected area in Donoso (2009) were acquired to enable the development of, respectively, a hydro power plant and a copper mining project since the mixed use of the protected areas allow for designated 'sustainable development' projects to take place (see Map 2). Except for Guna Yala and Madugandí comarcas, the majority of

both recognized and claimed indigenous territories overlap with protected areas, having in effect dual tenure (Vergara-Asenjo and Potvin, 2014). Hence, the creation of protected areas can function as a pre-emptive measure to ‘set aside’ resources for external exploitation causing indigenous population displacement. Another example is Parará Puru, an Emberá village on the river Chagres. Due to the establishment of the protected area of Chagres National Park in 1985 and the curtailment of their subsistence activities such as hunting and agriculture, Emberá communities have increasingly come to rely upon cultural tourism (Theodossopoulos, 2010: 127). The lack of control and democratic participation in deciding the type of development to pursue leaves unresolved issues of access to resources and rights protection, often masked by the misleading label of sustainable development.

Two views of the environment as an economic commodity to be exploited and to be protected independently from the peoples living within, is reflected in the polarization of the environmental discourse in Panama. This polarization is critical to understand the social conflicts that stem from issues of environmental contestation. There is a continuous contradiction between urban and rural habitants, indigenous and non-indigenous, formal constituencies of rights bearers and failed attempts for collective rights recognition. Perspectives on environmental rights polarize the debates into environmentalist versus anti environmentalist leaving little room to discuss environmental human rights. The executive government has played this polarization to its favor, depicting environmentalist as an antidevelopment rich elite. The message is clear: if you support environmental protection, you are not in favor of the country’s and people’s development.

Environment and development become implicitly two enemies that cannot be reconciled. However, the use of the words ‘sustainable development’ can be attached to anything in the political discourse. The Panamanian government is aware that its economic competitiveness depends on the quality and degree to which its natural resources are exploited (IDB, 2010: 8). On the other hand, it feels the pressure to keep its economic growth rate on an ascending pattern. While continuing to rely on canal services and their expansion, the government has also decided that economic diversification is needed. This diversification is, though, driven by foreign investments which do not consider national social and environmental needs, or at least they do not aim nor guarantee an equitable determination of value of what are different and competing interests (see Map 3).

Despite the largely adversarial framing perpetuated by the government commented above, civil society in Panama has developed substantially and increased environmental awareness among the general public. The increased profile of environmental campaigning was facilitated by international as well as national processes. An increased flow of international funding for environmental or sustainable development purposes (GEO Panama, 2009), the pressure for alternative economic developments that opened the niche of ecotourism and the implementation of pilot projects for UN REDD and REDD+ (2010-2015) (Vergara-Asenjo and Potvin, 2014), mechanisms for reduced emissions from deforestation and forest

degradation, as well as the physical presence of regional UN offices in Panama contributed to exert international pressure on the wider environmental policy making. On the national level, the rise of indigenous issues in the political landscape (2010/2011) as well as a disaffection of Panamanians towards the elected government marred by corruption allegations (2012) and poor capacity to deliver what it proposed, contributed to channel process of changes. Results of the most recent elections (2014) have been highly influenced by these processes, bringing a well-known environmental activist to be the vice mayor of the capital<sup>26</sup> and prominent environmental lawyers being appointed to the top jobs within the National Environmental Authority<sup>27</sup>.

At the same time, public mobilization for the environment has increased exponentially, gaining more visibility and monopolizing news but also creating a network of support that overcomes the rural/urban as well as indigenous/non-indigenous divides. In 2010, the campaign against open cast mining was gaining momentum while strong debates on mining were daily news. In fact, an alleged environmental disaster caused by overflowing tailings ponds in the Petaquilla Gold mine (Arcia, 2010), the attempt of the parliament to amend the mining code to allow foreign states to directly invest in mining operations and increase state royalties (Zea, 2010a), and a judicially challenged copper mine operation in EIA stage (Zea, 2010b), contributed to place mining projects and questions about ‘sustainable development’ as a central political issue. Civil society campaigning has further extended to the issues surrounding lowland protection, which is a high priority in climate change talks and affects directly Panama City in the Juan Diaz neighborhood, wildlife protection, and the most contentious of all, hydroelectric dam projects. International human rights and environmental conservation organizations have played a major role by supporting greatly Panamanian civil society organizations: they contributed to give resonance to Panamanian environmental and human rights issues in international fora and amplified the exerted pressure on national discussion tables.

Indigenous groups have proved to be an important catalyst and dissenting force within Panamanian civil society. Indigenous communities would normally protest against specific policies or events in their detriment within their territories, removed from urban centres, blocking the Pan-American Highway. The disruption of this key communications infrastructure for Central American region has never resulted in the achievement of protest objectives but rather increased social conflict and result in violent confrontations with police forces. Indigenous peoples, especially the Ngäbe-Buglé within their comarca have suffered from violent repressions, first in February

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<sup>26</sup>Raisa Banfield is an architect, TV presenter, and environmentalist that contributed to the protection of urban forest in Clayton neighborhood in Panama City. She was co-founder and executive director of the Centro de Incidencia Ambiental (CIAM) till 2010. In 2011 she founded the Fundación Panama Sostenible. In 2014 she was elected as vice-mayor of Panama City.

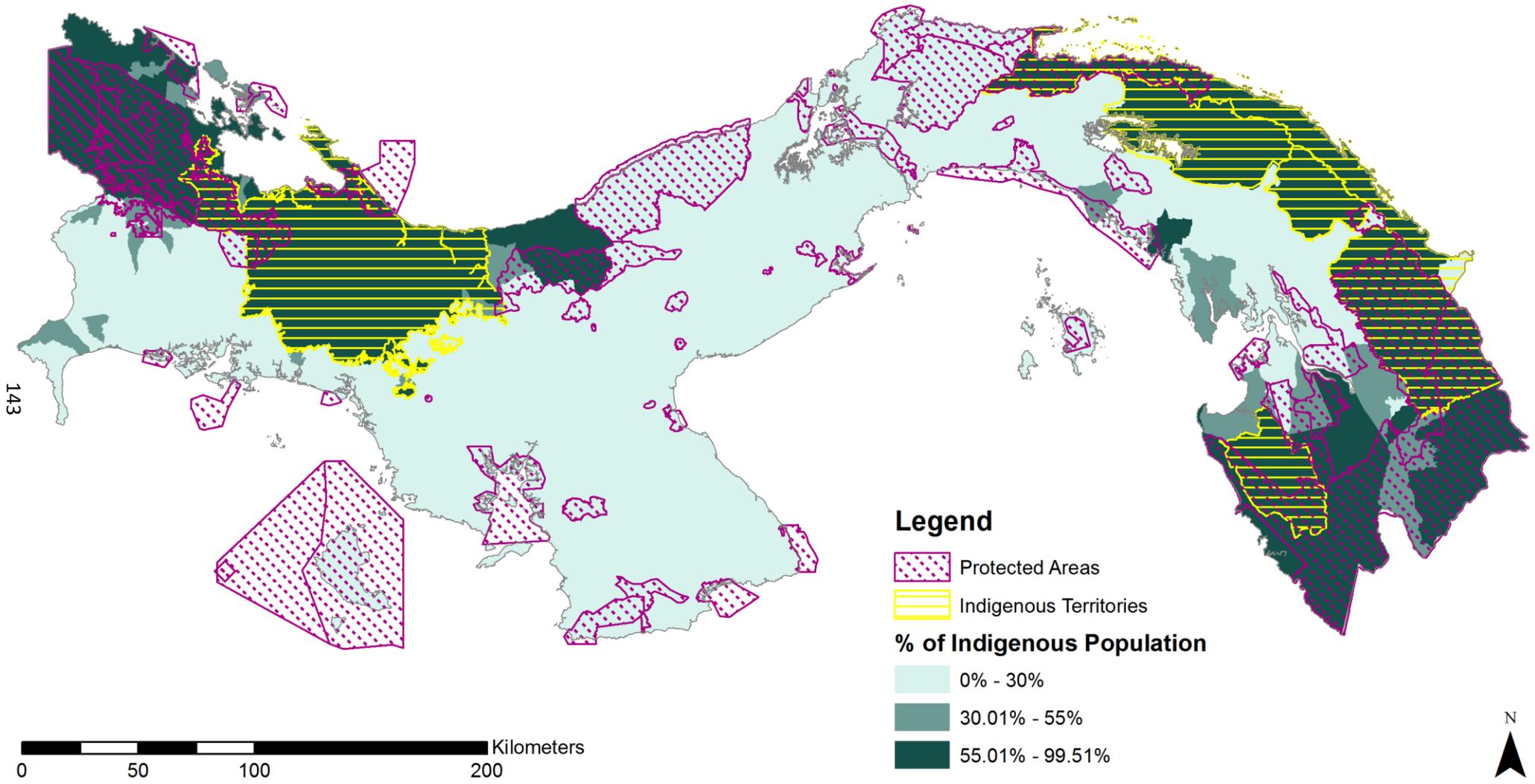
<sup>27</sup>Felix Wing Solis, human rights lawyer, previously director of CIAM and founder of Derechos Humanos, Ambiente y Comunidades (DHAYC), has been now appointed as Secretary General of the ANAM (now Ministry of the Environment).

2011 against legislative amendments that would allow mining exploitation within their territory (OSAL 2011)<sup>28</sup>, the second in February 2012 against hydroelectric projects approved without prior and informed consent. Because of this continued mobilization, the Ngäbes, led by the *cacica* (chief) Silvia Carrera, earned their position in Panamanian political debates. In fact, they managed not only to establish negotiations but also they were able to claim the power of review over proposed hydroelectric projects. Despite the violence and police repression, the Ngäbes increased awareness of Panamanian society on the effects of development choices on indigenous peoples, especially, and understandably, in Panama City, where non-indigenous people sympathized and protested in solidarity with the indigenous struggle against hydroelectric projects (Fisher, 2014). However, the promises have yet to be complied with, and two of the biggest projects have gone ahead, with Chan 75 dam already in operation since 2011 and the Barro Blanco dam in the final stage of construction.

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<sup>28</sup>In July 2010, a strike called by the banana plantation workers in Changuinola, Bocas del Toro against the provision of the famous Ley Chorizo (literally sausage law – Law 30) ended after violent aggression of the police left two dead and more than 300 Ngäbes with serious eye injuries due to the use of pellet rifle shot at a man's height.

# Panama: Indigenous Population, Demarcated Territories and Protected Areas

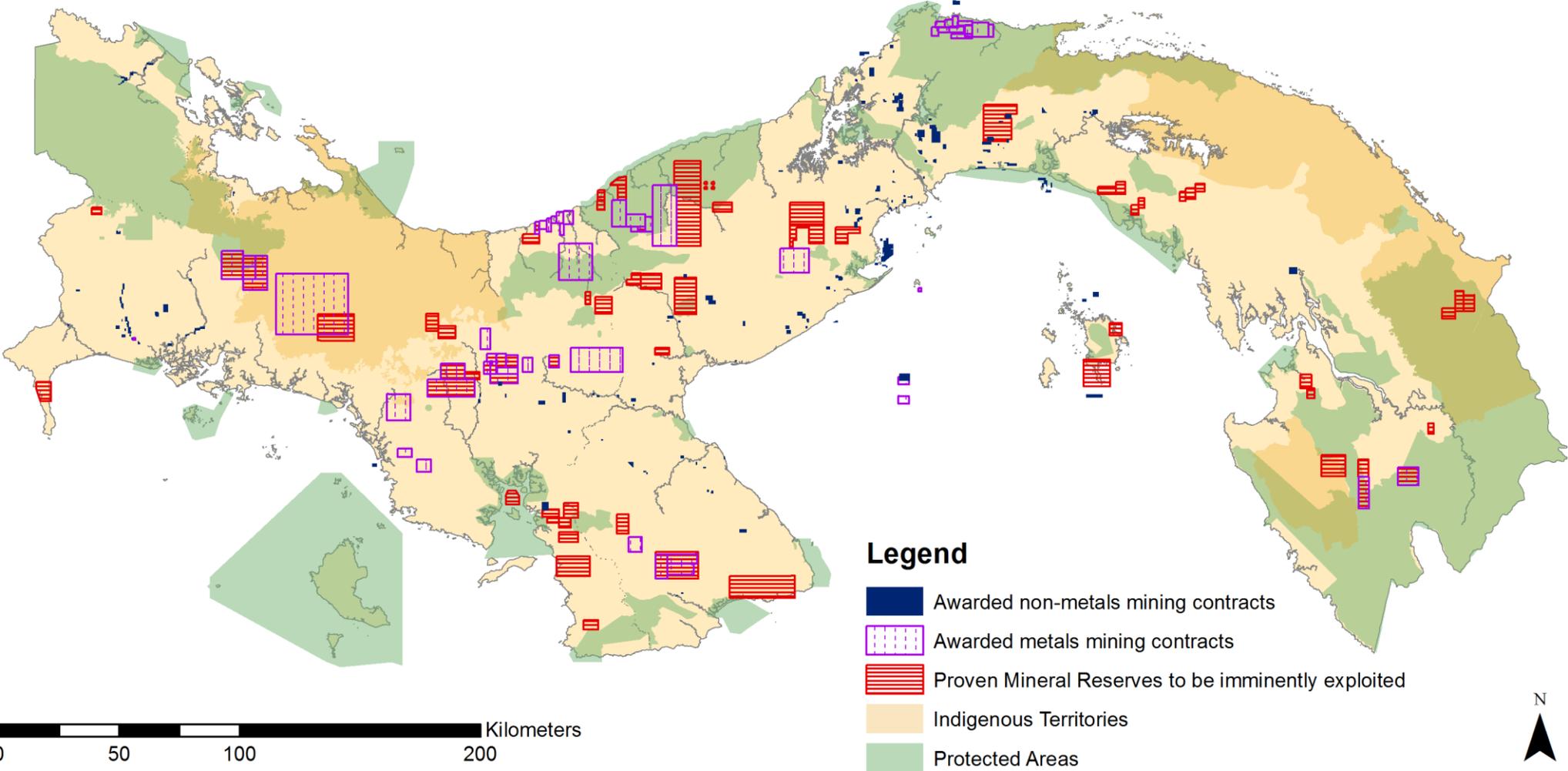


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Map 2

Population data sourced at the "Corregimiento" level from the 2010 National Census INEC. Indigenous territory boundaries sourced from the official administrative units boundaries; INEC. Protected Area boundaries sourced from ANAM. All data acquired on October 2015.

# Panama: Awarded Concessions and Mineral Reserves



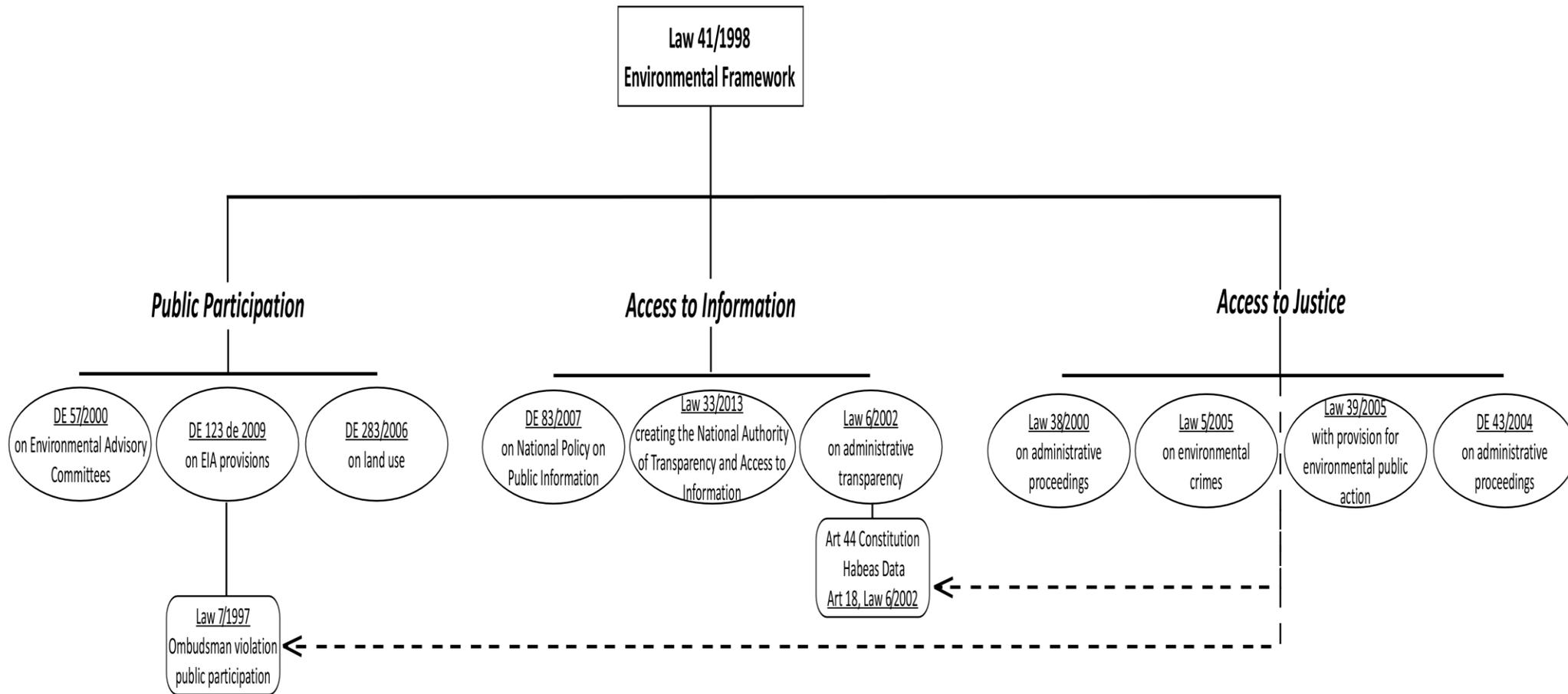
Map 3

Mineral concession data updated to September 2015 sourced from the Ministry of Commerce and Industries (MCI).

## **5.2 The environmental legislative framework**

Panama's legal framework addresses environmental issues in the context of economic, social and cultural rights, as well as non-discrimination and protection of indigenous peoples. The state has ratified relevant international treaties and convention for human rights protection, such as the International Covenant on Civil and Political Rights and on Economic, Social and Cultural Rights (in 1977), and the International Convention on the Elimination of All Forms of Racial Discrimination (in 1967). Panama has ratified the American Convention of Human Rights (1978) and recognizes the competence of the Inter-American Court of Human Rights. In addition, it voted in favor of the adoption of the Declaration on the Rights of Indigenous Peoples (2007).

There is a constitutional clause that recognizes the RHE (art. 118) and it has a framework law and several laws and regulations to implement environmental directives (see Figure 2). However, as it will be described in the following sections, these laws and regulations, which apparently cover most of environmental issues, are operationally deficient. They are not implemented in a transparent manner and there is a lack of government will to enforce the environmental principles. In addition, the current political economy trends and government's attitude under the Martinelli's administration (2009-2014) have been the main cause of the weakening of such laws in favour of a less environmentally regulated economic development. The government's interpretation understands resource exploitation as being entirely compatible with the term 'sustainable development'.



**Figure 2** Flow chart presenting the existing laws and regulations for the exercise of environmental procedural rights.

\*There have been two changes in the EIA legislation.

DE 155/2011 modified, among others, the provisions that establish the timeframe for EIA comments submission. Category III EIA has just 10 days timeframe for public participation compared with the old provision of 20 days.

DE 975/2012 allows for changes in a project undergoing or already undergone EIA evaluation. If the project developer alleges that changes are minor and not producing additional environmental impacts, the environmental authority should not ask for a new EIA to be produced.

### 5.2.1 Constitutional RHE

The Panamanian Constitution (as amended in 2004) enshrines the right to a healthy environment in a manner similar to the African Charter, linking environment to development and setting environmental limitations of development activities. Article 118 affirms that the “state has a fundamental duty to guarantee that citizens live in a healthy environment free of contamination, in which air, water and food satisfy the requirements of adequate development for human life”. Article 119 imposes the duty on the state and citizens to promote social and economic development that prevents environmental pollution, preserves ecological equilibrium and avoids ecosystems destruction. The state also bears the duty to regulate and implement the necessary measures for the use of natural resources (art. 120). It also mandated that the law shall regulate the exploitation of non-renewable natural resources to prevent negative effects on the social, economic and environmental dimensions of development (art. 121).

These articles have a programmatic nature: they reflect principles and aspirations, but they do not establish justiciable rights (Young, 2005: 62). The Panamanian constitution, therefore, does not create an enforceable right in itself. It establishes general programmatic guidelines rather than rights and obligations. In fact, none of the articles that compose the ‘Ecological Regime’ of the constitution, under Title III of Individual and Social Rights and Duties, enshrine a right to environment or of the environment, but rather impose obligations on the state to refrain from purposefully damaging the environment.

The laws and regulations constituting the environmental body of law of Panama provide a more detailed guidance on more specific and operational environmental rights and judicial norms regulating the environment.

### 5.2.2 Law governing environmental regulation

The Environmental Framework Law 41 of 1<sup>st</sup> July 1998 (*Ley General de Ambiente*, hereinafter LGA 41/1998), following a three year long progressive case (Young, 2005), became the first Panamanian juridical instrument to regulate environmental administration and is currently the environmental normative framework of reference along with its complementary laws. It establishes basic principles and norms for the protection, conservation and restoration of the environment (art 1). Adopting the definition of sustainable development as elaborated by the Brundtland Commission (Young, 2005), the LGA’s aim is to regulate environmental management and to integrate it with social and economic objectives (art.1).

The Environmental Framework Law contains several provisions that require specific regulations enabling the correct application of complementary theoretical and practical aspects of the law (Young, 2005: 92). The key provision of the

framework law is the mandatory requirement for the Environmental Impact Assessment (EIA) to be carried out before the execution of any development project (Young, 2005). The framework law has an instrumental, operational and institutional character (Chandek, 2004). It is instrumental as the framework law establishes several key principles of environmental quality to enhance environmental protection (Chandek, 2004). The framework law is operationalized by establishing general parameters (Chandek, 2004) for the approval of environmental quality norms based on international scientific standards (Young, 2005).

The institutional aspect of the framework law refers to the establishment and development of environmental management at the national level (Chandek, 2004). A central, coordinating environmental institution, National Environmental Authority<sup>29</sup> (ANAM in its Spanish acronym), was created overcoming sectorialization of environmental protection. This institution has also the power to impose fines, control environmental threats, and evaluate both the natural and the manmade environment (Young, 2005). To further advance environmental management capacity, the framework law foresees the possibility of local governments, indigenous community and private companies to contribute to collective management of protected areas, designated by ANAM. With respect to indigenous peoples, the framework law establishes that any activity and project executed within indigenous territories must undergo public consultation, and it foresees benefits for the use of natural resources (Young, 2005).

The environmental framework law establishes responsibility - civil, criminal and administrative - and provides redress mechanisms for environmental and public health damages. In addition, it establishes a dedicated prosecution agency for environmental issues (*Fiscalía Superior del Ambiente*): claims can be presented by citizens and civil society organization in the name of collective interest (environmental public action), prescribing procedural guarantees and incentives (Young, 2005).

In the following sections, the relevant laws and regulations that cover environmental rights will be described with the aim to illustrate the level of protection and promotion of access to information, public participation and access to justice as environmental rights guaranteed by Panama. In doing so, this thesis recalls the structure of Chapter 3 and Chapter 4, presenting the existing legal framework and then looking for the procedural RBA to the environment in the context of Panama. The following sections examine the provisions by analyzing several case studies of development projects and how environmental rights are claimed by citizens and respected by the state.

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<sup>29</sup>The National Environmental Authority ceased to exist in March 2015 with the creation of the Ministry of the Environment (Law 8, March 28, 2015).

### 5.2.3 Redress mechanisms for environmental law violation

Panamanian law provides for administrative and judicial procedures to allow citizens to exercise and claim their constitutional and legal rights (Young, 2005). Law 38/2000 regulates administrative procedures. On one hand, it provides rights and obligations for citizens to exercise their constitutional rights and it provides means for citizens to appeal administrative acts that are considered in violation of their rights. In addition, this law imposes obligations on public servants in relation to the principles of due process and legality governing public administration (Young, 2005).

For what concerns environmental matters, there are a number of special administrative procedures, mainly related to permit issuance for the use of natural resources, water and forestry concessions and EIA procedures (Chandek, 2004). For instance, Article 31 of the LGA 41/1998 allows for an appeal of reconsideration against the decision of the National Environmental Authority. Other judicial redress mechanisms for environmental law violations are available for both actions that caused environmental harm and administrative acts that violate environmental norms.

The National Environmental Authority, as an institution responsible to protect the environment, constitutes the first level of intervention after a complaint of environmental harm. Any member of the public can file complaints of environmental harm before the National Environmental Authority, which should address it within five days and decide whether it needs further investigation (art. 51, 52, 53, Executive Decree –hereinafter ED- 57/2000, see also MarViva, 2012).

A list of crimes against the environment was added to the Criminal Code with Law 5/2005. Therefore, actions that are in violation of any of the environmental laws are sanctioned by the Division of Environmental Crimes of the Judicial Investigation Directorate of the Prosecutor Office (art. 122, LGA 41/1998; Law 5/2005), a specialized judicial institution which recognizes not only criminal but also civil responsibilities. This institution is also in charge of promoting collective action against administrative acts that violate environmental norms.

In addition, Panamanian legislation on wildlife (Law 24/1995 amended by Law 39/2005) contemplates the so called ‘environmental public action’ which is the right that entitles any person, despite the absence of direct or individual injury, to act on a procedural level in order to demand a suspension, prevention or remedial order of either public or private activities that might cause environmental damage (MarViva, 2012).

### 5.3 Environmental Procedural rights

#### 5.3.1 Access to Information

According to the international benchmark established by the Aarhus Convention, the right to information has two separate but interdependent aspects: passive and active transparency. Passive transparency refers to the right of the public to seek information and the obligation of public authorities to provide information upon request. Active transparency concerns the right of the public to receive information and the obligation of authorities to collect and disseminate information without any request (UN/ECE, 2000), as well as the capacity of the state to collect and standardize high quality environmental information in order to make it available to the public.

In the Panamanian context, this separation is reflected in the legislation: the framework law regulates only the central government's management of environmental information, meanwhile the *Ley de Transparencia* (Transparency Law, Law 6/2002) sets out the provisions that concerns citizens requesting access to information and the duties of government institutions to facilitate available information.

A National Policy for Environmental Information (Política Nacional de Información Ambiental) was elaborated in 2007 (ED 83 /2007) aiming to guide the implementation of the right to access to information. In addition, Article 45 (LGA 41/1998) established the National System of Environmental Information (Sistema Nacional de Información Ambiental - SINIA) with the aim of collecting, classifying and distributing freely environmental information. Anyone that submits an access request, though, shall bear the cost of the service (see also ED 83/2007).

The right to access information is regulated by the *Ley de Transparencia* (Law 6/2002), which embodies norms that promote transparency in the public administration. Article 2 affirms that any person can claim access to information without the need to provide any justification or a reason. The public access to information (art. 4) is free as long as reproduction is not requested. In this case, the information reproduction costs, and only these costs, are borne by the solicitant. The information shall be given in the format requested or any format already publicly available (art. 7). The request to access information can be submitted in a written manner or via email (art. 5). The request shall be attended within thirty days (art. 7). In case the information is not available in the institution, it is a duty of the public officer processing the request to indicate where the information is stored. If the deadline cannot be respected for any valid reason, the institution should communicate to the solicitant the time extension and provide an explanation for it (art. 7). Whenever an institution cannot provide the requested information, it should inform as soon as possible the solicitant and explain the reasons for not being able to release the information (art. 16).

Article 44 of the Panamanian Constitution identifies the writ of Habeas Data as the instrument to seek redress in case of the violation of the right to access public information (MarViva, 2012: 47). Habeas Data is a judicial process aiming to protect the right of an individual to access specific information of any public entity or institution as well as the right to be protected from the dissemination of information that might affect personal and family privacy (MarViva, 2012: 47).

In cases of denial of access to information the scope of legal redress is further regulated and widened by the Transparency Law (Law 6/2002). The law establishes that any person has the right to submit a writ of Habeas Data before the competent Superior Tribunal or the Supreme Court to guarantee its right to information, when an information request has not been satisfied (art. 17, Law 6/2002). For what concerns specifically environmental information, since the Habeas Data is filed against the general administrator of the National Environmental Authority, the Supreme Court of Justice has the duty to resolve it (MarViva, 2012). In addition to the denial of access request, the Habeas Data writ can be submitted also when the access to information request is not dealt with within the regulated timeframe or the information is mistaken or incomplete (art. 18, Law 6/2002). The submission of Habeas Data does not require any legal assistance (art. 19, Law 6/2002).

### **5.3.2 Public Participation**

Through executive decree (ED), Panamanian legislation provides guidelines and appropriate settings for carrying out participatory decision-making processes. Public participation is defined as a continuous process of communication between public and private actors. It has a twofold aim. First, it aims to reconcile environmental protection with human activities. Second, it aims to balance technical requirements and political needs of environmental decisions as well as individual and collective interests (art 3; ED 57/2000).

There are several “formal mechanisms of public participation” (ED 57/2000) in order to incorporate a public participation process into environmental management. The aims are: “to involve citizens in state’s environmental management as active actors and participants; to strengthen the government democratic system through the enjoyment of non-political rights; to facilitate information and negotiation requests between public and private sector; to increase state institutional credibility; to facilitate environmental planning and a more coherent management of governmental actors; to strengthen civic-environmental education process of citizenship; and to introduce administrative transparency of environmental management” (art 2, ED 57/2000).

The Executive Decree 57/2000 regulates the role of Advisory Environmental Committees established by the framework law, as well as mechanisms to enable public participation and to make complaints. Four modalities of participation are contemplated: (i) public consultation on a specific topic seeking opinions from the public or organizations; (ii) public hearing, where the public is requested to submit opinions personally before the interested institution; (iii) forum or workshop, which

include key stakeholders and the relevant institution; and (iv) direct participation, which is the unsolicited and proactive participation of individuals or organizations.

Despite the ‘richness’ of the public participation provisions, two things must be briefly explained to illuminate the general context for understanding the detail of the case studies. First, the Advisory Environmental Committees (Comisiones Consultivas del Ambiente) should be established at different administrative levels: national, provincial, comarcal (indigenous) and district. The comarcal advisory committees should be established with the particular purpose of discussing environmental matters that affect the respective indigenous territory (art. 28, ED 57/2000). Despite having the potential to provide a venue for participation, they appear to be ineffective. In fact, between September and October 2010, a background research for a project proposal on the role of advisory committees indicated to this researcher that only one comarcal advisory committee was established (Guna Yala, 2006). The other comarcal advisory committees were never asked to meet or to submit any input on environmental issues. Recent developments show acceleration in the process of establishment of the committees, especially since September 2014, which reflects the new and more environmentally pro-active administration within ANAM and increased will to promote environmental governance starting from the existing legal instruments for public participation.

Public Consultation (Consulta Publica) is the most widely used participation mechanism being a defined legal requirement within EIA procedures. The following section (i) on EIA will cover this topic. Public consultation can be also an instrument for the citizens to autonomously claim their right to participate, calling ANAM for a public consultation to be convened (art. 49, ED 57/2000). However, no such meetings have been convened for any of the case studies.

Violations to the right to participation are to be dealt with by the *Defensoría del Pueblo* (Ombudsman, Law 7/1997), which is the institution responsible for the protection of the rights enshrined both in Title III of the Constitution and in international human rights treaties. It is the institution in charge of investigating, mediating and denouncing the acts or omissions of public servants which violated human rights or any irregularities of public administration. No specific rules are set out for violation of public participation within the environmental governance context.

#### **i. EIA processes**

Environmental Impact Assessment (EIA) should be regarded as a key regulatory instrument falling within the environmental rights framework in Panama because it provides mechanisms for information access and public participation. ED 123/2009 (Article 12) contains the obligations for the project’s promoters to guarantee the participation of civil society in the process of the EIA as well as to facilitate access to information relative to the project. The framework law on the environment states that any activity, public work or project which for its characteristics, effects or

placing generates or might generate environmental risk, will be undergoing an EIA (art. 23, LGA 41/1998). However, the EIA underwent several regulatory changes from 2006 through 2012, that mostly weakened its scope, reducing the numbers of projects that have to present an EIA and establishing unclear participation requirements in relation to the definition of the ‘public concerned’ (ED 123/2009), shortening the timeframe for public participation (ED 155/2011) and allowing project’s changes without additional environmental evaluation (ED 975/2012). Environmental risk refers to the possibility to cause harm to the surroundings or to the ecosystems (art. 2, LGA 41/1998). EIA constitutes a prerequisite for any development projects that might have an effect on the environment or public health. Development projects that have to undergo an EIA process cannot be executed unless approved by the ANAM through administrative resolution (art. 4, ED 123/2009).

There are three steps of the EIA process to be followed for any development projects to be approved: the presentation of the EIA before the ANAM, evaluation and approval of the EIA, follow up and monitoring of project activities (art. 24, LGA 41/1998). The contents of the EIA are established by the ANAM (art. 25, LGA 41/1998) which is also responsible to monitor the implementation of the projects approved to ensure that EIA provisions are respected throughout the projects life. An EIA should be undertaken by an agent that must be independent from the promoter of the project which is to be assessed (art. 26, LGA 41/1998) and shall be presented before the ANAM that is the institution responsible for the evaluation of such study and for the approval (art. 24, LGA 41/1998; art. 8, ED 123/2009).

These general elements characterizing the EIA processes have been further regulated by the Executive Decree 123/2009. The EIA is defined as a document that describes the characteristics of a particular human activity: it identifies and quantifies the relevant environmental impacts and also considers the measures to reduce, minimize, compensate or mitigate the significant adverse impacts (art. 2, ED 123/2009). An environmental impact is defined as any change, beneficial or adverse, to the environment, that might be considered to result, totally or in part, from the development of a project (art. 2, ED 123/2009).

The legislation establishes five criteria of environmental protection (art. 23 ED 123/2009) to identify those projects that must be subjected to an EIA (art. 22, ED 123/2009). The criteria identify what kinds of environmental risk a project might generate so that they can be included and assessed in the relative EIA. These criteria are developed around: the determination of risk occurrence and degree; the degree of impact on natural resources; the significant alterations of areas of high aesthetic, touristic and environmental value; the displacement of human communities as well as disruption of human activities and customs; significant impacts on areas declared of anthropological, archeological and historical values.

There are three recognized categories of EIA according to the capacity of a project to eliminate, mitigate and/or compensate potentially its negative environmental impacts (art. 24, ED 123/2009): category I is limited to the projects that might generate non-significant negative environmental impacts and do not carry

any significant environmental risks; category II labels those activities that might cause significant negative environmental impacts that partially affect the environment, but could be eliminated or mitigated through known and easily applicable measures; category III is the highest risk category, that refers to those projects that might produce negative environmental impacts that are significant in both qualitative and quantitative terms, and deserve a more careful evaluation to identify mitigation measures to be applied.

The following table (Table 2) indicates the EIA requirements for the Category III projects, which are object of the case studies, as detailed in the Executive Decree 123 of 2009.

**Table 2** This table describes the EIA provisions for high impact development projects (Category III) such as mining and hydroelectric dam. Relevant provisions to exercise each procedural right are listed.

Access to Information		Public Participation		Access to Justice	
Type of information availability	EIA document + any document presented to an authority by the developer (art. 13)	<p>Mandatory Requirement:</p> <ol style="list-style-type: none"> <li>1. to hold informative meetings and carry out interviews or surveys.</li> <li>2. Documentation of participation and analysis of outcomes</li> <li>3. Public Participation Plan (art. 31)</li> <li>4. formal advisory meeting which should take place during the evaluation stage of the EIA</li> <li>5. a public forum during the evaluation process, before any administrative decisions about the EIA</li> </ol>	<p>Public Participation Plan (art. 30)</p> <p>Contents included:</p> <ol style="list-style-type: none"> <li>1. identification of key stake holders within the affected area of the project;</li> <li>2. participation mechanisms applied with stake holders with correspondent results and analysis;</li> <li>3. information dissemination mechanisms;</li> <li>4. access to information requests and replies to the community;</li> <li>5. stakeholders inputs;</li> <li>6. identification of conflicts and possible resolutions.</li> </ol>	Administrative Review Procedure	Administrative resolution can be challenged submitting a <i>Recurso de Reconsideración</i> – Request for reconsideration (art. 54) within five days of the publication
EIA extract	<ul style="list-style-type: none"> <li>• the name of the project and developer;</li> <li>• the interested area;</li> <li>• brief description of the project;</li> <li>• synthesis of foreseen environmental impacts and mitigation measures;</li> <li>• observations' reception deadline and place to be submitted;</li> <li>• date and place of the public forum;</li> <li>• to specify whether the publication is the first or the second one (art. 36)</li> </ul>				
Dissemination EIA extract	<p>twice within seven days, through two means of communication:</p> <ol style="list-style-type: none"> <li>1. municipalities (city halls) directly related to the projects (mandatory);</li> <li>2. any of communication media such as newspaper, television or radio (art. 35).</li> </ol>				
Timeframe for information availability	20 working days availability from the last publication date (art. 33, 35)	Public Consultation	Note to be published on developer's website	Judicial Review Procedure	<i>Jurisdicción Contencioso Administrativa</i> – Administrative Dispute Jurisdiction (art. 55)
Public observations submission	20 working days (art. 34) During formal consultations or submitted to the ANAM (art. 13)		It has to take place during the evaluation of the EIA		
ANAM Obligations/prerogative	might actively request information from CSOs representatives or scientific institutions (art. 31)		Project developers shall present in details of the project plan and EIA content		
	obligation to revise all the comments received and transmit to the developers so that they can respond (art. 34, ED 123/2009)		ANAM is the mediator and has the responsibility of choosing the date of the meeting (art. 37, ED 123/2009).		
		Participants should be able to submit comments and observations about the EIA			

### 5.3.3 International human rights mechanisms to enhance domestic RBAs to environmental issues

International human rights monitoring mechanisms – reporting to the Committee for the Elimination of Racial Discrimination and the Universal Periodic Review - have been invoked with respect to local political issues. Despite these mechanisms being not directly concerned with environmental regulation, they contributed to indicate several obligations that the Panamanian government should comply with in terms of indigenous rights, environmental rights and non-discrimination.

The recommendations of the Committee for the Elimination of Racial Discrimination (CERD) in 2010 gave ample space to the human rights violations, discrimination and marginalization suffered by Afro-Panamanians and indigenous peoples, especially in the area of economic, social and cultural rights (UN/CERD, 2010: para. 11), highlighting the lack of accessibility to basic services such as water supply, electricity, sanitation, education, public housing programmes and microcredit, and their marginalization in the wider process of development decision-making. The Committee further dwelled on the issues of environmental contestations between indigenous peoples which are consequences of the ESC rights violations and the incapacity of the state to fully grant self-government and communal land ownership provisions to all indigenous peoples in the country (UN/CERD, 2010: para. 12-13). In particular the committee recommended the state to adopt measures to ensure the prohibition of forced expulsion and displacement due to energy projects, exploitation of natural resources and tourism and to provide adequate redress and compensation (UN/CERD, 2010: para. 15). In addition, it recommended that the state assume the role of mediator in protecting vulnerable citizens and guaranteeing the implementation of international standards as well as statements and decisions of international human rights mechanisms, especially in cases of environmental conflicts where there is an evident power imbalance in benefit of private developers (UN/CERD, 2010: para. 14 - 16).

The recommendations ensuing from the Universal Periodic Review in 2010 indicate that Panama has the responsibility to take positive steps towards the enjoyment of the rights of indigenous population. In fact, it calls for the state to “take more operational steps for the implementation of the United Nations Declaration on the Rights of Indigenous Peoples, including: the recognition of the right to land and natural resources of all indigenous peoples in Panama (UPR, 2010: para. 31); to conduct prior consultations with indigenous communities, as required by international standards, in relation to all plans and projects that might affect them, in particular when it comes to large-scale projects such as hydroelectric dams and mining activities as well as regarding national plans and projects to reduce emissions from deforestation and forest degradation” (UPR, 2010: para. 69.31- 69.32).

### 5.3.4 Legal precedents in Panama

Several cases have been submitted before the Inter-American Commission on Human Rights with mixed results. In 1995, Rodrigo Noriega, an environmental lawyer, alleged the violation of the collective right to property of Panamanians due to the building of the Northern Corridor highway through the Metropolitan Nature Reserve (*Metropolitan Nature Reserve v. Panama*, IACommHR, 2003). Despite the failure of this petition to be deemed admissible, the precedent it sets is progressive because it refers to a collective right to property held by citizens, and has led to many authors questioning the capacity of the Inter-American Commission to handle environmental violations (Shelton, 2009b; Anton and Shelton, 2011). The petition failed because it was deemed to be overly broad, as the collective character of the victims was not well defined. However, the petition refers also to more general violations of due process that have been less noted. The petitioner claimed a violation of the right to due process in decision-making, since the Metropolitan Nature Reserve, being an area of environmental, scientific and cultural interests, was meant to be managed through a “collegial procedure for decision-making with regard to the Nature Reserve: non-governmental organizations, city and national government were to resolve issues in concert” (IACommHR, 2003: para. 14). In order to build the highway, the state bypassed this procedure and even reformed the law underpinning it. In addition, the state had refused to halt construction on precautionary grounds despite lawsuits filed at national courts by a local environmental civil society organization. Lastly, the petition alleged a violation of the rights of the child and future generations (IACommHR, 2003: para. 16). For this researcher, therefore, the petition is important because it is distinctively broad in its approach to resolve an issue of environmental contestation through a human rights framework, highlighting the collective character of environment, the impact on future generations, the critical issues of procedures in decision-making and the need for precautionary rather than violation approaches. These substantive merits have been identified also in a dissenting opinion in the Panamanian Supreme Court, in deciding upon the corresponding national lawsuit filed to annul the administrative resolution approving the highway project EIA. The dissenting opinion noted that the majoritarian vote, which rejected the lawsuit, did not take into consideration third generation human rights, and ratified international treaties (Pinilla, 2009: 21-22. See also Young, 2005: 64).

There have been a number of key cases at the IACommHR involving indigenous rights and development projects. Filed in 2000, the case of *Kuna of Madungandi and Emberá of Bayano Indigenous Peoples and Their Members v. Panama* (IACommHR, 2009a) brings to the forefront issues of compensation, territory recognition and demarcation, and questions the capacity of existing domestic legal mechanisms to ensure rights protection. This case has a long history stemming from the construction of Bayano Hydroelectric Dam (at the confluence of the Rivers Canita and Bayano, with a reservoir covering approximately 350 km<sup>2</sup>) built between 1972

and 1976 (para. 11-12). The dam caused the flooding of 80% of Guna and Emberá ancestral lands, forcibly displacing Emberá and Guna to smaller and inferior quality lands, affecting indigenous collective livelihoods and culture, alongside adverse environmental impacts (para. 12). The promise of financial compensation was provided only for loss of crops. In fact, indigenous peoples were deemed ineligible for property compensation on the grounds that they have a collective concept of land ownership and no property title (para. 13-14). The collective feature of indigenous peoples not only failed to offer protection but effectively disabled their claim. In 1977, the state suspended compensation payments even though Guna and Emberá peoples have “continued to suffer the effects of the loss of their lands and crops following the dam’s construction” (para. 15). The lack of compensation and long-term negative effects of land loss triggered the petitioners to bring the case. Petitioners alleged that the state of Panama had failed to: pay the full amount of compensation agreed to the victims; demarcate and protect the Guna of Madungandí territory; recognize territory inhabited by the Emberá of Bayano; respect and protect indigenous culture; protect against the intrusion by colonists into the lands presently inhabited by the alleged victims which has generated a situation of constant conflict. The case was considered admissible on the grounds of the violation of Article 21, right to private property, of the American Convention on Human Rights, and possibly of Articles 8, 24, and 25 (respectively fair trial, equal protection and judicial protection). A notable point of this case is the reference to exhaustion of domestic remedies. In line with its mandate (Chowdury et al., 2010), the Commission recognized that, despite the existence of several legal enforcement and remedial mechanisms, their failure to deliver timely and effective rights protection forced the petitioners to seek international redress instead (para. 31-45).

The case of *Ngäbe Indigenous Communities v. Panama* (IACommHR, 2009b), that will be subsequently described in more detail as a failure of procedural rights to guarantee meaningful participation, was admitted in 2009 on the alleged violation of Articles 5, 7, 8, 13, 19, 21, 22, 23, and 25 of the American Convention on Human Rights (the right of American peoples to humane treatment, personal liberty, fair trial, freedom of thought and expression, rights of the child, property, freedom of movement and residence, participation in the government, and judicial protection). The petitioners alleged that the state, in authorizing the construction of a series of hydroelectric dams in the Teribe-Changuinola River area, violated the collective property rights, the right to prior consultation taking into account the traditional social structure of the communities or their decision-making processes and the integrity of their territory. In addition, the state carried out persecution and repression of peaceful demonstration (IACommHR, 2009b: para. 30).

The important points to highlight are the attitude of the state and the Commission’s reference to the exhaustion of domestic mechanisms for ineffectiveness. The state justifies its failure to comply with human rights obligations stating that the dam site is well within a protected area but not an indigenous reserve. Using the protected area as a tool to trump indigenous rights, the state argues that

indigenous peoples have no right upon it because “Ngäbe ancestral lands are not being affected” and adding that “those lands were populated sometime around the sixties due to the nomadic nature of these ethnic groups” (IACommHR, 2009b: para. 19).

These cases brought before the regional mechanism are symptomatic of the incapacity of the State of Panama to fully protect environmental and indigenous rights. What has been defined as a comprehensive legal framework for protection (Roldán Ortega, 2004; Campbell, 2014), it fails in reality to fulfil certain rights and to render them justiciable. This is manifest in land rights, public participation and third generation rights, specifically the Right to Development.

The government of Panama can take advantage of the legal pluralism on property rights in order to avoid the obligation to comply with indigenous and environmental protection measures. In the cases of Changuinola (Chan 75) and Barro Blanco hydropower projects, since they do not occupy indigenous territory (Anaya, 2009a: para. 26), the state asserts that it does not have the obligations to take any tailored measures for adequate compensation (Anaya, 2009a: para. 42). In the case of Bayano dam, the state did not adequately compensate the value of collective lands. In fact, while it recognizes collective land tenure of indigenous peoples, it does not define corresponding procedures for compensating and respecting collective land rights in the context of granting concessions and licences for natural resources exploitation (IACtHR, 2014). This grey area therefore undermines indigenous rights protection and evades special protection measures which could be afforded under them.

Similarly, Panama rejects the obligations to take any measures to widen information and participation, or to take additional measures for indigenous peoples, which affects the capacity of the state to carry out a development project with free, prior and informed consent of indigenous peoples. Free prior and informed consent depends upon the totality of the environmental rights framework in its procedures and in its contents. In the cases of Changuinola and Barro Blanco, discussed in this chapter, the state arguments suggest that consent equates with agreement to be compensated, or even with simple acknowledgment of the project. This is another gap of the legislative regimes. While it accords indigenous peoples with some rights to have their consent sought, it does not undertake procedural measures to achieve that consent.

Finally, the issue of consent is also inextricably tied to the rights to livelihood and to development. The case of Bayano dam shows that displacement and changes in the use of natural resources led to changes in livelihoods. The state, though, does not take remedial measures or protective measures so to consider the full costs of these changes. It might be argued that compensatory measures to remedy the loss of property or economic gains fail to adequately engage with the concept of development and livelihood, in an indigenous context.

These examples inevitably lead to question to what extent the state is accountable for failures in environmental deliberative and policy measures to protect indigenous minorities and the environment as international human rights violations. In these

cases, the state of Panama fails to address legislative gaps in order to render itself unaccountable both to their citizens and to international institutions.

### 5.3.5 Conclusion

On the face of it, Panama appears to have an extensive legislative framework to guarantee environmental rights, including Environmental Framework Law, the relevant executive decrees (ED 123/2009; ED 57/2000), regulatory laws (Law 6/2002; Law 38/2000) and provisions for procedural rights that provide means for citizens to exercise access rights and also impose clear obligations on the state and its officials.

Access to information is regulated by two different laws which cover the obligation of the state to manage environmental information and the rights of the citizens to request access to information within a transparent public administration system. However, there are some gaps that have negative consequences in the overall promotion of a rights based approach to the environment. There are a number of practical barriers, though. First, the regulation is poor in relation to environmental information. Articles 45, 46, 47 of the Framework Law (LGA 41/1998) are dedicated to environmental information but do not clearly specify what environmental information can be accessed and what should be actively disseminated by the state. Foti and de Silva (2010) highlight the importance of the availability of environmental information and the means through which this can be accessed or is distributed in a useful and useable format. Copying costs can also act as a barrier which may prove to be unreasonable.

As it will be clearer in the description of cases, provision of environmental information solely in digital form is highly unsatisfactory and not fit for purpose. Also the requirements for access to information requests are not fully respected by the environmental authority. Even though e-mail request to access information should be accepted (art. 5, Law 6/2002), ANAM only processes written requests. In addition, the environmental authority unilaterally imposes a precondition of 'sufficient interest' requirement to grant access to information.

Foti et al. (2008) specify how important it is to take into consideration the geography of the territory in order to guarantee physical access to communication and information channels. ANAM has a central national office based in Panama City and has regional branches, one for each province. These regional branches should be able to perform basic tasks of distributing, and granting access to, information as well as monitoring and investigating the use of natural resources. Since development projects are mostly outside Panama City, regional branches of ANAM should be the point of reference for affected communities to access and to receive relevant information (art. 50, cap. II, ED 57/2000). However, it has been noted that these regional branches are often not in possession of any relevant information about development projects, making it impossible for affected people to exercise access rights within the necessary time-frame. Poor technology availability and lack of

environmental knowledge and skills of public servants pose further barrier to access rights and often exacerbate conflicts within communities.

Several formal mechanisms of public participation are contemplated in the above-mentioned Panamanian legislation. The only mandatory public participation requirements are framed within the EIA process which is extremely limited as it will be described in the cases. In fact, public participation in the EIA does not affect the decision-making process on licenses and concessions and the technical nature of the data is a major barrier. The environmental advisory committees, which could be an effective participation mechanism at the core of the decision-making process, rarely meet or have not been created in the areas where they are needed most. For instance, the only indigenous advisory committee established is the Guna Yala Comarca, while there is not one for the Ngäbe-Buglé Comarca, where most hydroelectric and mining projects are taking place.

According to the international standards set out in the Aarhus Convention, public participation can and should take place not only in decision-making process regarding a specific activity, but also in wider policy processes for environmental planning, programmes and policies by public institutions, as well as generation of law, regulations and binding norms (UN/ECE, 2000). Public participation in Panama is mostly limited to the EIA and it is not actively pursued for wider environmental and other policies or law creation. For instance, the Economic Commission for Latin America and the Caribbean (2013) supports a farther reaching mechanism, the Strategic Environmental Assessment (Evaluación Ambiental Estratégica – EAS), a precautionary evaluation of programs and policies which have combined environmental impacts, which has a broader scope and more opportunities for meaningful participation. The SEA proposes to mainstream environmental considerations throughout policy programming and it is considered as a tool to mediate between economic, environmental and social needs, thereby advancing sustainable development objectives. Panama has yet to approve relevant regulations. Though, in January 2015 ANAM has started training key actors in government and private consultants on the use of this new instrument (ANAM, 2015)<sup>30</sup>.

For what concerns access to justice, administrative procedures are envisaged by the law to guarantee the right of access to information and to appeal governmental decisions. However, there are elements suggesting that access to justice is not fulfilled. Lengthy judicial procedures contribute to the inefficient management of environmental complaints. Interestingly, Panama has a dedicated environmental tribunal to deal with environmental crimes where judges should have a minimum of five years' experience in environmental matters to be appointed. Several countries in

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<sup>30</sup>Art. 7 (ED 123/2009) states that the ANAM has to approve regulations for the SEA within two years of the Executive Decree entry into force. However, through Law 8 of March 25, 2015, ANAM has officially become a Ministry and art. 21.a states that the Ministry has to approve regulations for the SEA within two years of the Executive Decree entry into force.

the region have dedicated environmental tribunals<sup>31</sup>, which should aim to advance environmental protection in a more expeditious manner. Despite this, they mostly fail to consider the complexity arising from the intersection of environmental protection with other procedural and collective rights. As it is evident in Panama, the court that decides on environmental conflicts is not the environmental one as most appeals against government decisions are decided by judges of the Supreme Court of Justice, which do not have to fulfill any environmental experience requirement. While it is not necessary to have environmental knowledge to protect constitutional rights, it would be an advantage when dealing with appeals related to environmental conflicts which do not involve criminal consequences. Access to justice is available for the violation of access to information and for complaints on environmental harms. The effect of the Ombudsman (*Defensoría del Pueblo*: see section 5. 3. 2 above) in relation to violation of public participation is limited as it can only issue recommendations.

#### **5. 4 Development Projects and Environmental Contestation**

As stated in the introduction to this chapter, Panama is rich in natural resources and has experienced steady economic growth (1990-2009; WB, 2011). Although they only contribute 1.4% to Panama's GDP (Redwood, 2011: 17), the projects that imply the use and management of natural resources and land are the ones that have caused and still are causing most of the instances of contestation between the government and the population.

As discussed in the methodology chapter (2), in 2010 this researcher had the opportunity to collaborate with a local environmental civil society organization and to have a first-hand experience of environmental rights in practice. Over the course of one year, the researcher has witnessed the struggle of vulnerable groups and environmentalists to exercise their environmental rights in the context of high impact projects such as hydroelectric dams, open pit mining, tourism development, real estate development. Despite the comprehensive legislation in force in Panama, human rights and environmental rights protection was not guaranteed.

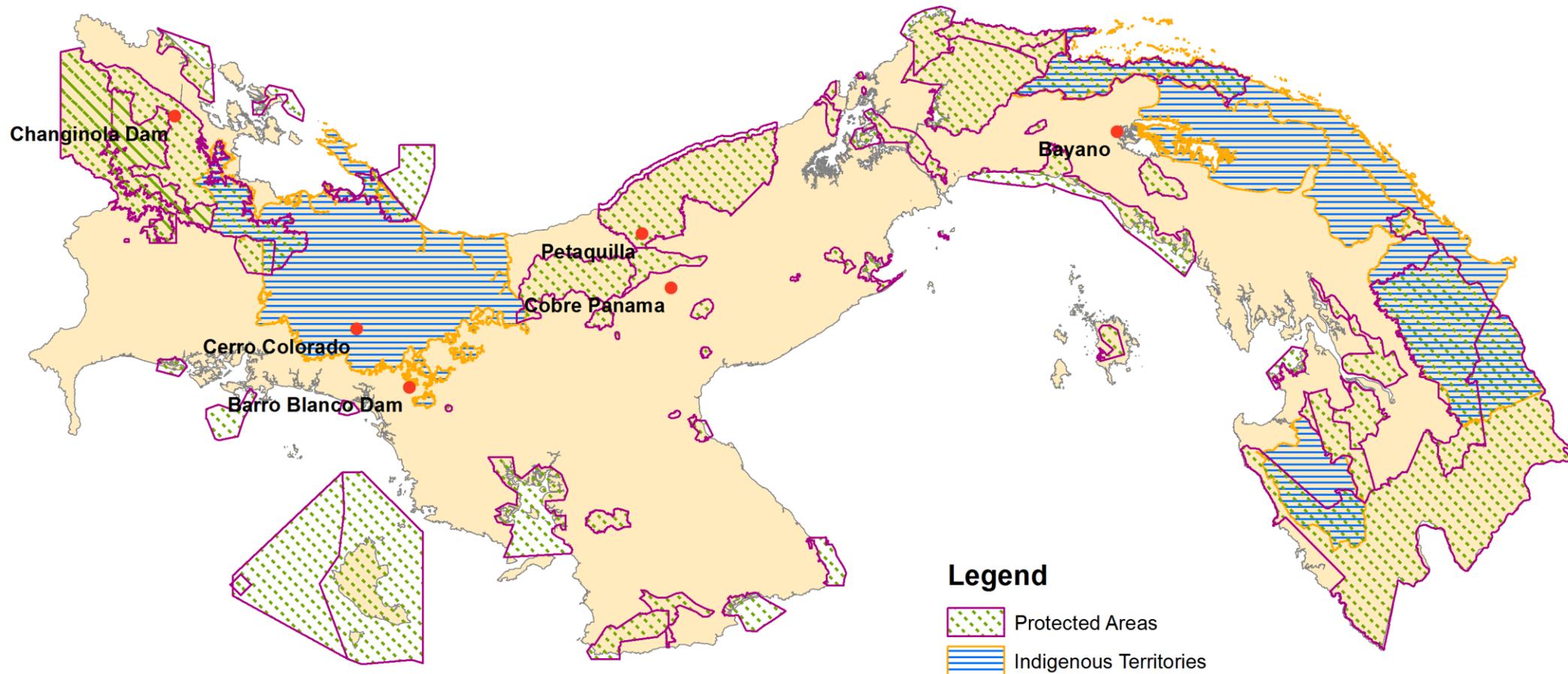
In the next section, four illustrative cases of how procedural rights are exercised and how the norms are applied are going to be described to delineate the major areas of conflicts: Cobre Panama and Cerro Colorado mine, Barro Blanco and Chan 75 hydroelectric dam (see Map 4).

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<sup>31</sup>Other countries have established environmental tribunals, such as Guatemala, Colombia, Honduras, Dominican Republic (Frochisse and Alanis Ortega: CEJA), Bolivia, Brazil, Chile, Costa Rica (Pring and Pring, 2009).

# Panama: Indigenous Territories, Protected Areas and Case Study Locations

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Map 4

0 50 100 200 Kilometers

Chapter 5 Environmental procedural rights in Panama

Locations of case study locations captured in the field. Indigenous territory boundaries sourced from the official administrative units boundaries; INEC. Protected Area boundaries sourced from ANAM. All data acquired on October 2015.

### **5.4.1 Extractive Industries: Panama and copper mining**

The mining sector has gained prominence in national development plans for economic growth, as Panama sits on one of the biggest copper deposits in the world. Environmentalists, conservationists and indigenous peoples strongly oppose mining. Open cast mining, in particular, causes deforestation, possible water and soil pollution, and increased vulnerability to long term natural disasters. The social impacts of mining include displacement, loss of livelihoods, disruptions to the social fabric and cultural erosion.

Among several gold and copper mines in Panama, two particular copper mining projects have been contested since 2010 due to flaws in the consultation processes: the Cobre Panama project in Donoso and the Cerro Colorado mine in Chiriquí. Other mines, such as Petaquilla Gold or Cerro Quema mine (not discussed here), have also been notably challenged on the grounds of environmental pollution and lack of capacity of the National Environmental Authority to comply with its monitoring and control obligations.

This researcher has direct experience of the participation process for Cobre Panama, which is described below. Meanwhile, the Cerro Colorado mine became relevant since it was the object of contestation in the wider protest against the mineral resources code reform, which was approved through Law Decree 8 of February 11, 2011. While the Cobre Panama project explores participation as a procedural requirement of the EIA, the Cerro Colorado conflict questions the substantive nature of public participation in the wider political decision-making of economic development.

#### **5.4.1.1 Cobre Panama: public participation and EIA process**

Cobre Panama is a mining project in the district of Donoso providing an illustrative case of direct participation in the consultation process. This case helps to identify the relevant questions that need to be asked regarding public consultation and illustrates the limitations of participatory approaches. The limited ability to impact on actual outcomes shows procedural measures to be highly problematic: participation in practice is limited by a number of barriers, resulting in it not being meaningful in a substantive sense. Since the status of the mining concession is not affected even when the public opposes the development, public participation has little substantive effect on decision-making. In fact, the decision to grant an exploration or exploitation concession is taken prior to the submission of the EIA by the Ministry of Commerce and Industry. The deliberation process is, therefore, over-determined by the status of the ‘concession-holder’, which is also responsible for commissioning the EIA. This environmental evaluation process over-represents the party with a vested economic interest and greater economic and informational power and resources, restricting the public who can only comment upon specific technical faults or inaccuracies within the EIA. The National Environmental Authority (ANAM) can reject the EIA on the ground of scientific deficiencies, but not on the ground of social disapproval.

In 2010, Minera Panamá submitted the EIA for the “Cobre Panamá” project, an open cast copper mine comprising a power plant, a port and road access. This researcher participated as a member of the civil society organization *Centro de Incidencia Ambiental* (Environmental Advocacy Centre - CIAM Panama) dedicated to the promotion and defense of environmental rights, in the public consultation when the project was presented to the inhabitants of the affected area (held on November 26, 2010). Inhabitants of Donoso were not in majority supportive of the mine, since it would affect livelihoods, taking over more than a hundred thousand hectares of land and forcing more than 35 households to relocate, according to (conservative) EIA estimates. At the time of the public consultation, mining had become a national public issue, and environmental NGOs strongly engaged in public mobilization in opposition to large mining projects. Despite civil society objections, the EIA was accepted by Panamanian National Environmental Authority (ANAM) in December 2011.

This case can exemplify the shortcomings of the procedural approach to issues of environmental contestation. In fact, none of the access rights - access to information, participation and justice - were fulfilled in this case. Public participation as a procedural requirement within the EIA process failed to deliver meaningful outcomes.

Participation requires access to the decision-making process and to information. The state has a key role in guaranteeing access to information but, in practice, this requires an adequate organizational structure as well as the capacity to comply with both positive and negative obligations of information access (Petkova et al., 2002: 18). The identification of the ‘public concerned’ is of outmost importance to enable procedures to reach stakeholders in decision-making. According to Aarhus Convention, ‘public concerned’ refers to parties affected by – limited scope -, or interested in – broad spectrum of public interest, the relevant environmental decision (art. 2, Aarhus Convention, 1998). Despite promoting in principle a wider understanding of public interest and the recognition of non-governmental organizations as having a sufficient interest in environmental issues (Lee and Abbot, 2003; McCracken and Jones, 2003; Morgera, 2005; Boyle, 2010; Jans and Marseille, 2010; Ebbesson, 2011), the weakness of the Aarhus approach is that it gives the state the freedom to define who should participate. In Panama case, the authorities with the responsibility to provide information have showed a tokenistic attitude, seeing attempts to avail of information as an obstacle to efficient evaluation of the EIA. ANAM has this task but applies a very narrow interpretation of ‘public concerned’, and does not undertake a very serious commitment to wider participation. This is illustrated by the reported comment of ANAM's deputy administrator Vergara, who stated that ‘only the parties involved, which are the company, institutions and communities directly affected, had access to the [EIA] document. We couldn't think that anybody could ["] ask to borrow it ["], because, when would we finish evaluating?’ (Chi, 2012).

The format and nature of information provided could itself present a barrier to participation and impede the fulfillment of the right to access to information. The highly technical nature of the information of the EIA can be difficult to manage for anyone that does not have specialist knowledge, especially for indigenous people who may not have a command of the official language, let alone technical or specialist language. In Cobre Panamá case, the EIA document was physically large (14.500 pages) making it inaccessible due to restricted distribution and the difficulty in approaching and handling the document. A reduced and simpler, non-technical, document or summary was not provided as it is not prescribed by the law. Considering that the directly affected population is constituted mainly by rural communities with lower level of education, the procedures failed to deliver usable and easy to understand information.

The law allows for information to be accessed and distributed in digital form. However, ANAM failed to make the document accessible and CIAM resorted to obtaining it directly from the company. In an EIA process with strict timeframe, the delay in accessing information directly impacts the capacity of the public to be informed and consequently to participate in a substantive process of decision-making.

Despite the availability of legal remedies supporting the right to access information, they were of no avail to civil society organizations. If access to information is denied or is being delayed without notice, a *habeas data* writ can be filed for the Supreme Court to resolve it. The environmental NGO CIAM resorted to filing a *habeas data* writ. However, this was not resolved within two days as per the law's provisions (IACommHR, 2011). If the NGO would have relied only on the Supreme Court, it would not have had access to information at the time of the public consultation event and it would not have had the time to submit comments to the National Environmental Authority.

The consultation event that took place in front of indigenous and non-indigenous *campesinos* was not appropriately tailored for the particular nature of that 'public' and failed to provide opportunities for consultation and seeking informed consent. The event consisted in the presentation of technical information about specific mine operating systems and the mechanics of copper extraction process. Not much has been said on how the environment would change during the construction and exploitation phases of the mine. A Q&A session through written questions was carried out, but no opportunities were given to follow up on the answers or to engage in a direct discussion with project developer's representatives or ANAM representatives. The fact that one could only submit written questions in order to participate is a *de facto* discrimination towards a vulnerable sector of population. Half of the people that turned out for the consultation were denied entry to the designated space and were instead confined outside the fence, unable to see either the speakers and projected images. No actions were taken to include these people during the consultation, suggesting that there was no willingness to include as many people as possible to the consultation. Therefore, the consultation process of Cobre

Panama was really only understandable by civil society organizations' representatives.

The role of civil society organizations (CSOs) for the effective realization of procedural access rights is crucial since they have the expertise and capacity to exercise and advance rights' claims in environmental decision-making as well as to monitor the enforcement of environmental law (Shelton and Kiss, 2005). While CSOs like CIAM-Panama have played a central role in making environmental rights work, it must be recognized that CSOs are limited by their own scope and agenda. For instance, environmental CSOs will be concerned with environmental protection rather than indigenous, poor people and rural employment. The EIA is not a suitable instrument to address these wider concerns for social development. During the consultation event and the entire EIA process in Cobre Panama, environmental CSOs demonstrated that they had both the resources and knowledge to advance public participation through access to information and justice claims. However, their capacity to address social, environmental and economic needs in an integrated way was more limited. The sole focus on environment of the Cobre Panama project suggest that environmental CSOs have failed to combine the social development needs of the rural communities affected by mining with the wider environmental protection. This leads to a skewed CSO representation and to the question of 'who is speaking for whom?' The process of participation itself framed in the EIA which rigidly codifies what counts as knowledge and who can represent it (Pieraccini, 2015), contributes to both skewed representation and participation. It is the technical nature of the EIA process to reinforce this imbalance between environmental and social impact. Social dimensions are under-specified, since the EIA focuses only on measurable environmental criteria. The evaluation of social impact that is present in EIA (in Spanish often regarded as Environmental and Social Impact Assessment - EsIA) lacks an agreed methodology, contributing to undervalue social dimensions and subordinates them to economic and environmental considerations. The law that provides for public participation in environmental matters does not confer to social impacts any importance, so that judicial challenges do not rely on measures of social impacts.

The Cobre Panama mine case further illuminates the limitations in access to justice. As mentioned above, despite the availability of legal remedies supporting the right to access information, they were of no avail to civil society organizations. Similarly, this case indicates that judicial remedies for the violation of the right to a healthy environment are not available to citizens. Despite Panama's legislation providing a broad legal standing (art. 111, LGA 41/1998), environmental organizations are not legitimate to present an *amparo* to claim the right to a healthy environment (EPU, 2010: para. 43). Citizens may not directly use this judicial remedy (*amparo* in administrative, civil and penal matters to protect constitutional rights) to exercise their right to a healthy environment (EPU, 2010: para. 43).

In any case, judicial mechanisms cannot resolve issues arising from contradictory governmental decisions. In fact, the land concession of the mine overlaps with the Donoso Protected area. Minera Panamá, the project developer, was given the land

concession in 2009 by ANAM, which established at the same time the protected area (March 2009; Res. AG-0139-2009). Minera Panamá presented an *amparo* against the establishment of the protected area claiming that ANAM did not comply with the necessary public consultation requirements. On December 27<sup>th</sup>, 2011, one day before the ANAM approved the EIA for copper mine exploitation, the Supreme Court rejected the *amparo*, confirming the legality of the establishment of Donoso protected area (Berrocal R., 2012; Prensa, 2012). In this case, the Supreme Court has not resolved the contradiction in the environmental regulation and the tension within interested parties – state, civil society, project developer.. These judgements have been closely monitored by civil society since they would also set a precedent over another similar case regarding the Bahia de Panama Ramsar<sup>32</sup> site and protected low land area threatened by a major real estate development.

The constrained nature of public participation and the lack of meaningful participation in the Cobre Panama case are evident. Weak environmental institutions and lack of institutional capacity contribute to deficiencies in the process leading to unjust situations related to accessing information. The technical focus of the EIA process incidentally excludes huge sections, if not all, of the ‘public concerned’ from the process of participation. Equally, the measurable environmental criteria contribute to the under-specification of social impacts. Ultimately, the impossibility to influence, or provide an alternate outcome in a decision-making process does not equate to meaningful participation. The EIA process produces conflicting reactions. Most participants are primarily seeking to stop the project during the consultation, not to improve it or render it technically ‘environmentally friendly’.

#### **5.4.1.2 Cerro Colorado: public participation and legislative decision-making**

Ngäbe-Buglé people, the largest indigenous group living in the West of Panama, had been in a constant state of alarm and mobilization between 2009 and 2010 protesting against mining. Specifically, Ngäbes’ struggle aimed to prevent the possibility of exploitation of Cerro Colorado. Cerro Colorado sits within the Ngäbe-Buglé territory and has undergone exploration and prospecting activities since the 1970s (Gjörding, 1991). It is one of the world largest unexploited copper deposits, prevented from exploitation until recently by the decline of copper market price (Wickstrom, 2003) that made it financially not viable for exploitation. Even though there is no current operational commercial mine, the past exploration activities have left visible signs on the natural landscape as well as allegations of river and soil pollution, and increased sedimentation (Nakoneczny and Whysner, 2010). Cerro Colorado is important in the field of public participation because it could be the first mining project where public participation, in this case indigenous participation and consent, can contribute to a different outcome in decision-making. In fact, it could be

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<sup>32</sup>Protected area under the Convention on Wetlands of International Importance especially as Waterfowl Habitat, agreed in Ramsar (Iran) in 1971, known as Ramsar Convention.

the first case where indigenous people could exert a veto over a governmental decision.

The first wave of protests in February 2011 was set off by a clumsy and rushed attempt at reforming the mining code governing extraction activities (Law 8 of February 11, 2011), spurred by the rise of copper prices (Redwood, 2011) and the policy decision for Panama to diversify its economy (Simms and Moolji, 2011). Three main changes to the 1963 Code of Mineral Resources were proposed: the increase of state royalties, from 2% to 5%, increase of lease rental fee per hectare; the contested point, though, was that the reform would allow foreign state-owned mining corporations to directly invest in Panamanian mining concessions (2011e).

Ngäbe-Buglé people perceived the reform as a direct threat to their natural resources, as it was clear that the reform aimed to create a favourable environment for the exploitation of Cerro Colorado, among other mines<sup>33</sup>. The mining code reform was approved despite widespread and daily protests in the first two weeks of February 2011 (OSAL, 2011: 4) and Panamanian government clearly disregarded public opinion, 75% of which was opposed to mining development according to governmental polls (Gonzalez Pinilla, 2011). After a month-long widespread and multiple protests, the government signed a six points agreement (Acuerdo de San Félix, February 27, 2011) with indigenous leaders, with the commitment to not exploit Cerro Colorado and to approve a law prohibiting mining exploration and exploitation within the *comarca* (Law 12 was passed on March 18, repealing Law 8; Garrido and Loo, 2011). This has been the most important development for indigenous people in terms of self-determination, especially in the light of a relative weakness of the indigenous protection decree establishing Ngäbe-Buglé indigenous territory (art. 48, Law 10/1997) which leaves the sovereignty of natural resources to the discretion of the government (Jordan, 2008: 484). However, it is still problematic. In fact, instead of improving procedural access rights, the cancellation of permits removes from the discussion the topic of ‘development choices’. The fact that the government maintained a gateway open for hydros reinforces that idea that it will force this type of development on indigenous peoples, only needing minimum consent.

For what concerns Ngäbes’ political reaction, it is to be considered that they were already in a state of alert for the several high impact projects developed in their territories, i. e. Barro Blanco. Indigenous resistance to large economic development projects is deeply rooted and historical: the Ngäbes have been opposed to Cerro Colorado exploitation since the 1970s, at the beginning of copper mining development in Panama (Wickstrom, 2003). They interpreted the news of the mining code reform and the possibility of Cerro Colorado exploitation as an assault on

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<sup>33</sup>LS-Nikko Copper Inc of South Korea had an interest in acquiring 20% of Minera Panama (Cobre Panama project) and the government was supposed to open a call for interest for the exploitation of Cerro Colorado (Redwood, 2011). In January 2012 Korea Panama Mining Corporation (KPMC), holding owned by LS-Nikko Copper and state owned Korea Resources Corporation, acquired 20% of Minera Panama, securing funds for the development of the mine (Reuters, 2012).

indigenous rights and their right to self-determination. The Ngäbes had already fought a long struggle to secure their *comarca*, because of unsolvable disagreements over the exploitation of Cerro Colorado mine and hydro projects Tabasará and Teribe Changuinola (Jordan, 2008: 479). The fact that Panama has not ratified ILO 169 and that it does not foresee special access rights procedures for indigenous peoples leaves a wide legislative gap for high impact development projects. However, prior consultation and consent must be undertaken in cases of natural resources exploitation as established in art. 228 in the Executive Decree 194/1999. This should confer protections via procedural rights; nevertheless no special procedures are foreseen to enforce this aspect of the law. The same Environmental Framework Law 41/1998 indicates that natural resources within indigenous territory can be exploited only with the consent of indigenous authority and people.

Against this background, in January 2012 the indigenous protest escalated again (Comisión de Comercio y Asuntos Económicos, 2012; COVEC, 2012) in opposition to the approval of the law that would sanction the sovereignty of indigenous peoples over their natural resources, the need for free, prior and informed consent and, most importantly, the ban of any mining exploration and exploitation concessions within the *comarca* territory with a retroactive effect (CIAM, 2012b). The protest began when, during the first stage of approval of the law in question - project law 415 – the crucial article that would have canceled all mining exploration and exploitation concessions as well as hydropower concessions (art. 5<sup>34</sup>) disappeared from the text (COVEC, 2012). On February 7, 2012, after 200 hours of violent protests against hydro power and mining projects, indigenous leaders and the government signed the San Lorenzo Agreement, which called for the cessation of violence caused by the confrontation of riot police and indigenous people blocking the Panamerican highway, immediate release for all indigenous persons detained during the protest, a human rights investigation of the facts, and, most importantly, the reincorporation of Article 5. In March 2012, the national assembly passed the Law Decree 11 which regulates the special regime of the Ngäbe-Bugle *comarca* for water, mining and environmental resources. The law decree 11 (March 26, 2012) establishes the requirement for prior and informed consent of indigenous peoples for future hydro power projects within the demarcated territory, annexed and adjacent areas of the *comarca*, and establishes the right to compensation. In addition, it cancels retroactively all mining concessions, banning mining within the territory (art. 3, 4), and it recognizes the rights of indigenous peoples over their natural resources.

This law decree 11/2012 is a landmark event for indigenous rights in Panama and a victory for Ngäbe Buglé peoples defending their territory. At a closer look, the law has only partially addressed the causes of the conflict with Ngäbes over the use and access of natural resources and has been looked on with suspicion (Velásquez Runk,

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<sup>34</sup>“All existing concessions granted to national or foreign companies for exploration and exploitation of mineral resources and the construction of hydroelectric projects in the Ngäbe-Buglé territory annexed areas and communities Ngäbe-Buglé are to be cancelled, outside the *comarca* and all work being carried out by such companies are to be immediately suspended” (art. 5, project law 415, October 27, 2011).

2012). The same indigenous leaders met the new law with mixed feelings, since they succeeded with the mining ban but the law still leaves the door open for hydropower exploitation (Rodríguez, 2012). This dissatisfaction is especially apparent on the article regarding prior consent before the government can grant concessions of hydropower projects (art. 6). The power to grant project approval resides with the general congress of the *comarca*. However, problems with a history of corruption, crisis of power legitimization as well as an uneasy interaction between a multiple indigenous type of leadership and the government structure (Jordan, 2008; see also Jordan, 2011, cited in Simms and Moolji, 2011: 24) suggest that congress approval may still fall short of popular participation. Clearer procedures for consent are therefore crucial to avoid future conflicts and to identify the duty bearer of the process. In addition, it is to be seen how the enforcement of consent procedures might interact with EIA legislation for future project approvals.

The 2012 Ngäbe-Buglé protests against the mining code reform expressed frustration at the lack of participation at the legislative and public policy level. Looking at the sequence of the events and how the protest evolved and incorporated other related policy issues (OSAL, 2012), connecting environmental claims to other claims for social development, it becomes apparent that claims for environmental rights and environmental conflicts are not all that is at stake. What is at stake is much broader and deeply rooted dissatisfaction with the role of the citizens in deciding development. This dissatisfaction takes new meanings when it comes to indigenous peoples, since they have to navigate in this emblematic juxtaposition between providing basic needs in a hostile economic environment while preserving their traditional livelihoods and their cultures (Thorpe, 2010). The Ngäbe-Buglé peoples are faced with the challenge to decide how to frame their rights as an indigenous collectivity and to negotiate their membership in the wider Panamanian society. In addition, considering that their traditional livelihood based on agriculture cannot any longer sustain the growth of population and their land is in the interests of the central government, Ngäbes have to negotiate with multiple actors in an uneven playing field.

#### **5.4.2 Renewable energies: Hydropower and Indigenous peoples**

Hydroelectric power projects have been at the centre of social conflicts and allegations of human rights violations, especially since they are being developed within both recognised and contested indigenous territories. Finley-Brook and Thomas (2010) suggest that this trend for increasing hydroelectric power projects, and the related carbon trading scheme, can be considered a form of colonialism of indigenous lands, defined ‘carbon colonialism’ (Velázquez Runk, 2012: 22). The government has, in more occasions, reinforced its stance on the promotion of hydroelectric energy (Anaya, 2014: para. 38-39) to guarantee energy demand increase while producing clean energy. According to the Empresa de Transmisión Eléctrica, S.A (ETESA), 64.60% of energy production comes from hydroelectric

power (ETESA, 2013: 7). The tentative power development plan for the period 2013-2016 foresees the development of 876 MW of additional capacity, the majority of which is to be generated by hydropower plants (ETESA, 2013: 26). The energy policy of the government, thus, focuses on the promotion of hydro power projects development to cover the increase in electricity consumption (ETESA, 2013) but more importantly to export excess energy making Panama the energy centre for the Americas (Giardinella et al., 2011). In 2011 Panama added seven new hydropower plants, the biggest one with 222 MW capacity (Changuinola) and the others between 5 MW and 57 MW (Dolezal et al., 2013: 23).

The World Commission on Dams concluded that dams have “disruptive, lasting and involuntary impacts on the livelihoods and socio-cultural foundations” (WCD, 2000: 102) on peoples without compensating these costs by any receipt of services or by access to the benefits (Stavenhagen, 2003: para. 59- 60). Thus, disruptive impacts of dams are to be evaluated alongside the absence of compensation and benefits. Dams have particular negative effects on indigenous peoples and ethnic minorities which go beyond the submergence of the area if appropriate measures are not taken to assess risks and recognise rights (Stavenhagen, 2003: para. 60-61).

The next section describes the conflict over the Barro Blanco dam project. This case brings together several elements of the environmental debate that are often analysed in a fragmented manner. It provides an illustration of what issues of environmental contestation look like on the ground, how international and national, as well as indigenous and environmental legal orders collide and contradict each other, perpetrating human rights violations while failing to address matters of equitable distribution of benefits and burdens. A further example of a hydroelectric related conflict – Chan 75 - will be briefly discussed, to illuminate barriers and challenges surrounding the process of participation as an EIA requirement.

Similar to the preceding case of Cerro Colorado, the protagonist of Barro Blanco case is the Ngäbe-Buglé *comarca* and its people. As mentioned previously, this *comarca* has been suffering the most in terms of high impact development projects, with a number of mining concessions and hydro power projects scattered throughout the indigenous territory and borders. For this reason, the Ngäbes became the most vocal advocates opposing development projects, embodying a complex struggle of environment and human rights. Despite living in one of the environmentally richest region of Panama and having the vastest indigenous territory, Ngäbes suffer from the lowest standards of social development, with a high level of poverty and poor access to public services, such as water, sanitation, education and health care.

As mentioned in the introductory section of this chapter, Ngäbe-Buglé *comarca* was established in 1997 through the Law Decree 10. The territory, which is the biggest in comparison with the other recognised indigenous territories, represented half of the land that was originally claimed by Ngäbes (Wickstrom, 2003). The government retained the right to exploit underground natural resources. Due to their dispersed way of living, a significant percentage of Ngäbe-Buglé peoples have been left outside the *comarca* territory which form the so called ‘annex areas’. These areas

were supposed to be legally defined and incorporated into the *comarca* within two years of coming into force of Law 10/1997. However, the government has to date failed to carry out proper demarcation of all the annex areas, which is a critical matter in environmental contestation concerning indigenous peoples, as indicated by the IACtHR in the Saramaka case (2007). Similarly, the government has demarcated the *caserios*, the land where households were established, but failed to demarcate the *trabajaderos* (del Rosario, 2011), land used for livelihood activities, “for materials, medicines, craft items, workshops and other production activities” (WB, 2010: xii-70). This lack of clarity has created strains on the indigenous communities when it comes to protect indigenous rights against development projects. Even though Panamanian legislative system for indigenous protection seems to be very advanced (Roldán Ortega, 2004), the gaps and traps in the legislation itself and the failure of the public institutions to comply with obligations and the implementation of regulatory mechanisms leave indigenous peoples vulnerable to the state’s discretion.

The former UN Special Rapporteur on the Rights of Indigenous Peoples James Anaya (2014: para. 14) noted that indigenous peoples retain certain control over the development of natural resources within the *comarca* territory. However, this control is limited to the mandatory requirement to conduct environmental impact assessment procedures, which are mandatory to non-indigenous territories as well and to obtain authorization of *comarca* authorities.

For what concerns non-renewable resources, the indigenous territory does not have the same control. The law reform of 2012, after a series of strong protests of indigenous peoples, grants the Ngäbe-Bugle *comarca* a special regime to protect mineral, water and environmental resources, cancelling all exploitation licences and prohibiting new ones to be granted. An exception is made for hydropower projects, which need to obtain prior and informed consent of the *comarca* authorities. The law requires that 5% of the benefits generated by these projects are to be enjoyed by the Ngäbe peoples (Anaya, 2014: para. 15).

The unevenness between the legislative norms and their enforcement on collective property has also contributed to create an opportune gap for denying indigenous rights or to dodge the obligations to take positive actions for indigenous rights protection. For instance, Law 72/2008 establishes the special procedure of collective land adjudication for the areas outside the *comarca*. The title to be granted is collective, imprescriptible, non-transferable, indefeasible and inalienable. Consent from indigenous authorities is mandatory for any development in these collective lands (Anaya, 2014: para. 16). However, till 2014 only three territories have received title under this law - Caña Blanca and Puerto Lara of the Wounaan people and Piriati of the Emberá people –, while there are other 30 claims pending (Kjaerby, 2015: 116-117). In effect, these territories have remained for more than five years in a limbo with the risk of high impact development. The Inter-American Court of Human Rights in December 2014 found that Panama violated the right to collective property and legal protection of the indigenous Guna people of Madungandi and the Emberá Piriati and Ipetí communities of Alto Bayano (Kjaerby, 2015: 117, ANATI,

2015, IACtHR, 2014). For this reason, the relevant institution acted upon the judgement and titled the territories (ANATI, 2015).

#### 5.4.2.1 Barro Blanco Hydroelectric Project

The Barro Blanco case shows that there are different issues of contestation that are not resolved within the current legal framework as they represent competing interests and overlapping international and national, indigenous and environmental legislations. The Barro Blanco conflict escalated to a level that required an intervention from the United Nations Programme for Development (UNDP) regional office as it will be explained later. Additional conflict was generated by the approval of the project by the Clean Development Mechanism (CDM) for emission reductions<sup>35</sup>. However, this event is beyond the scope of this chapter.

The Barro Blanco Hydroelectric Power Plant Project comprises a run-of-river hydroelectric power plant with a capacity of 28.84 MW located in the Tabasará River. According to the EIA, the project is located between the County of Bella Vista, Veladero and Cerro Viejo, in the district of Tolé, Chiriquí province (AENOR, 2011). Barro Blanco project developer, GENISA, submitted the category III EIA for a 19 MW hydro power project in 2007, receiving approval through administrative resolution in May 2008 (Corte Suprema de Justicia, 2014). Indigenous people's resistance and the social conflict around hydropower projects on the Tabasará River are not recent. A long history with protests taking place in 1985 and in 1999<sup>36</sup> because of two previous hydropower project proposals, prompted the indigenous communities to organize a protest movement called *Movimiento 10 de Abril* (M10).

##### i. Information access and information quality

The EIA for the Barro Blanco project was submitted first in 2007, followed by an addendum in 2010 for the increase in capacity, by the project developer and made available for access through ANAM. The EIA outlined environmental impacts and mitigation measures, relating to flora and fauna, land, forest and air quality, among others, as well as social impacts generated by the project. The project developer recognizes in the EIA that there was a conflict issue related to the flooding of 6.7

<sup>35</sup>Clean Development Mechanism (CDM) is a flexibility mechanism defined in the Kyoto Protocol to emit certified emission reductions (CERs). In order for projects to qualify for CDM, a validation is required and results from a third party assessment of the project design, the project's baseline, the monitoring plan (MP), and the project's compliance with relevant UNFCCC and host country criteria (AENOR, 2011). Barro Blanco Hydroelectric Power Plant Project was granted CDM validation on the forecast that the project will displace 529,430 tons of carbon dioxide equivalents (tCO<sub>2</sub>e) during the first crediting period, generating an equivalent amount of CERs. Finley-Brook and Thomas (2010) present a critique of CDM in relation to Panama's Bayano and Chan 75 dams.

<sup>36</sup>The project *Hidroeléctrica Tabasará II* was suspended since the court recognized that it would contribute to the expropriation and inundation of indigenous territory without having the free and prior consent of the affected communities, to affect adversely indigenous livelihoods, and to the disappearance of cemeteries and archeological petroglyphs, which are part of indigenous culture. This court decision clearly affirms that environmental protection, the respect of cultural and ethnic tradition of indigenous communities and archeological sites protection represent values that are hierarchically superior and enshrined in the constitution (Pinilla, 2009: 25).

hectares, but that it was resolved in 2009 with the consent of the indigenous *comarca* authority.

The EIA document was challenged by civil society organizations, in collaborations with international organizations, which found several issues with the analysis of biodiversity, impacts on flora and fauna, and mitigation measures. An overarching issue concerned the definition of the area for study, leading to an underestimation of the area inundated and of the impacts on the *Bosques de Galeria* along the river bank. These two aspects have a direct impact on the affected communities. As pointed out by the independent environmental and social impact assessment of the project carried out by the UNDP in 2013 in a bid to facilitate the dialogue between indigenous peoples and the government, the area to be flooded was significantly underestimated as the risk of seasonal flooding was not taken into consideration (Lopez, 2013, cited in UNDP, 2013b: 1-4). The numbers of households potentially affected by inundation is therefore likely underestimated. In addition, the EIA failed to take into account the ecological value of biodiversity preservation along the river bank which constitutes the *Bosques de Galeria*, a habitat with a central socio-economic / livelihood role for indigenous communities due to the availability of valuable wood and medicinal plants (UNDP, 2013b: 16). The loss of, and change of access to, the *Bosques de Galeria* are direct negative impacts on indigenous communities. Issues with definition of the affected area and what effects should be taken into account affect, in turn, the participation process.

The project promoter identified 13 communities which would be affected to some extent from adverse impacts and carried out perception surveys in August 14, 2007 (CDM PDD, 2010: 55-58). A total of 58 numbers of surveys were applied to understand the perception of local communities in relation with the Barro Blanco project. The PDD states that the survey forms “were designed to allow the persons surveyed to describe their living conditions and opinions about the project” (CDM PDD, 2010: 55). From the 58 surveys, it appeared that 50% of the population was in favour and 50% was against the development, with the highest level of rejection in Tabasará and Nancito, which are the most affected communities. The most recurrent causes for rejection were: land expropriation, environmental impact, displacement, lack of land for farming, no access to the river. The reasons for approval were listed as: new job opportunities, cheaper electricity, more water, improved standard of living, and improved infrastructures, such as roads. The project promoter alleged the negative legacy left by other hydroelectric projects in the country contributes to the negative perception and rejection of change. The project developer stated in the CDM project document that the community is now in favour of the project going ahead and that “that many of the owners that in mid-2007 were opposed the Barro Blanco project have voluntarily sold their acres to GENISA” (CDM PDD, 2010: 55-58). In addition, GENISA claims that no people are to be displaced since no one resides in the purchased land or in the area to be flooded.

The questions around the social assessment carried out by the project developer are raised considering the contradictory results yielded by the social analysis conducted by the UNDP (2013b). In fact, the UNDP study showed that community

members inhabit the flooded area and there was a strong social opposition to the project. A participatory rural appraisal was carried out for the indigenous communities of Quebrada Caña, Kiad and Nuevo Palomar. All three will be directly affected by the raised water level on the left bank of Tabasará River, further upstream from the dam (UNDP, 2013b: 3). Similar data were disclosed by a local and international civil society organizations coalition, which alleged that the water reservoir of the dam was indeed expected to flood land in the *Comarca* of the Ngäbe-Buglé and that more than half a dozen communities along the riverbanks in Ngäbe-Buglé territory will be flooded, negatively and irrevocably impacting the livelihoods of some 5000 Ngäbe farmers who rely on the river for potable water, agriculture and fishing (CIAM et al., 2012a).

The conclusions of the UNDP assessment indicate that it is reasonable to raise concerns also on the validity of the public participation requirements. In fact, the consultants found that: there were 50% more households than recorded in 2010 census; none of the three communities were directly consulted about the project nor invited to any information/consultation event; there are petroglyphs that will be submerged that are linked to the cultural and religious heritage of the indigenous communities the significance of which is unclear; the communities do not have a clear understanding of the project and its consequences, which contributes to a sense of fear and creates opposition; the communities are highly cohesive and act as a whole, therefore the inundation of even a small percentage of their territory is grave and can destabilize the life of the communities as a whole (UNDP, 2013b).

In the case of Barro Blanco dam, it is evident that the quality of information and the lack of special procedures for indigenous peoples negatively affect the right to access to information. International standards for indigenous peoples recognizes them the right to participate in decisions affecting their lands (art. 15, ILO Conv. 169) which imposes on the state the obligation to actively engage with indigenous peoples during decision-making processes and obtain free and prior consent (Swepston, 1990). Protection of indigenous peoples' right to access to information, thus, requires special procedures in order to respect the use of native languages, traditional knowledge including natural and cultural heritage as well as their own mechanisms for participation and decision-making.

The communities affected by the dam are mainly indigenous speaking a minority native language; nonetheless, the project developer did not make any effort to provide the information in the native language. The Supreme Court itself, resolving a lawsuit over the flaws of the EIA, affirmed that the state, or the project developer, did not have to take any positive action to produce documents or hold consultations in a language other than Spanish (Corte Suprema de Justicia, 2014: 27). As mentioned in the previous chapters, access to information as environmental procedural right calls for additional characteristics compared to the 'traditional' right to information by virtue of its interdependence with the right to participation. Specifically, information needs to be in an understandable and usable format for the users to facilitate meaningful participation. Since the prime users are indigenous

peoples, information should be translated in the language spoken by the indigenous group and should take into consideration the different worldviews.

## ii. Participation Procedures

GENISA claimed to have executed formal and informal public consultation and that the EIA was publicized by ANAM. Specifically, in 2007 the EIA was presented to indigenous authority; in February 2008 a public consultation was held in Veladero, which was announced by radio, newspaper and posters (50 people were present); more than 30 meetings had taken place with indigenous communities members. In addition, GENISA participated to a Dialogue round table in May 2011 to mediate the conflict; the consultancy firm Technoserve – in charge of social development projects – claimed to have consulted with affected communities in deciding which sustainable development projects to implement<sup>37</sup>. The project developer claimed to have held several information sharing meetings (CDM PDD, 2010: 55-58), but did not specify when or where they took place, and were unable to provide any evidence.

For the public participation process to be meaningful, several procedural and substantive requirements have to be fulfilled. First, the process should fulfil requirements of publicity and documentation. Second, the consultation should take place in an adequate location, accessible for affected communities and with enough space to allow broad attendance. Consultation processes need to be carried out in a way to guarantee meaningful participation. This includes adequate information being widely available and participants being able to engage with it. Participants should be able to understand the information distributed and communicate their opinions and observations. Lastly, any consultation should put forward a follow up strategy on observations and concerns. In addition, all interested public should be able to attend, not only the stakeholders identified by the project developers.

Bearing in mind this guideline, the Veladero consultation illustrates the potential problems faced by a procedural approach. First, it did not fulfil the public participation requirement for adequate location since the consultation took place 50 km away from the affected communities, approximately more than two hours walk. This is one of the immediate factors that raise the costs of access rights and act as a barrier to participation in environmental decision-making (Foti and de Silva, 2010: 9), as affected communities would have faced costs for displacing themselves to the location of the consultation.

Parallel to the issue of surveying an adequate population proportion for registering social perception, the number of people attending consultation is equally important to guarantee meaningful participation. Only between 41 and 60 people

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<sup>37</sup>GENISA claims that is working with the international NGO Technoserve since 2009 to help poor communities to develop alternative livelihoods. On the information available on Technoserve webpage, it appears that the organization has not worked in Panama since 2008. The only information that has been retrieved is an article of the news outlet “La Voz de Panama” that refers to a Tilapia aquaculture project for six families living in El Retiro, Veladero (April 10, 2014).

participated to the Veladero consultation. Considering the number of affected adult population is higher than 3000 (INEC, 2010), the number attending seems very low – at most 2%. This researcher does not believe that a consultation, intended as a mechanism for participation in decision-making rather than a means to simply inform, can hardly be considered as a valid method to pursue meaningful participation with such a slim representation.

The most visible issue is the one of language. EIA legislation on public participation does not refer to any language requirement. The event was carried out in Spanish, which is not the first language of the Ngäbe-Buglé. No translation was available and the information was not presented in a comprehensible format, as it is not required to present a summary of the EIA. This contributes to the violation of the right to participation since it impedes informed decision-making (Arosemena and Arauz, 2013)<sup>38</sup>. In addition, the project developer was recommended to organize an additional consultation event within the indigenous territory, but never complied (Arosemena and Arauz, 2013). Considering that the project could significantly affect indigenous communities of the Comarca Ngäbe-Buglé, the process of public participation should have included special procedures to cater to indigenous people needs.

The case of Barro Blanco brings in another factor: the miscalculation of the EIA in terms of environmental impacts as described above would have misguided the public consultation in its content, and no mechanism was in place to take into account other relevant social and economic impacts besides the EIA.

The case of Barro Blanco dam can be very illustrative on the limitations of access to justice for the violation of the right to participation, the failure of the state to be a human rights guarantor in the conflict, and the failure to protect the environment on a precautionary base. A claim was filed in June 2011 against Barro Blanco dam project alleging the failure of the project developer to submit the project for public knowledge and review, especially failing to hold a public forum within the indigenous *comarca*, violating the principle of citizen participation (Corte Suprema de Justicia, 2014: 24). The Supreme Court, with one dissenting opinion, rejected all the claims in July 2014, adding that it was not the responsibility of the private actor to inform affected communities or to take positive actions towards the inclusion of indigenous people, but it was the state and the executive power who had such responsibility. During the three years the lawsuit was pending resolution, no precautionary measures were ordered and construction activities continued causing a long-lasting confrontation between Ngäbe-Buglé communities, the state and the project developer. It is evident that the remedial mechanisms available in the case of Barro Blanco have turned out to be insufficient and not timely. The consequent lack of adequate redress and recourse mechanisms reduces the chances of meaningful outcomes and participation and increases the likelihood of conflict.

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<sup>38</sup>The Amicus Curiae was submitted by a coalition of international NGOs (environmental, anti-mining, indigenous) which although were not part of the lawsuit, had a strong interest in the matter. Though, their brief was not successful in influencing court's decision.

### iii. Contextual Issues: Development, Land Ownership and Forced Displacement

The World Commission on Dams (2000) questions the value of dams for the lack of equity in the distribution of the benefits, as well as issues of governance, justice and power (WCD, 2000: xxviii). Dams have been criticized as development projects due to technical, financial and economic factors while the costs and benefits are unevenly distributed, disproportionately burdening vulnerable groups (WCD, 2000: xxxi). The rural poor and indigenous groups suffer displacement, downstream adverse consequences, and environmental negative impacts while receiving neither water and electricity services nor social and economic benefits (WCD, 2000: xxxi). Governments have a central role of responsibility when implementing dams as a development choice which should be aligned to global commitment to sustainable human development, equitable distribution of costs and benefits and human rights principles (WCD, 2000: xxviii - xxxiii). WCD find, however, that, available alternative opportunities are not considered and affected people are either not recognized or not empowered enough to participate in decision-making (WCD, 2000: xxxii).

Analyzing the case of the Barro Blanco dam project, the nature and implementation of public participation can be examined. This, however, neglects other important contextual issues of economic development, employment, land ownership and forced displacement.

The developer, GENISA, claimed that the project has an important social component, since the power plant is located in an area with low standards of living where basic needs are not adequately met. GENISA claimed that the dam is a socially beneficial project that could provide employment opportunities, health and education services and a means to define land ownership. GENISA undertook an EIA which is not, however, an adequate instrument to address these issues, therefore the related participatory process cannot frame these concerns.

According to the project documentation, “the project contributes to regional development, consolidating the local and regional administrations in institutional terms [...] will provide direct financing to the municipalities that are directly affected, which will allow them to assume the development of their own projects, thus contributing directly to the improvement in the standard of living of the communities affected” (CDM PDD, 2010: 3). Since the identification of affected communities is disputed, the real reach of this measure is questionable.

For what concerns employment, GENISA claims the execution of the project will contribute to the creation of jobs, since it obliges its subcontractors to “ensure that at least 60% of staff for unskilled work in activities related to his contract, coming from the boroughs or districts of the province where the project is developed” (CDM PDD, 2010: 3). At the same time, GENISA (2011) states that hydropower is not a particularly labour intensive industry: 300 individuals will work on construction and once the hydro station is operating, only 25 persons will be employed. So it is not clear how many jobs would provide for affected communities and for how long.

Barro Blanco dam raised concerns over the issues of forced displacement and land ownership. Forced displacement concerns are related to 6.7 hectares of land that belong to an annexed territory to the indigenous *comarca*, inhabited by five communities (Nancito, Coglé, Palomar, Quiabda y Quebrada Caña). GENISA alleged that these indigenous hectares are ‘not cultivated’ or used for ‘any productive purpose’. As a ‘gesture of good will’, it agreed to rent this land from *comarca* authority in 2009 (GENISA, 2011). However, the UNDP assessment showed that communities as a whole will be affected not only by the inundation of land parcels, but also by the hydropower’s impacts on the river, aquatic species and surrounding habitat (UNDP, 2013b: 17). Barro Blanco dam would displace a number of households and flood hectares of land reserved for subsistence agriculture and communal activities with traditional and economic value such as medicinal plants harvesting and wood.

GENISA secured another 198 hectares of land within the project perimeter without disclosing further information. It did disclose that it bought a total of 20 hectares from 49 small landowners. Six of them were in a particularly vulnerable situation: since they had to sell to the company their land used for cultivation or livestock, these particular landowners will have to drastically change their livelihoods (GENISA, 2011). The displacement of livelihood and communal life has not been subject to any further analysis, raising questions of development choices and benefits. Barro Blanco may not involve forced displacement in the strictest sense, but it displaces livelihoods and does not provide means to negotiate equitable outcomes (WCD, 2000).

## **ii. Recent developments**

The new Panamanian government voted in 2014 has taken measures to tackle the Barro Blanco conflict. A High Level Governmental Commission on Barro Blanco - composed by representatives of ANAM, UNDP, indigenous leadership and religious institutions (Abrego, 2015) – has been established in an effort to mediate this conflict and, as a result of it, the ANAM suspended the project on February 10, 2015 opening an administrative procedure against the project developer for non-compliance with several EIA requirements. The environmental institution is questioning the lack of definite agreement with the affected communities, the absence of an archeological management plan approved by the National Institute of Culture (Instituto Nacional de Cultura - INAC) for the protection of petroglyphs and other archeological findings. In addition, ANAM detected extraction of non-metallic minerals without a corresponding EIA, lack of mitigation measures for soil erosion and sedimentation, as well as non-compliance with waste disposal plan (Mendoza and Hernández, 2015).

The halt to the project is an important action taken by the current administration, which showed the will to pursue policies that protect both human rights and the environment both at national and international level (AIDA, 2015). Even though this

development brings significant hopes for stronger environmental regulation, two elements are to be considered. First, the timing of this action might have limited repercussions, since the dam construction works are almost completed (95% progress; Bocharel, 2015). Second, the reasons for ANAM to halt the project are mainly related to technical matters of environmental standards. In fact, even if the High Level Governmental Commission highlighted the failure of the project developer to reach an agreement with affected communities, no redress can be sought for the violation of the right to participation. This intervention of the government, although trying to pursue peace, on one hand reinforces the precedence of the environmental standards over participation/human rights standards. If the project developer would have adopted all environmental mitigation measures, the government would have not stopped the project for the lack of consent. On the other hand, the fact that the government has done so at such a late stage might undermine the peace talks as it might not be able to provide the sufficient redress affected communities are looking for. It is evident that the relationship between indigenous communities and the state has been profoundly affected. The state is no longer trusted to legitimate participatory processes and judicial institutions have failed to provide redress mechanisms.

#### **5. 4. 2. 2 Chan 75 and the failure to receive free, prior and informed consent**

Barro Blanco dam is not an isolated case in Panama, but is the last of several energy related environmental conflicts over the years. Chan 75 is a case to recall as it shares similarities with Barro Blanco in terms of conflicts and tensions involving indigenous peoples. In addition, Chan 75 shows how the environmental and indigenous rights legislations can be in tension with one another, creating gaps which can be opportunistically interpreted by the state in favour of economic goals (cf. Randeria, 2003a). The Chan 75 project lies within the boundaries of the protected area *Bosque Protector de Palo Seco* (BPPS), established in 1983 (Executive Decree N° 25 of September 28, 1983) as a buffer zone for the international La Amistad Biosphere Reserve, a UNESCO protected world heritage site which spans the border of Costa Rica and Panama (Lutz, 2007; AIDA, 2009; Young, 2009). The creation of the protected area in itself was part of a national strategy of environmental conservation for the purpose of public interest development (Anaya, 2009a: para. 15). However, the area was already occupied by indigenous communities (Anaya, 2009a: para. 15).

The hydroelectric project Chan 75, on the Changuinola River is a symbolic case of what Finley-Brook and Thomas (2010) defines as ‘green authoritarianism’ or ‘carbon colonialism’: manufactured consent and curtailment of indigenous rights for clean energy production. The project was visited by the UN Special Rapporteur on Indigenous Peoples and Human Rights Anaya in January 2009, who commented that the hydroelectric project’s construction had significant impacts on the indigenous communities. Anaya (2009a) found that the project fell short of the required international standards for free, prior and informed consultation process and

exacerbated by the insecurity on land tenure and natural resources ownership due to forced relocation.

Despite the state and the company fulfilled general requirements for consultation to agree on relocation conditions (Anaya, 2009a: para. 17), the Special Rapporteur identifies a violation to the right of prior and informed consent of the communities affected by the project. This is due to the general requirements of public participation being inadequate to cater to indigenous communities' needs and to mediate competing interests in a project involving forced displacement and raising questions of land rights and resources access.

What is most striking is the unapologetic attitude of the state which does not recognise obligations imposed by international law. On the contrary, the State claims that it is only its right and duty to make relevant decisions on the project as a development project (Anaya, 2009a: para. 22), disregarding the social impacts and possible human rights violations.

Several consultations have taken place with the purpose of managing and agreeing compensation and mitigation measures for those who would have to be displaced. According to UN Declaration on Human Rights of Indigenous Peoples (art 32, 3), the state is responsible for the effective implementation of compensation and mitigation measures. However, in Chan 75 case, the state has delegated this responsibility to the private company leaving them in charge of the management of compensation and relocation agreements (Anaya, 2009a: para. 35). The state claims it retained supervision of the process, but the Special Rapporteur stresses the imbalanced power dynamic under which these arrangements might have taken place, due to the differential access to information and capacity (Anaya, 2009a: para. 35-39).

The public participation process in Chan 75 created dissatisfaction because the parties involved have a different understanding of what acceptance of the project to be carried out consists in and what acceptance of compensation measures entails (Anaya, 2009a: para. 38). In fact, the lack of discussion between the project developer and affected communities also contributed to create conflict in regard of the right of the communities to economic benefits from the project (art. 15 (2), ILO Conv. 169). From the perspective of the state and AES (project developer), communities have already benefited in economic terms from the project, since they were provided compensation and received additional benefits such as educational scholarships and the construction of social infrastructure. The Special Rapporteur notes that compensation and mitigation measures, or social projects, do not amount to benefits sharing.

Prior to the intervention of the Special Rapporteur, several judicial means have been sought to secure precautionary measures, among which an *amparo* in December 2007 filed before the Supreme Court of Panama, but without any success. Since the *amparo* showed no advancement, two CSOs - Alliance for Conservation and Development and Cultural Survival - filed a petition to the Inter-American Commission on Human Rights (IACommHR) which subsequently passed it to the

Court. Chan 75 (also known as Changuinola I on the project developer's website) is in operation since 2011.

The Chan 75 case provides a precedent for identifying general controversies relevant to issues of environmental contestation, such as the integration of international human rights standards within national legislative framework, and more specific one that are both a cause and a result of the EIA including what provisions it makes for procedural rights. The narrow definition of 'public concerned', the claims for fair and equitable benefits and the overly narrow application of the principle of free, prior and informed consent are problematic points that recur throughout the cases. These lead to question the EIA mechanism and its adequateness for the exercise of procedural rights.

### **5.5 Barriers to meaningful participation within the EIA: cross-cutting issues in access to information and public participation**

In the cases of Cobre Panama mine and Barro Blanco dam, and in general of any high impact project, Environmental Impact Assessment processes can be said to be rather circumscribed to the analysis, definition and quantification of environmental risks that might have an economic or scientific value. Despite the EIA optimistically described as a 'precaution enabling device' (Cameron, 1993: 21, cited in Barton, 1998: 521), fall short of considering all aspects of development. The analyses of environmental risks are carried out independently from the social value, function or impact that a proposed project might have. These Panamanian case studies show how fulfilment of EIA procedural requirements tend to under-specify social impacts of development projects. They do not adequately guarantee the right to participate in the decision-making process or succeed in providing for free, prior and informed consent of the directly and indirectly affected communities.

Access rights instead should aim to directly fulfill, not merely respect or protect in principle, the human right to a healthy environment, which demands for democratic choices of sustainable development rather than solely environmental protection on its own. Because of its technical nature and its origins in economically driven projects, the EIA process therefore lacks the normative and conceptual framework to give proper consideration to the aspect of social development and how this should complement concerns of environmental protection.

The right to participation is often overlooked in EIA and reduced to the requirement to present information to a generic public which has no power to influence the outcome of the decision-making process. The space of public participation is in fact full of potential claims and concerns on decisions, implementation, benefit distribution and evaluation (Cohen and Uphoff, 1980: 219) that the nature of EIA cannot deal with.

On the other hand, public participation that relies on the EIA evaluation skews the deliberative process, balancing the economic demands with environmental protection, but neglecting the social 'pillar'. 'Social development', intended as a

generic ‘better life’, is used by the government as an excuse and approached as an overarching goal for any type of development activity justifying human rights violations that might occur. This manipulation of the content of public participation legitimizes human rights and environmental rights violations for the sake of economic development.

The assumption of the procedural approach is that if access to information is complied with and redress mechanisms are available, than meaningful participation is guaranteed. But access to information alone does not guarantee substantive influence on the decision-making process. In the same fashion, access to justice does not guarantee that remedial opportunities are available or sufficient. EIA processes denaturalize participation, making it impossible for the public to actively choose between different options for development rather than accept a decision made on their behalf.

The EIA tends to grant more importance to project’s adverse impacts on biodiversity, and geophysical processes (e.g. erosion and sedimentation) rather than adverse impacts on society. While it is true that environmental impacts have quantifiable indicators, EIA legislation does not mention specific guidelines for the description and analysis of less well-understood criteria and thresholds for social impacts. The lack of definition of social impacts does not mean they are not important.

Both Cobre Panama and Barro Blanco EIAs lack a scientific methodology to analyse the social impacts of the projects which produce two side effects: it impedes the most inclusive identification of the public concerned; the derived exclusion reflects in the public participation process, which becomes limited and targets specific groups regardless the degree of their affectation.

In the Cobre Panama mine EIA, the project developer claims that the social baseline study was elaborated following 276 family surveys of social perception about the project (EIA, 2010: 766). The families interviewed that did not belong to indigenous communities were more inclined to be favorable towards the project (EIA, 2010: 767). The surveys, included in the EIA, are designed to collect basic socio economic indicators (income, spending capacity, education and health) and indicate in a superficial way the respondent’s general beliefs on mining as well as its related benefits and burdens. It is not specified whether the survey was applied after a short briefing on the part of the interviewer, or if the interviewee communicated through Spanish or another language. Mitchell (2015: 4) indicates that field instruments [of the EIA team] such as questionnaires were not translated into the local indigenous language (Ngäbere) or assisted by local translators at the start.

One of the most pressing concerns of the affected communities is employment. However, the project developer notes that individuals without formal education and training will not be eligible candidates for employment and their only hope is the assistance for seeds, fertilizers and similar (Annex XX: 88, in EIA, 2010).

In Barro Blanco dam EIA, the project developer claims that the community was in favour of the dam based on a numbers of surveys carried out in the communities which were thought to suffer from adverse impacts to a greater and lesser extent

(CDM PDD, 2010: 55-58). Only a total of 58 people out of 3166 people over 18s years of age (INEC, 2010) were surveyed to understand the perception of local communities in relation with Barro Blanco project. The number of surveys applied in relation to the number of total population over 18s seems without a relative proportion and it is legitimate to question whether it could be considered as a sufficient and representative measurement of social perception. According to the project developer, the survey forms “were designed to allow the persons surveyed to describe their living conditions and opinions about the project” (CDM PDD, 2010: 55). It proved impossible for this researcher to gain access to the original survey forms that have been applied and they are not reproduced in the EIA executive summary nor in the documents available through the CDM portal. Therefore it is difficult to evaluate whether the surveys were appropriately tailored for indigenous peoples and for rural communities.

The limitations specific to the design of procedural rights within the EIA mechanism are exacerbated by more structural limitations in the exercise of rights, such as the lack of adequate education, what knowledge is legitimized and by whom, the definition of ‘public concerned’ and adequate representation.

Both mining and hydroelectric project cases bring to the surface the issue of education and environmental knowledge which proportionally affects the ability of people to exercise the right to access to information in its substantive meaning and to participate in decision-making. The lack of adequate education, in its general term, and the lack of sufficient environmental and human rights education mean that any participatory process discriminates against the most vulnerable sections of society. Usability of environmental information is crucial for meaningful participation, but the lack of technical expertise or basic tools to comprehend, and employ environmental information to one’s advantage transforms the whole process into a meaningless one (Foti et al., 2008: 59). Also education about the process of participation itself leads to participants becoming more willing to interact (Foti et al., 2008: 62).

The quality and clarity of information paired with the capacity of the public to comprehend and employ it affects the legitimation of any type of social perception survey or consultation.

Mitchell (2015) identifies that the EIA process of Cobre Panama was negatively influenced not only by syntactic boundaries (mainly between the EIA consultants speaking English and affected communities speaking either Spanish or indigenous languages) but also by semantic ones that led to different interpretations and meanings of what constituted an impact, its severity and the effectiveness of any proposed mitigation measures.

Having the same effect, the Barro Blanco EIA reported miscalculated data on area of affectation, flooded area and land use, causing a communication barrier. The wrong information on the extent of the project’s impacts had a negative effect on the capacity of the affected communities to formulate an opinion on the project. According to the UNDP evaluation (2013b), it is evident that affected communities

are very aware of their environment, of their geographical distribution and the social and economic use of different geographical locations. Nonetheless, they have not had any chance to bring this knowledge into the participation process.

Defining the public concerned in participatory processes has important consequences in terms of legitimization of the process and of the outcomes. It has been a contested matter as there was this assumption that only the ‘public concerned’, the public who has a legitimate interest, has the right to access relevant information; to participate to a determinate decision-making process and possibly to present a claim before a judicial body. Thus, identifying in the most inclusive manner the wider ‘concerned public’, a public that is not limited to being directly affected, is of primary importance to enable procedures to reach stakeholders without discrimination.

For instance, the Cobre Panama project affected two indigenous communities which were denied recognition a stake (Mitchell, 2015: 5) since their land was outside any demarcated *comarca*. This lack of recognition enables discrimination at every stage of the participatory process.

In the case of identifying the stakeholders the view of Pieraccini (2015) is interesting in relation to the participation process to define marine protected areas in the UK. Stakeholders are people called to represent a particular, exogenous interest located by the project within ill-defined and bounded categories. Participants are framed as stakeholders: their stake is decided a priori and relegated in categories that limit their opportunity to express multiple knowledge confining their view to specific areas instead of enabling them to offer a more nuanced perspective on issues of concern. Stakeholders might be ill defined. As a result, defining stakeholders in a limiting manner has the effect of dichotomy between socio economic and ecological interests (Pieraccini, 2015).

In these Panamanian case studies is evident that stakeholders are confined to a specific interest. This definition also produces a conflicting contraposition between different stakeholders, for instance between environmentalists and affected inhabitants which are not able to voice their concerns and are taken over by CSOs that have the capacity to speak up but without considering all interests at stake (see also Pieraccini 2015).

Panamanian environmental CSOs have failed to combine the social development needs of the rural communities affected by mining with the wider environmental needs. This leads to a skewed CSO representation and to the question of ‘who is speaking for whom?’

The process of participation itself framed in the EIA which rigidly codifies what counts as knowledge and who can represent it (Pieraccini, 2015), contributes to both skewed representation and participation. Participants’ stakes are decided a priori by who is leading the EIA process, the project developer, so that it relegates participants in fixed categories which limit their opportunities to express multiple knowledge (Pieraccini, 2015) and multiple interests. This framing of participants creates a space for enhanced contestation and exacerbates the polarization of the public around competing development determinants instead of facilitating a participation process

that provides a broad understanding of multiple coexisting interests and knowledge, smoothing out contradictions and competing interests. Participants are therefore forced to advocate for the only stake they have been recognized for: looking at Panamanian cases, environmental CSOs are forced to concentrate mainly on the ecological stakes, distancing themselves from the social and economic impacts of development.

Skewed representation and participation is also the product of the particular mode of discourse that is defined for a certain EIA process. The mode of discourse, or the use of a particular language, may reflect a manifestation of power by some stakeholders which assert their dominance (Black, 2001: 45), excluding or putting in a disadvantaged position others (Foucault, 1991, cited in Black, 2001: 45). In addition, the lack of translation in its wider understanding of “the expression of the sense to one another” (Black, 2001: 47), contributes to exacerbate the exclusionary effects of the participation process.

The Chan 75 case evidences a critical ambiguity that affects the capacity of the concerned public to be recognized and to be represented as such. The difference between consultation and consent and the ambivalence of EIA legislation raises questions about what public participation as an access right entails. EIA has a consultation requirement, inaccurately referred in legislation as public participation. On the other hand, the ILO (1989a) established the principle of free, prior and informed consent (FPIC) as a collective right “to exercise control, to the extent possible, over their own economic, social and cultural development” (Article 7(1), ILO Conv. 169). There is a qualitative difference between consultation and consent based on the way decision-making authority is exercised and legitimized (Herz et al., 2007: 7). Consultation consists of an exchange of information: it does not foresee negotiation on decision’ outcomes. Instead, FPIC is a “continuous, iterative process of communication and negotiation spanning the entire planning and project cycles” (WCD, 2000: 281). FPIC understood as a process can channel claims and become the space to address issues of resettlements, compensation, benefits sharing, transparency and accountability mechanisms (Herz et al., 2007: 7).

Considering the qualitative difference above mentioned, public participation to be meaningful must encompass both concepts of consultation and consent. If consultation might advance access to information, consent might allow meaningful participation through negotiation of fair and enforceable outcomes (Herz et al., 2007: 7). Further elaboration on the issue of meaningful participation will be presented in the concluding chapter.

## **5.6 Conclusion**

Several high impact cases have been described in this chapter to highlight a series of limitations of the procedural approach which does not enable meaningful participation to take place.

Access to information is pivotal for unlocking opportunities to exercise the right to participation and access to justice. Without proper access to information, public participation cannot be meaningful. Partial and misleading information can further compromise the fulfillment of participation requirements.

The right to participate and the compliance with a fair public participation process depend on multiple procedural and substantive factors. These have been undervalued in the current procedural approach, which limits participation to a consultation requirement. The lack of specificity in the requirements and the difficulty in clearly defining the duty bearer of participation undermine the effort to deliver meaningful participation.

Public participation processes are not only flawed in procedures: the lack of substantive requirements impedes negotiation on outcomes of decision-making processes.

Access to justice is limited by the violations approach. A violations approach generally precludes full guarantee of access rights and ultimately questions the type of justice that is delivered. An EIA process could be subject to a process of judicial scrutiny, but administrative remedies have a limited reach. The fact that a request for access to information is not granted promptly does not generate consequences on the timeframe for public consultation. No immediate redress mechanisms are available for public participation or iteratively return to challenge the substantive meaning of the public participation process.

The current EIA regime fails to guarantee adequately the right to participate in the decision-making process and to grant free, prior and informed consent of the directly and indirectly affected communities, underspecifying the evaluation of social impacts of development projects.

The role of civil society in changing the status quo is crucial. In Panama, civil society has produced tangible changes over time. The new government appears to embody this expression of change and its commitment towards environmental protection is reflected in recent changes in legislation. Law 8/2015 that created the Ministry of the Environment, redressing the position of institutional subordination that characterized historically the ANAM, changed some of the articles of the Environmental Framework Law (41/1998) that govern the EIA process. In particular, art. 20 states that licences and permits to carry out an activity or a project are granted *after* the approval of the relative EIA (emphasis added). Art. 23 states that the Ministry could apply preventive measures and halt activities in case of non-compliance with environmental standards or to prevent negative consequences on public health and the environment. These two changes redress partially the problems of the EIA identified in this thesis. Further changes in EIA regulations are still needed.

The next chapter builds on the case studies and the limitations of the procedural approach questioning the understanding of ‘meaningful participation’. It then elaborates human rights criteria to assess meaningful participation. Ultimately, it

explores the RHE as a vector for a more holistic, indivisible approach to environmental rights in a context of just and sustainable development.

## Chapter 6 From the procedural approach to access rights

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In this concluding chapter, the researcher revisits the existing legal perspectives and instruments on environmental issues, as described in Chapter 3 and 4, and builds upon the procedural approach bearing in mind its limitations described in detail in Chapter 5 with case studies from Panama. The aim of this chapter is to conclude the research by moving towards a holistic understanding of the RHE that include existing contributions from non-rights based regulatory and rights based approaches but adds substantive depth and scope to the right. It does this by returning RBA to healthy environment to the sustainable development framework and recovering the indivisibility of human rights via the right to development.

Considering the limits of the procedural approach to issues of environmental contestation, this chapter aims to elaborate on the substantive component of the RHE and substantive rights claims that are insufficiently addressed. These include the difficulty that states face in mediating between competing interests, overlapping legislation, the overly narrow focus of environmental rights as minority rights, issues surrounding the responsibilities of non-state actors, and trying to more fully understand the significance of meaningful participation. This Chapter expands the current RBA to the environment through the Right to Development as a vector of rights, benefits sharing, non-discrimination and self-determination. This discussion concludes by making a claim for the RHE as a way to redress the failures of the procedural approach and to recognize an expansive developmental vision of the RBA to the environment promoting a more rigorous form of environmental governance.

The cases described in the previous chapter have shown the constrained nature of public participation in environmental decision-making. They show how the procedural approach fails in different ways to render the participation process meaningful. Public participation often does not succeed in producing different outcomes and diverse limitations within access rights' procedures undermine the legitimacy of the participation process. The procedural approach is inadequate to channel substantial interdependent rights' claims and this tends to escalate, rather than resolve, environmental conflicts. Public participation has the task of mediating claims of developmental rights, resources distribution and accountability (Newell and Wheeler, 2006), but it falls short of bridging these demands.

The literature often labels access to information, public participation and access to justice, interchangeably as 'procedural rights' or 'access rights'. As discussed in Chapter 4, procedural rights are civil and political rights that promote accountability as well as transparency, inclusive and democratic decision-making. Procedural rights are instrumental to the achievement of substantive rights, but their value lies in the process rather than the outcome. As Black (2001: 46) suggests, procedural rights cannot remove the distorting effects of power, unequal resources and capacities which are problematic for deliberation. Access rights have a wider reach, ensuring compliance with inclusive and democratic procedures in order to ensure fair

outcomes. Access rights are not only about the enforcement of procedural guarantees but also of substantive ones. Drawing from the features of ESC rights, access rights provide expansive positive obligations, and serve the dual function of freedom and equality with and through participation (Andreassen and Marks, 2010; Eide et al., 2001; Eide, 2007: 21). Access rights offer a more comprehensive legal framework that aims ultimately at the promotion of good governance. They aim to enhance institutional accountability and offer a method to balance public and private interests, thereby contributing to the development and legitimization of public policies. The enforcement of procedural guarantees is meaningless unless substantive goals are achieved: for this reason access rights are presented as expansive in order to provide fairer and more equitable solutions that are acceptable within the human rights framework. At the same time, they challenge the current human rights regime to find innovative ways to deal with new threats. Access to information is then about the information itself, the quality, the usability and the timing of access. Participation is public in the widest sense of ‘concerned public’ rather than an exogenously and narrowly defined ‘public concerned’. It needs also to be meaningful, influencing and legitimizing decisions. Access to justice takes on more functions: remediation and compensation of violations are to be accompanied by a precautionary approach. Access to justice could benefit the legitimization of the political process by contributing to the identification of duty bearers and rights holders.

Bearing this differentiation in mind, the shift from procedural to access rights can contribute to the elaboration of a substantive RHE. One of the most promising developments on Rio Principle 10 and environmental access rights is being led by the Economic Commission for Latin America and the Caribbean (ECLAC process). Despite advancements in the definition of access rights, it seems that the participation aspect remains the most underdeveloped. The lack of established benchmarks for early participation impedes the RHE to be fully established and enjoyed. Similarly, the lack of substantive parameters for environmental justice, understood as more equitable distribution of benefits and burdens, and the lack of application of the Precautionary Principle in environmental procedures weakens the RHE and limits its reach.

The Right to a Healthy Environment, with its multiple dimensions could be considered as an expression of the Right to Development. In this view, public participation is a mechanism through which one could channel different claims - access to resources, benefit sharing, adequate representation, obligating non-state actors as duty bearers. These claims which we associate with the Right to Development are deeply intertwined with, environmental protection, environmental quality and other intrinsic values linked with the environment such as cultural worth and aesthetic value. Thus, access rights that guarantee early participation and a precautionary approach set in motion a radical change in how decision-making is carried out, questioning development decisions and, therefore, bringing in the wider claims to the right to development.

The description of the case-studies contributed to identify several issues of the relation between human rights and the environment. The Cobre Panama mine and Barro Blanco hydropower cases question the validity of the procedural approach. Each access right presents limitations in its application and might contribute to human rights violations, discriminating against sections of the population. The case of Cerro Colorado questions the substantive nature of public participation and its role in the wider policy making for development. The Chan 75 dam case shows the failure of the minority protection framework and the discrepancies between the international and the national human rights standards. In addition, it points towards the unresolved issue of benefits sharing as an outcome of access rights and the public participation process. A common denominator of these cases is the attitude of the state which uses environmental law and management as a disguise to deny human rights claims or justify their violations. The cases also show the problem within environmental legislation of identifying who is responsible in environmental decision-making process and to what extent. Even when forced displacement occurs as seen in Cobre Panama, Barro Blanco and Chan 75 cases, the state relinquishes its human rights duties, leaving private actors in total control of the EIA process, consultations and negotiations for relocation or compensation.

All four cases indicate a difficulty of the state to mediate different types of claims – tensions between individual and collective claims, environmental protection and peoples' self-determination, exogenous development priorities and endogenous development choices. These cases inevitably lead to challenge the assumptions that the state acts in the public interest and that civil society and individuals have adequate capacity to hold the state accountable for human rights violations (Randeria, 2003a). Randeria (2003a) questions how the 'cunning state' capitalizes on its perceived weakness, in order to render itself unaccountable both to its own citizens and to international institutions. She also questions how might a state fulfil its role as duty bearer in a credible manner and enable citizens to successfully claim their rights and hold accountable the state and other non-state actors.

In focusing narrowly on the procedural approach, these cases serve to illustrate the failure of the right to participate to deliver meaningful public participation. The cases show that participation as a procedural right may still fail to impact in a substantive way on the decision-making process. In particular, matters of access to resources and benefits sharing are not dealt with. It remains unclear what public participation means within access rights, what it entails and what might be its reach. Access to resources and benefits sharing from development are critical grey areas of interconnectedness between human rights, sustainable development and environmental protection. A broader understanding of 'meaningful participation', and consequently of the RHE, can help to substantiate matters of fairness, substantive equality and indivisibility of human rights in order to enable instances of sustainable development.

## **6.1 Human rights, environment and development: new meanings within the Latin American regional framework**

Access rights in their whole contribute to a fair, equitable public participation process. The procedural approach as it currently is, it does not consider the interconnectedness of the rights and the need for substantive rights to be exercised through the procedures. In addition, the focus on indigenous rights has narrowed the scope of environmental rights. The RHE, understood as a collective right with multiple determinants, has in effect only a limited reach, recognizing the claim for a healthy environment only to restricted minorities and considering social environmental determinants related to indigenusness. The fragmentation and minimization of the scope of RHE follows the general trend for progressive underestimation of peoples' rights and the contestation of the right of self-determination (Alston, 2001). Communities that cannot claim a transcendental connection with nature are discriminated. On the other hand, this focus of environmental rights within the minority rights framework does not grant substantive environmental protection (Yang, 2002) to minorities and ignores non-indigenous demands for environmental justice. Protections afforded by procedural rights are very limited and do not protect nor advance broader rights' claims, social justice, demands for substantive equality and greater community control over resources. The potential of the procedural approach to promote sustainable development through the promotion of transparency and accountability is challenged by its ineffectiveness in counterbalancing presumptions in favor of development and economic interests (Hayward, 2005: 180).

Knox (2012) noted how environmental concerns stem from efforts to pursue economic and social development. The increasing emphasis on economic growth and sustainable development contributed to the rise of environmental consciousness which in turn spurred calls for the RHE, due to the established relationship (Knox, 2013b: 17) and recognized mutual interdependence of environment and human rights. It is especially the Latin American and the African regional systems which actively link environmental protection and environmental concerns to sustainable development and economic growth, consistently recognizing a right to a healthy environment conducive to sustainable development. The country providing the context for this research is particularly relevant because of its position within the Latin American region that has been particularly vocal about the connection between environmental rights and sustainable development, demanding substantive equality especially in the international sphere. The experiences of the Latin American region and its engagement with environmental rights are particularly useful to frame the sphere of interests of the RHE. It also tries to illuminate how claims of the RHE are being negotiated, protecting first and foremost vulnerable groups but also expanding the perception of who is entitled to the RHE, viewed as a wider solidarity right.

In Chapter 3 this researcher turned to regional instruments to understand the tendency of RHE recognition and its judicial implications of addressing

environmental issues through human rights. This concluding discussion returns to the regional perspective in order to challenge the relation between issues of environmental contestation and human rights within the sustainable development framework. In fact, the environmental jurisprudence in the American regional system results from the view that human rights are instrumental to better environmental protection (Shelton, 2009b). IACHR jurisprudence demonstrates that there is a willingness to guarantee environmental rights in defined terms of environmental degradation affecting the enjoyment of economic, social and cultural rights (Sands, 1995). The RHE is enshrined in the San Salvador Protocol (art. 11) which adds the protection of economic, social and cultural rights to the existing human rights system of the Organization of American States (OAS). It indicates an emerging consensus in relation to the collective character of environmental rights. Inter-American jurisprudence has promoted collective rights applying the principle of non-discrimination and equality. However, this recognition is limited to indigenous peoples and it is not extended to other type of collective.

Newer developments in the jurisprudence of the Inter-American Commission denote worrying attitudes of states to vindicate their right to development justifying the curtailment of environmental rights and indigenous rights. The Belo Monte dam case (2011), the third world's largest dam for energy production to be built on the Xingu River (MRGI, 2012), has exposed a double limitation of the Inter-American Commission to provide an alternative redress mechanism for affected communities and civil society and to further embed international norms at national level (Bratman, 2014: 282). The legal controversy stems from the lack of consultation of the affected indigenous peoples as required by the Brazilian Constitution (Article 231) as well as by Brazil's obligations under ILO 169 and other international agreements (MRGI, 2012; Jaichand and Sampaio, 2013).

In April 2011, the IACommHR granted precautionary measures for the members of the indigenous communities of the Xingu River Basin, requesting Brazil to halt the licensing process for the dam's project and any activities towards its construction unless minimum conditions for the protection of the right to free, prior and informed consent and the right to life and physical integrity of indigenous peoples were met (for a thorough account see Jaichand and Sampaio, 2013). However, Brazil disregarded IACommHR decision and took a hostile stance delegitimizing the Commission and its actions in this case as "meddling" in internal affairs (Jaichand and Sampaio, 2013; AIDA, 2014a). In July 2011, the Commission changed the precautionary measures, leaving the procedural concerns of prior consultation and informed consent aside as being beyond the scope of the precautionary measures, showing a deferential attitude to the government's view of consultation.

Similar to the arguments used by Panama to justify human rights violations in Chan 75 and Barro Blanco dam cases, Brazil has argued that since the actual infrastructure of the Belo Monte dam and its reservoirs would not be physically located on indigenous lands, there is no need for consultation with the indigenous groups, and that the dam, contributing to national development, is in the interest of the Brazilian society as a whole. The fact that Belo Monte dam is partially financed by the

Brazilian national development bank (BNDES), and that it is part of a wider policy program for growth acceleration (Klein, 2015), contributed to state's actions to dilute and undermine the substantive content of international human rights norms engaging in policy commitments for the "wider public interest" (Bratman, 2014).

Existing human rights are designed to engage with well-defined problems, requiring definite categories: 'proof of violation', individual impacts and state responsibility. Environmental matters transcend these categories. Environmental issues might have a global or transboundary dimension, interest a wide range of actors and affect inter and intra-generational equity (Atapattu, 2006). In accepting that RHE requires mechanisms to access political and social justice, which affects groups and communities rather than individuals, the regional framework may provide a more expansive platform so that the collective character of the RHE might be vindicated.

The regional perspective acts as a sort of bottom up approach to human rights conceptualization: it might be a more appropriate instrument to detect specific needs of the most vulnerable and discriminated sectors of population, ensuring standards adequate to the regional realities are formulated.

The regional perspective supports the call for social and political justice, for inclusiveness and equity as well as transparency and accountability. Particular relevance has been granted to the judgment of the *Saramaka* case which most importantly indicates benefits sharing as a duty of the state: this duty implies the need for an inclusive and democratic political reform of the status quo.

The regional approach to the RHE makes it inescapably tied to sustainable development. The obverse is also true. For development to be sustainable, it needs to pursue equality in access and distribution (UN, 1987), echoing and reinforcing the RHE and its goals of transparency and accountability as well as equal benefits and burdens negotiated through participatory process.

The sustainable development discourse has been criticized for being monopolized by top down planning and decision-making. The changes needed to overcome the stand-off between economic growth, poverty eradication and environmental limits should be rather found in governance strategies that facilitate bottom up 'variety and selection' type of participation (Tukker, 2013). Similarly, the human rights framework is constantly challenged for its failure to comply with the expectations of universalism. The regional perspective can reduce the 'distance' between bottom up participation and top down policy making, mediating in both human rights and sustainable development, becoming a potential middle ground for innovative approaches. The regional framework can benefit in turn of the promotion of the RHE, since it might contribute to the active implementation of a right based approach to sustainable development. In this interaction between environment and development, the RHE might facilitate the mediation between bottom up interpretations and contents of environmental rights with the need to enforce the principle of indivisibility, universality, non-discrimination and equity of human rights.

Two new regional developments are worth noting in the Latin American context: first, the ECLAC process aiming to draft and sign a regional agreement on access rights; second, the EIA guidelines for mining projects led by an international organization which provides a practical solution to counteract states' failures. A brief description of these developments shows that even if beneficial and expansive, they fall short of providing the procedural approach a substantive meaning. Since this research has criticized the EIA as an adequate means to exercise access rights, an overview of developments in impact assessment is provided. Specifically, an overview of the Strategic Environmental Assessment (SEA) is provided and its potential to exercise access rights and to mainstream the RHE.

**a. The Latin American process for the implementation of Rio Principle 10**

Since November 2012, the Economic Commission for Latin America and the Caribbean (ECLAC) has been leading a regional political process for the application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean. This process, set for conclusion by December 2016, is at the negotiation stage of a Regional Agreement on access to information, public participation and access to justice in environmental matters in Latin America and the Caribbean. Its ultimate objective is to strengthen environmental governance and the right to a healthy environment through the application of access rights (ECLAC, 2015: art. 1).

ECLAC has led an inclusive participatory process establishing the “Regional Public Mechanism” which engaged with the public through interactive webinars, web meetings and comment submissions on documents and statements. The ECLAC preliminary document for negotiation (2015) affirms that the RHE is “essential for the dignity and full development of human beings and for the achievement of sustainable development, poverty eradication, equality, and the preservation and stewardship of the environment for the benefit of present and future generations”. It further states that the right to a healthy environment is considered a precondition for, or at least a key right to be enjoyed to contribute to, sustainable development (Article 5; para. 1). Within this view, access rights are “prerequisites for building a citizenry that is committed to sustainable development in line with a rights-based approach” (ECLAC, 2015). As pointed out by Foti and de Silva (2008: 22), access rights are largely procedural in nature, but their purpose is to empower people to advance fulfillment of substantive rights (see also Brisman, 2013). Even if they are rooted in civil and political rights which provide the building blocks for access, their aim is to advance economic, social and cultural rights. Therefore access rights are a means to overcome human rights division.

This regional agreement, although still in negotiation, fills some gaps left open by the Aarhus Convention, the only international agreement currently existing on access rights implementation as discussed in Chapter 3. The ECLAC regional process redresses some implementation limitations providing more specific obligations and

provisions aimed to protect vulnerable peoples on the base of the principle of non-discrimination. These additional provisions are tailored to the regional experience and aim to bridge the disadvantageous gap that indigenous peoples, ethnic minorities and rural communities face when trying to exercise access rights. For instance, states are called to take positive actions towards disadvantaged groups providing technical assistance to exercise access rights (Article 5, para. 3). The state is thus called to be responsible to adopt inclusive measures, a role that is usually filled by civil society organizations.

While these measures expand environmental rights, especially in access to information and access to justice, aspects of public participation remain unclear. As discussed in Chapter 4, public participation is divided in two types: a general right to participation to environmental decision-making and public participation mechanisms related to environmental assessment.

Even though mechanisms of participation are left to be devised by the Conference of Parties (Article 8, para. 10), some specific obligations are outlined. States should “adopt measures to ensure public participation when all options and solutions are still possible and when the public is able to exercise real influence” (Article 8, para. 2). Differentiated participation processes should be implemented to accommodate social, economic, cultural, geographical and gender characteristics of communities (Article 8, para. 6). Language barriers should also be taken into consideration and positive action taken (Article 8, para. 6). Participation should also be promoted at international level on environmental matters (Article 8, para. 11). The establishment of permanent formal spaces for consultation with representatives of various sectors is encouraged as well as the interaction of different views and knowledge (Article 8, para. 12).

The preliminary document does contain something new in terms of public participation in relation with environmental assessment. Considering that public participation mechanisms are tied to EIA process which is led by developers, paragraph 15-18 might mark a shift in terms of who bears the responsibilities of guaranteeing that public participation procedures are carried out without discrimination and in an inclusive manner.

These paragraphs would require the state to bear the responsibilities of identifying the affected public, providing technical and financial assistance to facilitate their participation in situation of vulnerability (Article 8, para. 15-16). The public should have timely access not only to EIA documents, but also to non-technical summaries with the description of proposed project, major effects on the environment and mitigation measures to be adopted (Article 8, para. 17).

The ECLAC process is a valuable regional approach providing a space to challenge, consolidate and expand the procedural RBA to the healthy environment. It falls short, in two areas. First, even if it affirms the RHE and its role in achieving SD, it does so by treating the ‘environment’ mainly as a determinant of public health. Second, it calls for a new type of democracy and it stresses the importance of ‘early

participation’, but it does not further elaborate how the mechanisms for early participation should be or what benchmarks or indicators should be taken into consideration to evaluate ‘early participation’.

**b. NGO Guidelines to improve Environmental Impact Assessment of Mining Projects**

In 2014, the Inter-American Association for Environmental Defense (AIDA), a prominent environmental organization active in the Americas, elaborated recommendations for basic guidelines to draft Environmental Impact Assessment for mining projects. These guidelines constitute the base for any government to analyze the implications of any mining project according to possible impacts and to take an informed decision on the viability and convenience of such project (AIDA, 2014b: 8). This document promotes a social assessment that facilitates participation of communities not only to identify which negative impacts the mining project might generate, but which positive impacts can result compared to a situation where no mining project is carried out (see Box 1).

These guidelines are a laudable effort as it affirms, among others, that any project should be designed according to the principle of sustainability, precaution and prevention (AIDA, 2014b: 16). A few issues can be pointed out, though, which are consequence of the lack of a RBA as stated in the introduction (AIDA, 2014b: 8-9). The guidelines do not consider the implications of collecting, analyzing and interpreting social information by the project developer. It takes for granted that the state has up-to-date information on demographics, land tenure, economic activities, to be considered in the social baseline study. Moreover, it limits itself to list contents, while it lacks reference to a scientific method and minimum benchmarks for social impacts analysis, which could be established through the application of a Rights Based Approach.

The guidelines do not suggest a way to solve the biggest impediment inherent to EIA, being that EIA is not carried out by an independent agency but the project developer. How can we expect the project developers to conduct a thorough and dependable analysis of social values or social dynamics if that might suggest the project is not viable? Two possible solutions could be adopted: the social impact analysis could be carried out by the state, reclaiming its central role as a human rights duty bearer. Another solution would be to request project developers, mainly non-state actors, to adopt public human rights commitments and compliance with public implementation guidelines, as suggested by Oxfam (2015) on the issue of free, prior and informed consent, with stricter rules for EIA especially on the social impact analysis. It is to be acknowledged that there is an increasing reference to the UN Guiding Principles for Business and Human Rights (2011c), which provide recommendations for the implementation of the UN “Protect, Respect and Remedy” Framework to tackle the adverse impacts on human rights caused by business activity. Despite these principles being comprehensive and highlighting that the duty

to protect human rights remain on states, they remain a soft law approach to a critical grey area of human rights which could be more stringently regulated.

The regional process currently taking place in Latin America and the publication of the EIA guidelines for high impact projects show that there is a deep understanding that procedural rights are critical to improve environmental democracy but the current state of the procedural approach leaves some gaps which might allow human rights violations to take place. An expansive view is being elaborated to redress the current failures, with a special attention to regional realities, and to ensure that the immediate duty bearer is the state or the competent authority (ie. ANAM) rather than the project developer, often a private non-state actor, so that redress mechanisms can be more effective. It should be noted, though, in light of the Brazilian case of Belo Monte dam, that further solutions should be elaborated to address human rights violations in state sponsored development projects. Both the ECLAC process and the publication of the EIA guidelines build an opportunity to not only reshape the process of participation, but also in rethinking the procedural RBA to environment in a more progressive way, incorporating the concept of environmental democracy. However, both documents fall short to elaborate what ‘early participation’ entails and to impose positive duties on non-state actors to respect human rights so that they can be held accountable.

**Box 2. Basic Guidelines for the Environmental Impact Assessment of Mining Projects**

The innovative elements of these EIA guidelines are: the incorporation of an executive, non-technical, summary of the project; a more structured social baseline study; and an analysis of the situation with and without the project (AIDA, 2014b).

The executive summary should outline the most important elements of the project, without complex terminology, to be publicly available, especially for the local communities, in a free, accessible and easy (digital) format in the official languages as well as native languages (AIDA, 2014b: 12).

For what concerns the possibility to analyze the alternatives to the project, the guidelines indicate that the identification and the evaluation of project conditions, social and environmental impacts, should be carried out through an analysis of alternatives. At least two scenarios should be analyzed: one with the project and one without, referring to the current state of things prior to project development (AIDA, 2014b: 10). The objective analysis of a scenario without the project could be questionable as it might be portrayed negatively in comparison to the scenario with the project, considering the EIA is led by the project developer.

For what concerns the social baseline study, there is a list of information that should be included and which constitutes a full and comprehensive guideline. Among others, the social study should include a cost-benefit analysis indicating rates for employment increase, income redistribution, local investment. Under the heading of cost, elements to be considered are: severe environmental impact, migration, social welfare, displacement, public health (AIDA, 2014b: 16). Information of social baseline study should be presented in quantitative and qualitative manner. For instance, under the employment section, the EIA should provide numerical data to define employment rate increase and which profiles will be needed. It should include relation with local and national development plans, with special attention in case of indigenous communities (AIDA, 2014b: 49). A detailed description of land property, actual land use, and land titles, with special attention to land used by farmers and indigenous peoples should be also produced.

### c. **Innovations in environmental assessment to align RHE and Sustainable Development**

One of the key arguments advanced in this dissertation concerns the limitations of the EIA process. It argues that the EIA is a very inadequate mechanism for the full exercise of access rights that have substantive outcomes and for pursuing environmental, social and economic objectives in a holistic manner. The reconciliation of these SD objectives should be the purpose of meaningful, public participation, alongside providing the legitimacy of the whole decision-making process through deliberation (Zhao, 2010: 90). The case of Cerro Colorado, a potential mining exploitation site, and the struggle of indigenous peoples to participate in the legislative process suggest that there is a gap to fill to allow public participation in the wider political decision-making. The RHE and its procedural components offer greater opportunities for participation, compared to the national EIA process that is not fit for the purpose. An alternative instrument, developed in the late 80s within the European context (Partidário, 2012), could be used to exercise access rights. The Strategic Environmental Assessment (SEA) “as a strategic framework instrument that helps to create a development context towards sustainability, by integrating environment and sustainability issues in decision-making, assessing strategic development options and issuing guidelines to assist implementation” (Partidário, 2012: 11).

SEA is an instrument present since the 90s in legislations across the Latin American region, but has not been used in practice. Panama for instance lists it in the Environmental Framework Law (Law 41/1998) and added a dedicated article<sup>39</sup> in the recent Law 8/2015 that establishes the Ministry of the Environment. However, it failed before to approve relevant regulations for implementation and it is to be seen whether the new administration will redress it in the next two years.

The scope of the SEA is to advance integral evaluation and development of environmental policies from the point of inception. It provides a framework of action that determines acceptable environmental impacts and sustainability in short and long term (Herrera and Bonilla, 2009: 12; see also Thérivel and Partidário, 1996). It incorporates environmental and sustainability criteria at the earliest phase of decision-making process. The narrowest understanding of SEA makes it potentially more progressive than the EIA since it evaluates strategic planning and is not limited to individual projects, it involves an appraisal of alternatives based on environmental objectives and criteria and it influences decision-making. While EIA processes are only set in train after a project is initiated and after the decision has been made - addressing only mitigating measures, limiting consultation and limiting contribution to the eventual decision (CEC, 1993; DoE, 1991; Glasson et al., 1995; Lee and

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<sup>39</sup>Article 21-A. the Ministry of Environment shall carry out strategic environmental assessments for policies, plans and programmes which foresee potential strategic opportunities and risks for environmental conservation and the sustainable use of natural resources. The Ministry of Environment shall draft relevant regulations within two years from this law entry into force. Law 8/2015.

Brown, 1992; Théritel et al., 1992, cited in Théritel and Partidário, 1996: 8) – SEA considers additive effects, induced and synergistic impacts as well as global impacts of small and big projects that are carried out within the same area (Théritel and Partidário, 1996: 8-9).

SEA aims to inform decision-making on alternative planning and development options which might result in sounder environmental outcomes (Théritel and Partidário, 1996: 4) and it has a more proactive character (Goodland, 2005). Because it is a proactive, ex-ante, formal and systematic process (Goodland, 2005: 2), SEA is more conducive for the RHE to be exercised respecting a precautionary approach.

SEA understanding has evolved and even more distant from the EIA instrument. Partidário (2012: 20-21, citing Council for Scientific and Industrial Research, 1996) notes that “while EIA focus on the effects of development on the environment, SEA focus on assessing the effects of the environment on development”. In this way, SEA integrates environmental issues in the development process by making the environment to set the conditions for development (Partidário, 2012). This more progressive understanding of SEA, which is known also as Integrated Environmental Assessment (IEA) (UNEP, 2009b), might provide a framework compatible with the RHE as it implies transdisciplinary and policy relevance.

This section has showed that certain regional innovations in the Latin American regime of environmental regulation may provide a platform to vindicate the collective character of the RHE and to locate it within the sustainable development paradigm. This potentially, but not explicitly, supports calls for social and political justice, for inclusiveness and equity as well as transparency and accountability. The emerging regional approach seems to be moving towards participatory processes that could lead to a fairer distribution of benefits and burdens. The recent developments in regional legislation – the negotiation for a regional agreement to further the implementation of Rio Principle 10 (ECLAC process) –, the products of regional public interest activism – mining EIA basic guidelines (AIDA) – and the existing but not applied SEA tool for development policy making, but also the setback presented by the Belo Monte case, demonstrate a trend towards the expansion of the procedural approach from just procedures to just outcomes. Negotiation of outcomes, thus meaningful participation, becomes the central concern for the possible interpretation of the RHE as a substantive right.

## **6.2 Meaningful Participation. The substantive quality of participation**

Access rights, understood as procedural rights aiming at substantive fair and equitable outcomes in environmental decision-making, have been studied and analysed since their official inception in Principle 10 of Rio Declaration in 1992. Especially in this last decade, international and local civil society organizations first, followed by the UN system, have really pushed the boundaries of access rights and dedicated effort in detailing the practical meaning of each one of the access rights. The goal has been to widen the space for democratic decision-making in

environmental issues as much as possible applying the principle of non-discrimination and equality. The right to access to information has been deepened to recognise and accommodate the needs of vulnerable peoples that suffer the most and are effectively excluded from top-down environmental and developmental decisions. Recognition of native languages, illiteracy, and other barriers to access and participation are essential for people not to be discriminated and giving due consideration to their cultural and social contexts. Additional positive actions are being required from the state to provide technical assistance to cater for these needs and promote equitable opportunities to access information. Similarly, the right to access to justice has been widened on the base of courts' experiences, calling for broader legal standing, more expeditious proceedings and lower court fees, and, ideally, specifically trained environmental officials.

Despite this advancement in the understanding of access rights and their implementation in the context of environmental democracy, the right that calls for public participation has been left behind. Aside from tiny procedural tweaks to enforce the principle of non-discrimination, mainly indigenous related, public participation seems to be too much of a contentious topic to be dwelled upon. As discussed earlier, public participation has been contested for failing to fulfil the purpose of a deliberative process, to address a broader range of issues (Barton, 2002: 98), to influence the decision-making process and for the impossibility to seek redress for the violation of public participation (González, 2002: 645).

The following section expands on the concept of public participation. First, participation is briefly explored in general terms which show the ambivalence of this concept which can be rooted in the procedural approach. Second, a more specific understanding of participation as key process of environmental decision-making is provided. The aim is to characterize 'meaningful participation' and possibly shed light on the substantive character of the RHE through participation as access right.

There are two main perspectives of public participation: one that favours participation as an end in itself for more legitimate decisions (process based goals perspective) and one (substantive based goals perspective) that considers participation as contributing to further, potentially better and locally reflective, outcomes (Pring and Noé, 2002: 22). This view correlates with the description of proceduralization by Black (2000). Proceduralization is seen as the means for achieving substantive ends, since it recognizes a non-hierarchical relationship between politics, law, and other social systems (Black, 2000: 603). It is a particular mode of decision-making that implies a shift in regulation where substantive ends are induced through indirect strategies instead of being commanded through the imposition of laws. Proceduralization is closely associated with participation and deliberation which are both frequently understood as techniques of proceduralization (Black, 2000: 599). However, calls for procedures that will facilitate participation or deliberation often do not consider the form that participation should have (Black,

2000: 599). This arguably undermines the capacity of procedures to contribute to substantive outcomes.

Black (2000: 607) distinguishes a ‘thin’ proceduralization from ‘thick’ proceduralization, based on two competing theories of democracy, which influences which form of participation is adopted. ‘Thin’ proceduralization (or liberal proceduralization) refers to procedures that aim only at bargains and compromises, based on liberalism’s concept of democracy as a mechanism for the expression and aggregation of preferences. ‘Thin’ proceduralization therefore foresees a mode of participation in which preferences remain exogenous, unchanged and discourse-less. ‘Thick’ proceduralization, on the contrary, aims to orient participation towards the mutuality, consensus and inter-subjective understanding of deliberative democracy. This concept of democracy suggests that law and the exercise of political power is legitimate to the extent that it has been agreed upon by citizens in a process of deliberative opinion and will formation. Procedural law has double meaning as it expresses normative requirements and at the same time it is the legal technique to secure those requirements (Black, 2000: 607). Elaborating on Black’s analysis, the environmental rights field is currently dominated by a thin type of proceduralization, aiming for the benefit of the majority while leaving the minority in a situation of injustice. Could thick proceduralization provide an understanding of meaningful participation? Could meaningful participation as access right be the mechanism to unveil and secure normative requirements that would advance RHE? In order to answer these questions and to back any statement for a substantive RHE, it is necessary to understand public participation as an access right.

Public participation in environmental decision-making refers to an organized process adopted by either a public or private-sector organization to engage the public in environmental assessment, planning, decision-making, management, monitoring and evaluation (Dietz and Stern, 2008: 1). The case studies have showed that any participatory process in the EIA merely acts to fulfil a legal public comment/consultation requirement (condition of the legality of decision, Steele, 2011), when public influence on the decision is insignificant (Dietz and Stern, 2008: 17) and only the goal of providing information is fulfilled (Lee and Abbot, 2003). The question is how a participation process should look like if the aim is to fulfil an explicit requirement for deliberative consensus (Arnstein, 1969; Lee and Abbot, 2003; Fung, 2006, cited in Dietz and Stern, 2008: 17; McLaverty, 2011) .

There could be multiple definitions of public participation and multiple forms, depending on the values of the participants and the individuals, sector, or institutions promoting the participation process. A lot can be said on what constitutes a good process of participation in form and substance. Webler et al. (2001), after identifying five different perspectives of participation, opts for the following definition: meaningful participation is a participation that can influence the outcome within a legitimate decision-making process (Webler et al. 2001; see also Foti and de Silva, 2010: 13).

Two perspectives are particularly relevant in environmental decision-making: one that realizes the democratic principles of fairness and equality, which focuses on the process and quality of interactions; a second perspective promotes equal power among all participants (Webler et al., 2001). From a rights based perspective, these two perspectives complement each other as they are both based on the principle of non-discrimination and equity. The focus on fairness and equality aims to guarantee a participatory process that allows for fair opportunities to speak and be heard. It also promotes the idea that the participatory process' goal is to achieve informed and free consensus rather than absolute agreement. The necessity to promote equal power comes from the understanding that participants of a decision-making process have different power to influence the process itself. The aim of this perspective is to limit the influence of rhetoric and political power to reach, instead, a decision that potentially results in a more equitable distribution of benefits and burdens. Accordingly, Lee and Abbot (2003) identify the benefits of public participation and its potential to improve substantive outcomes while attempting to improve the procedural legitimacy of the decision-making procedures.

Participation, to improve the quality, legitimacy and capacity of environmental decision-making, should be designed following the principles of inclusiveness of participation, collaborative problem formulation and process design, transparency of the process and good faith communication (Dietz and Stern, 2008: 1 - 3). There are several understandings of the dimensions of public participation (Arnstein, 1969; Fung, 2006; Barton, 2002). Dietz and Stern (2008) identify five dimensions: (1) who is involved; (2) when, and at what point, they are involved; (3) the intensity of involvement of participants; (4) the extent of power or influence the participants have; and (5) the goals for the process (Dietz and Stern, 2008: 14).

1. 'Who is involved' in a public participation process, as it was previously described with the 'public concerned', is a matter of non-discrimination, inclusiveness of the process, but also a matter of understanding what are the stakes, the competing interests and the values. Participants in environmental decision-making, though, are very varied. They could be stakeholders understood as an organized group that is affected or has a strong interest in the outcome; but they could be identified as directly affected public, an observing or a general public (Dietz and Stern, 2008: 15). A fundamental but often overlooked matter is who is in charge of identifying 'who is involved', which influence the substantive quality and the goals of participation. For instance, Steele (2001) differentiates between 'affected parties' and 'interested parties'. These two potential subjects of participation intervene in two distinct manners, providing participatory process with two types of knowledge: the former provides situated knowledge born by the proximity of the issue while the latter offers breadth of reflection.

If we consider that a meaningful right to a healthy environment has to address the environment as a public good (Boyle, 2012: 628) as well as environmental governance, we might consider new theories of public goods that focus on the way

public goods generate, stimulate, and contribute to the continued existence of, the public made by Kallhoff (2011). Because of their inherent quality of equal accessibility and availability, public goods contribute to the making of the public through the facilitation of spheres of interaction that provoke mutual awareness, reliability and experienced equality. Kallhoff suggests that public goods create mutual awareness by constituting a public realm where one encounters the other. Public goods are considered to be ‘reliable’ as they are more complex and stable than other goods, and where one experiences equality. Following this new public goods theory, environment and environmental regulation fail to constitute public goods when these conditions are not met.

Elaborating on Kallhoff’s approach, this researcher argues that the environment or the environmental governance system can still facilitate the creation of the ‘public’ through mutual awareness. In turn, the combination of wider concerned public and narrower public concerned might contribute to build up the qualities of reliability and equality in access and availability that all duty bearers have the obligations to provide for the healthy environment and the environmental governance system to be public goods.

The right to a healthy environment, rallying the public around environment as a public good, contributes to the creation and strengthening of a new ‘concerned public’. This new ‘concerned public’ becomes aware of itself as a collective, recognizes the need for a collective effort for the public good to remain reliable and stable over time through participation, and recognizes the need of the public good to be equally accessible and available through the exercise of human rights.

The right to a healthy environment can spur the creation of a ‘concerned public’ with both a collective and diffuse interest over the environment. This might be a network of public interest activism (Boyle, 2010: 7; Boyle, 2012: 614) that expand individual’s demands in a collective view, bringing more depth and breadth to human rights claims through the principle of solidarity. The RHE can also provide public interest activism with the substantive claims as well as procedures to strengthen the public good and redress inequalities in access and availability.

Public participation serves the purpose of deciding the characteristics of access and availability of the public good and demand for transparent and accountable mechanisms to ensure that the public good remains reliable and stable over time. First, a consensus on basic universal values and content should be reached for the objects of the RHE to have the quality of reliability and stability. Second, reliability and stability should also be qualities of the environmental governance system to embody a public interest model of accountability (Boyle, 2012: 616). Through a RBA perspective reliability and stability could be derived from non-discrimination and participation from below.

A public good is a good that meets the conditions of open access and ‘basic availability’ (Kallhoff, 2011: 43): neither the environment nor the environmental governance system meets these criteria. The idea of benefits distribution is associated with the publicness of benefit and equity aspect of public goods. Equal access and availability are also matters of social justice, which requires that basic

needs are met, at a level that is appropriate for the community and at a level which relates to the standards, or to the benefits, enjoyed by others (Ewing, 1999: 105-106, cited in O'Connell, 2012: 5). A network of public interest advocates might mobilize participation, formulating claims for social justice through the exercise of human rights and the realization of human rights as public goods. In this view, the RHE reinforces itself as a complex vector of procedural mechanisms and substantive claims that culminates into the full realization of rights indivisibility.

2. The latest development in access rights calls for early participation, making the temporal dimension of participation central. The concept of 'early participation' is correlated to the capacity of the concerned public to influence the outcome of the process. Early participation gives the power to the public to intervene in public policies and challenge them. The idea of 'early participation' is in practice incompatible with the EIA process, as currently conceived once concessions have already been granted. Within the current EIA framework, a better designed public participation process should include first and foremost a reasonable period of consultation as well as multiple opportunities for participation which design should take into consideration participants' variety and capacity as well as the impact on economic, social and environmental level of the project in question.

The terminology of 'early participation' is nevertheless problematic as it suggests the need to give a specific temporal dimension to participation that clashes with the understanding of participation being a continuous, permanent and responsible process (UNEP, 1997b). In the context of environmental democracy, participation in decision-making contains educational and awareness raising elements (Lee and Abbot, 2003: 83) as well as public generating features (Kallhoff, 2011) that do not materialize in a one off consultation even if carried out at the earliest convenience.

3. The intensity of involvement from both participants and the state and non-state agencies promoting the participation process refers to the degree of interaction between participants, which does greatly depend on the goal of the participation process and the mechanism of participation itself. Consultative mechanisms do not pursue a high degree of involvement since they rarely influence the outcomes of decision-making process. Similarly, expert based decision-making processes discourage general public participation. This is said to de-politicise decisions (Lee and Abbot, 2003). The intensity of involvement is related to the capacity of the participants to communicate values and knowledges, and to persuade and being persuaded so that common views are defined (Steele, 2001). Active deliberation by citizens implies the possibility for views to change over time. Indeed such changes might be considered a good index for involvement. In addition, clear mechanisms to follow up on how the public inputs have been taken into consideration should be established. Implementation of multiple deliberative mechanisms in environmental decision-making would benefit the capacity for the public to interact, moving beyond simple aggregation of preferences towards an active engagement in reasoned argumentation (Steele, 2001; Lee and Abbot, 2003; McLaverty, 2011).

4. Public participation calls for transparency, accountability and equal distribution of benefits and burdens aiming to counteract inequality and to promote bottom-up approaches to decision-making. The extent of influence the participants might have is therefore an important matter when considering the quality and legitimacy of a participatory process. Procedural law alone cannot “cleanse the distorting effects of power, unequal resources and capacities” which are problematic in the deliberation process (Black, 2001: 46). In order to fulfil and achieve meaningful participation, a ‘thicker’ procedural approach should contemplate an analysis of the issues and the mapping of the differences and conflicts that it might generate and the deployment of a mediation strategy to overcome such differences and conflicts between participants (Black, 2001: 47; see also Lucas, 2002: 316 calling for a process for mediated negotiation of project approval applications). In her view of thick proceduralization, Black offers a scheme of mediation of deliberation that usefully defines the role of the regulators in the participation process. Regulators should be able to act as mediators, mediating between deliberants, mapping the discourse positions, regulating and facilitating their decision-making process (Black, 2001: 34). Rooting this role in human rights, regulators should have the duty to perform a translator/facilitator role that is required in a participation process.

In contrast with Black’s scheme of mediated deliberation, the work of Steele (2001) points out that a plurality in perspectives within decision-making processes have a problem solving potential in itself. Applying deliberative theory as elaborated by Sagoff (1988), Steele argues that participation in environmental decision-making concentrates on the communication of values, not interests. Therefore, a deliberative model of participation intended as a collective process of reflection, discussion, communication and attempted persuasion, aims “to encourage elaboration of values and gain a fruitful diversity of reasons” (Steele, 2001: 429), rather than to narrow down disagreement. Variety of values, knowledge and interests are viewed as resources of deliberative decision-making, not obstacles (see also Lee and Abbot, 2003; McLaverty, 2011).

5. Currently, the goal of participatory process in EIA is purely informative, which is the first dimension of participation as a spectrum of processes culminating in empowerment (Arnstein, 1969; Barton, 2002: 80; IAP2, 2006; cited in Dietz and Stern, 2008: 14). The goal of participatory process within the RHE should be to bring about consensus on development options for equal benefits. Taking inspiration from Fuller’s concept of polycentric disputes, which are cases that “involve many affected parties and a somewhat fluid state of affairs” (Fuller, 1978: 397, cited in O’Connell, 2012: 13), participation should aim to find a common ground within the polycentric dispute. This common ground is occupied by the concept of sustainable development. The development context renders participation polycentric: therefore a participatory process should be able to mobilize participation around the indivisibility principle of rights so that competing but interconnected centers of interests and instances of participation can recognize the common denominator of their claims and build a unified strategy for substantive change. The RBA to RHE

serves two substantive functions for participation. RBA can inform participation using it as a tool for claiming rights so that it can achieve meaningful substantive purposes. In turn, rights can “provide a tool for mobilization of societies and social movements” (Cottrell and Ghai, 2004: 59) to address the structural causes of poverty and exclusion (O’Connell, 2012: 203), expanding the reach of meaningful participation from narrow environmental procedural rights to wider substantive economic, social and cultural claims.

Allowing the wider ‘concerned public’ opportunities for continued participation and creating multiple mechanisms for deliberation and follow up, might enable the establishment of a participatory process that aims to build a consensus on substantive policy matters. In this dimension, a rights based approach could contribute to define who is to be held responsible for the process and the rights of the participants. Having better defined duties and obligations of the participatory process is beneficial for the legitimacy of the process as it increases transparency and accountability.

Nevertheless, meaningful participation in decision-making does not have the obvious outcome of increased environmental protection. As Shelton pointed out years ago, “some proponents of procedural rights also may have held an overly optimistic view that a fully informed public with rights of participation in environmental decision-making, and access to remedies for environmental harm, would ensure a high level of environmental protection. Such a beneficial outcome may result, but it cannot always be assured [...] In the environmental field, well-known problems of achieving environmental protection in the face of short-term economic costs, as well as scientific uncertainty or the perception thereof, make reliance on procedures insufficient to ensure a safe, healthy or ecologically sound environment” (Shelton, 2010a: 91). This view can be related to the conceptualization that adverse consequences might occur even if a meaningful decision-making process has taken place and that there is always going to be a burden of uncertainty and potential costs. Any decision-making process therefore will need to identify a threshold of risk, or the degree of risk aversion of a society (Ellis and FitzGerald, 2004: 796), which is a matter of specific context and not a general rule, and it should be the result of combining scientific knowledge available, the likelihood of a risk happening or negative consequences foreseen. Since risk aversion depends on the education, economic level, information accessibility of a determinate society, a decision-making process that challenges social values and scientific knowledge is needed. Integrating the Precautionary Principle into participation as an access right could add value as it would contribute to define the public interest in relation to scientific analysis and to social as well as economic priorities.

Any decision-making process when facing uncertainty “is a matter of policy and political considerations” (Tickner et al., 1999: 4; see also Ellis and FitzGerald, 2004: 794), because it requires the analysis of scientific knowledge available, of social and economic priorities (cost-benefit analysis), as well as public interest and response (risk aversion). A good decision-making process should be carried out in an open and transparent manner in order to “maximize legitimacy and reliability” (Ellis and

FitzGerald, 2004: 795). A decision-making process based on the Precautionary Principle is a process that is even more attentive of public interests and priorities, that should provide well-reasoned justifications, should be addressed to the broadest audience possible (Ellis and FitzGerald, 2004: 795). Such process should also be able to envisage positive and negative outcomes and anticipate certain types of unintended consequences.

An open, public and equal participation in the decision-making process is vital for the application of the Precautionary Principle since it questions indeterminacy (Hunt, 1994), which refers to the acknowledgement of the production of science as a socio cultural process of negotiation between social actors and subject to change in social attitudes and understanding. Scientific uncertainty as indeterminacy might be overcome by a democratization of risk assessment: widened participation in groups providing scientific advice, equal status of participants, and open and publicly accessible procedures and debates are the mechanisms that would enhance the application of the Precautionary Principle while exercising the RHE.

The Precautionary Principle, recognizing the indeterminacy of scientific knowledge, questions not only science capacity to accurately quantify possible harm, but also the social benefit that a determinate substance or activity might generate (Hunt, 1994). According to Hunt (1994), the possibility to ask so many different questions about the risks we are willing to accept and “ultimately what kind of society we want (and how much choice we have in creating it)” is the innovative element of the Precautionary Principle. The Precautionary Principle can benefit from its application in a RBA framework serving as a vehicle to serve justice, welfare and rights.

The Precautionary Principle, favouring pre-emptive and proactive actions, might assume a democratic and constitutional significance, serving as a legitimate means for public intervention to defend, pursue, and reassert collective non-economic interests (Feintuck, 2005). Nevertheless, the Precautionary Principle should not be viewed as a free standing concept, rather as a part of a package of environmental measures in a broader regulatory system that aims to “contribute to broader civic, democratic and collective values in protecting the commonwealth against private interests”, and also as serving “the goal of transparency and democracy in making decisions about technologies” (Myers, March 2000) encouraging public participation and contributing to the debate of “democratizing scientific expertise” (Harramoës, 2001: 4, cited in Feintuck, 2005: 377). Even if the Precautionary Principle is in itself worthy of providing a framework to take authoritative and legitimate decisions, it ultimately depends upon the value system within which the Precautionary Principle is used, which social values are given precedence to as well as which democratic system and political objectives are pursued (Feintuck, 2005). For this reason, the Precautionary Principle should be incorporated into a RBA framework and worked into the substantive components of the RHE in order to be subjected to, and to guarantee, substantive universal standards based on the principle of non-discrimination and equity.

Fulfilling the conditions of ‘meaningful participation’ is for this researcher critical to maximise the transformative potential of the procedural approach to address substantive issues on social justice and environmental protection. Meaningful participation is highly problematic as it questions its corollary conditions of access to resources, benefit sharing, and levelling power imbalances. If these issues are not addressed through participation, there would be no substantive meaning added to the process. Participatory process should not aim merely to inform people, but to challenge knowledge, values and benefits. Providing a framework for meaningful participation contributes to the reduction of marginalization of vulnerable groups that tend to be excluded from political and democratic processes and lack a political voice (Michelman, 2003, cited in O’Connell, 2012: 5).

### **6.2.1 Content of the RHE through participation**

One of the problems of public participation is that it is considered non-measurable and not based on substantive criteria. The objective of this section is to help identifying criteria or indicators to establish benchmarks of the minimum level of enjoyment of public participation. Of course, it is more complex, as meaningful participation includes both a well-designed, legitimate and fair process and a process that produces the best outcomes (Webler et al., 2001).

As it was indicated in the first two chapters, the RHE is considered being of the same nature of the Economic, Social and Cultural (ESC) rights. ESC rights are deemed to be poorly justiciable due to the lack of quantitative, definable indicators would make it easier to distinguish full, or degrees of, enjoyment versus instances of violation. But as Jaichand (2010) points out, it is not a matter of whether ESC rights are justiciable but how they can be enforced. For this reason, criteria to assess the degree of enjoyment of ESC rights have been formulated and this researcher uses them as a guide to specify the content of public participation of the RHE.

### **6.2.2 Four As criteria of ESC rights applied to Public Participation**

Alston’s view on human rights indicators and benchmarks suggests that the indispensable elements of the human rights framework are: normative specificity, an accepted legal obligation, a commitment to the use of all appropriate means, the provision of forms of redress in response to violations and the establishment of mechanisms of accountability at the national and international levels (Alston, 1998, cited in Green, 2001: 1095). Therefore, economic, social and cultural rights requires these essential elements, while surrogate terms such as poverty reduction, social exclusion, basic needs, and human security may serve to confuse rather than clarify (Alston, 1998, cited in Green, 2001: 1095). The rights based approach, however, aims to provide mechanisms to redress matters of poverty, social exclusion and discrimination, basic needs and security through the application of ESC rights.

Elaborating on Alston’s view, the RHE cannot therefore be given effect by general terms unless concrete elements of the human rights framework are present.

From an ESC rights perspective, problems related to environmental contestation - discrimination in decision-making, human security, food security, livelihoods, access to resources, benefit sharing – should be addressed by a rights based approach to the RHE. A great deal of effort has been invested in giving procedural rights the required normative specificity and to define them as the accepted legal obligations of the state. For instance, the recent developments in the Latin American region demonstrate a commitment to further specify procedural rights, reinforcing the procedural approach as appropriate and relevant to a RBA to the environment. However, not a lot has been done to benchmark the commitment to the use of all appropriate means, nor the sufficient forms of redress, and to establish accountability mechanisms.

Many scholars argue that RHE is not useful as it does not set quantitative standards to measure the quality of an environment that needs to be reached in order for it to be classified as “healthy”, favouring environmental law as a more complete instrument to deal with the issues. The formulation of the RHE does not, and may not need to set more quantitative environmental standards. Knox (2013a, 2015) identifies the value of human rights in the environmental field in terms of support for effective environmental policy making. Expanding this view, this researcher believes that the RHE should concern the political process of environmental decision-making in a preventive manner, dealing with rights and obligations of individuals, collective, state and non-state actors. This treatment has both a reactive and preventive character. The RHE should be addressing root causes of environmental degradation rather than environmental degradation itself; in addition, it could have the capacity to address environmental violations that directly or indirectly cause violations of certain individual and collective human rights. In this sense the RHE distances itself from the prescriptive character of human rights, towards a more operational quality.

Benchmarks in economic, social and cultural rights can be explored and established through the four As criteria – availability, accessibility, acceptability (quality) and adaptability. Along with cross cutting human rights principles (non-discrimination, access to information, participation, accountability and sustainability), human rights criteria illustrate the content and scope of the right and guide its implementation process. Such guidance can help define the action to be taken by states and offer generic examples of measures arising from a broad definition of the right (UN/CESCR, 2000: para. 13).

Knox (2012: 38) points out that the multitude of relevant forums and statements on the environment are dispersed, fragmented and fail to constitute a coherent set of norms. Despite this fragmentation, areas of convergence exist, especially in closing the circle between substantive rights likely to be impacted by environmental harm and procedural rights to ensure environmental protection (Knox, 2012: 40; Knox, 2013b: 27).

It is proposed here that RHE would be considerably strengthened by taking a 4 As approach together with human rights principles of universality, non-discrimination and environmental law principles of precaution and common but

differentiated responsibility. Thus, future approaches to RHE should encompass: (1) human rights principles, (2) environmental law principles of precaution and common but differentiated responsibility, and (3) 4 As criteria.

The criteria for the RHE should function to embrace the complex relationship between human rights, environment and development, reflecting also the principles of equality (entailing the recognition of diversity and protection of the vulnerable/disadvantaged), participation and access according to culture and development (UNESCO, working document (wd) 5). The 4 As criteria contribute to the realization and legal enforcement of ESC rights and the RHE, since they are to be respected, protected and fulfilled by the government, as the primary duty-bearer, and “include obligations to act and react to pursue specific conduct or to achieve a particular result” (Tomasevski, 1999: para. 42). Also, they impose duties on other actors (Right to Education Project, 2008; Schutter, 2010).

The 4 As scheme is not a definitive guide: it is a way of explaining tangible factors (Right to Education Project, 2008) while portraying the complexity of states’ obligations (Tomasevski, 1999: para 50). Although derived from the General Comment on the Right to Adequate Housing (1991), the elaboration of the 4 As criteria appears to be developed by the former UN Special Rapporteur on the Right to Education, Katarina Tomasevski in 1999 (Right to Education Project, 2008; Schutter, 2010), which outlined explicit guarantees of the right to education (Tomasevski, 1999: para. 42). Subsequently, 4 A’s criteria have been developed for the right to food (General Comment n. 12, 1999) and for the right to health in the General Comment n. 14 to the ICESCRs (2000a). The right to health is used throughout this section as a guideline to interpret the substantive nature of the RHE. This researcher has chosen the right to health because: the RHE sees its inception in the right to health; the right to health is one of the most affected rights by environmental degradation as indicated by many commentators and jurisprudence; it is one of the main rights to provide for substantive obligations for the RBA to the environment; and, last, focusing on health system and states’ responsibilities in the realm of health, it provides an adequate frame for environmental governance system and relative states’ duties.

4 As criteria for the RHE has not been so far explicitly elaborated. However, the Draft Declaration of Human Rights and the Environment included in the final report of the Special Rapporteur Ms. Ksentini (1994), gives some indications as to the content of duties created by the application of certain human rights principles to the issue of the environment. The draft declaration predates the first publication of the 4 As schema but it clearly follows a similar path, and duties are elaborated respecting human rights principle of non-discrimination, rights’ indivisibility, interdependency and universality, participation in decision-making, and accountability.

The principles of indivisibility, interdependency and universality of human rights bind the RHE to sustainable development and peace (Ksentini, 1994: para. 1) as well as to civil, cultural, economic, political and social rights (Ksentini, 1994:

para. 2). The principle of non-discrimination is applied “in regard to actions and decisions that affect the environment” (Ksentini, 1994: para. 3). The principle of participation enables any person to be an active player in decision-making processes related to environment and development (Ksentini, 1994: para. 18). Accountability requires the state to adopt the administrative, legislative and other measures to prevent environmental harm, aiming at the provision of adequate remedies, and at the sustainable use of natural resources (Ksentini, 1994: para. 22). The preamble specifies that duties apply to individuals, governments, international organizations and transnational corporations.

Within the criteria of the Right to Development - conditions of life; conditions of work; equality of access to resources; and participation, the forms, quality, democratic nature and effectiveness of participatory process, mechanisms and institutions are considered key indicators of progress in realizing the Right to Development (UN, 2013: 62). Therefore, factors to be assessed include the representativeness and accountability of decision-making bodies, the decentralization of decision-making, public access to information and responsiveness of decision makers to public opinion. The substantive quality of a participatory process should also take into consideration the opinions and attitudes of the participants, including the confidence in their leaders, feeling of empowerment and perception of having influenced the decision (UN, 2013: 62).

The UN Special Rapporteur John Knox does not see substantive obligations as directly derived from the RHE. Avoiding recognition of RHE as a novel right in itself, he takes a softer approach that tries to make existing RBA more adequate. In fact, he reiterates that established human rights provide substantive obligations to protect against environmental harm that interfere with human rights enjoyment (Knox, 2012: para. 17; 2013b: para. 44; 2015: para. 72-73). These obligations depend directly on what rights have been violated and states have the obligations to assess environmental impact on the enjoyment of human rights (Knox, 2013b: para. 44; 2014a). There is also a consensus that substantive obligations also refer to the adoption and implementation of an adequate legal framework as well as regulation of private actors to prevent environmental induced interferences with human rights enjoyment (Knox, 2013b: 44). Despite the agreement on procedural obligations (Knox, 2013b: 29, 36-40), the Special Rapporteur fails to address the issue of how participation can influence decisions. With the aim of identifying, promoting and exchanging views on practices relating to the use of human rights obligations to support environmental policy making, the Special Rapporteur has mapped good practices (2015). This report makes the point of highlighting how the, sometimes innovative, practices of human rights inform rights content and implementation, in a bottom-up fashion. This position follows the argument that universal recognition of the RHE is not necessary for the adoption of human rights friendly environmental policies. There are some key points where this researcher disagrees with Knox’s confidence in human rights obligations serving environmental purposes well, especially in the sector of participation and access to justice. These good practices add to this research in two ways: first, they could be a test for the definition and

implementation of the 4 As criteria to follow; second, they can prove the disconnection between human rights theory and practice is the main barrier for RHE acceptance. Section 6. 2. 4 is dedicated to the comparison of Knox's procedural good practices with 4 As criteria of the RHE.

### 6. 2. 3 Defining a 4As approach to make RHE meaningful

What needs to be available, accessible, acceptable and adaptable for the RHE to be meaningful and actionable? The 4 As criteria facilitate the elucidation on what it means to reach "the highest attainable standard" in the context of ESC rights. From the examples outlined for the right to education and to health, a more general significance could be extrapolated and applied to the RHE.

In the case of the right to health, *the highest attainable standard of physical and mental health [...] acknowledge that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health* (UN/CESCR, 2000: para. 4). It could be argued that the "highest attainable standard" demands a specific ESC right to be inclusive so that both entitlements and duties embrace a wider range of socio economic factors that promote conditions in which people can lead a life enjoying this right. This could mean also to embrace the enjoyment of other rights as a precondition or as a complement to a specific right. The 4 As criteria, therefore, identify benchmarks within these socio economic factors that enable a certain enjoyment of the right. In addition, the 4 As criteria indicate which are the freedoms and entitlements, specifying the content of the right and the "interrelated and essential elements, the precise application of which will depend on the conditions prevailing in a particular State party" (UN/CESCR, 2000: para. 12) and providing elucidation on duty bearer obligations and right holders entitlements.

Elaborating on the effects that the environment has on the enjoyment of other human rights, Ksentini (1994: para. 163-234) begins to define the scope of RHE by identifying the fourteen underlying determinants of a healthy environment could be: natural environment – 1) safe and potable drinking water (right to water), 2) clear air, 3) clean soil -, human environment – 4) adequate housing, 5) safe and hygienic working conditions, 6) an adequate supply of food and proper nutrition (as stated in art. 12.2 (b) ICESCR, UN/CESCR, 2000: para. 15), 7) risk and disaster prevention management (bearing in mind climate change issues) -, 8) governmental institutions involved in environmental decision-making, 9) access to information, 10) public participation, 11) environmental education, 12) access to resources, 13) sustainable development, 14) public health - reduction of exposure to harmful substances or other detrimental environmental conditions (art. 12.2 (b) ICESCR, UN/CESCR, 2000: para. 15).

As it is evident, the RHE has two major interactive components, which are 'environment' and 'health'. The notion of environment includes several elements that are conceptually close to the normative concept of adequate standard of living,

while the notion of health, which is expansive in its normativity, might be underspecified in relation to whose and what ‘health’ is in question. It is to be noted that Special Rapporteur Knox emphasizes consequences of environmental harm, binding substantive obligations for environmental standards mainly to the right to life, health and property (Knox, 2012: para. 17; Knox, 2015: para. 72).

Because of this overlap with other rights and because the underlying determinants of a healthy environment are so varied in nature, the criteria should be modelled on each of the determinants. As this would be a task beyond this thesis reach, this researcher will confine the application of the 4 As criteria to those aspects that directly correlate with participatory processes and access rights (see Table 1).

Availability refers to the object of the right, goods or a service, to be available in sufficient quantity and sufficient operational means should be in place. The object of the RHE is multiple - information, participation, justice, natural environment, human made environment, public health – but it could be generally encompassed by the environmental governance system. Functions could be related to how the environment is defined: land use, water, pollution. If we consider only the procedural aspect of the RHE, availability could be translated in functioning environmental institutions to be available in sufficient quantity within the state party to allow for monitoring and control of environmental determinants as well as disseminating information, consulting the public in environmental decision-making and providing redress mechanisms. The state should have an adequate organizational infrastructure and capacity to comply with both positive and negative obligations, actively disseminating information and responding to requests of access (Petkova et al., 2002: 18), facilitating participatory processes and providing avenues for judicial claims to be heard.

Accessibility is a multi-faceted criterion with four overlapping dimensions based on non-discrimination, an overriding principle of international human rights law that has to be secured immediately and fully (Tomasevski, 1999: para. 57), meaning it is not subject to the progressive realization condition. Accessibility means that the object of the right has to be accessible to everyone, including the absence of discrimination, geographical accessibility, economic accessibility (affordability) and access to information (UNESCO, wd5: 2).

Accessibility without discrimination of the RHE would read that any good or service related to the environment and the healthy environment itself must be accessible to all, especially to the most vulnerable and marginalized. Information, participation and justice must be accessible to all. For instance, information that is distributed on the web might be considered accessible to everyone. But vulnerable groups such as rural or indigenous communities in Panama do not have access to basic electricity services, let alone access to computing technology or requisite skills. The information of Cobre Panama mine EIA was supposedly available on the website or could be sent on a digital format upon request (Mitchell, 2015). This would discriminate against anyone that did not have the capacity, and the

knowledge, to surf the web. Another barrier to accessibility, as all the cases demonstrated, is the choice of language. Positive actions should be taken to avoid discrimination in language (see Chapter 5).

Physical accessibility in a more general view would include that a healthy environment, or an environment that does not cause any harm, should be accessible to everyone, especially most vulnerable and marginalized sections of the population with a clear reference to standards of living and cultural attachment to the environment. For the RHE procedural aspect, it would mean that environmental institutions or any governmental institutions involved in environmental decision-making, information access, public participation events, and judicial and non-judicial redress mechanisms should be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups. The location for the public consultation of the Barro Blanco dam EIA was removed from the indigenous communities, where road infrastructure is either poor or non-existent. Therefore, participation in environmental decision-making was not physically accessible to them.

Economic accessibility (affordability) refers to the capacity of everyone to afford to participate in environmental decision-making, a process that should not make the already poor poorer, and being able to afford access to information and eventually to afford judicial redress mechanisms. As stated in General Comment n. 14 on the Right to Health, “[...] equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households” (UN/CESCR, 2000: para. 12 (b)). Therefore, any access to information, participation or access to justice should not disproportionately burden poorer households. Considering that environmental issues affect poorer households the most, positive actions should be taken to ameliorate the burden of vulnerable sections of population. Considering also that environmental decision-making is time consuming often more so because of the bureaucratic elements involved in dealing with government institutions and courts, economic accessibility is also related to time. Poorer households might have to trade-off between time that might be spent for generating income and time to participate in decision-making. In the Panamanian case, it is indicative that all claims for access to information and administrative review filed before any judicial body see environmental NGOs at the forefront, as time and costs are too much of a burden for vulnerable groups affected by development projects. For instance, Lucas (2002: 322) suggests the establishment of a ‘participant funding’ scheme for citizen participation to redress the financial imbalances among stakeholders and support full and effective participation, increase transparency and accountability as well as enhance public acceptability of decisions. The dimension of information accessibility - the right to seek, receive and impart information and ideas (UN/CESCR, 2000: para. 12, comma b, iv) - would be superfluous as information accessibility is an integral part of the RHE that concerns both passive and active – state’s dissemination and citizen access - information as well as all data generated by governments or private actors on environmental quality,

on public health related to the environment and on development induced environmental impacts.

Relevant to both the criteria of availability and accessibility is the notion of decentralization of decision-making, which is also promoted by the Right to Development as a factor to be assessed. Decentralization is the process through which central governments transfer various forms of authority to subnational government for timely adaptation to locally specific conditions. A nuanced understanding of decentralization refers to a process of joint decision-making by central and subnational governments in deciding important public policies (Saito, 2011: 490-491). Decentralization is a means towards a range of broader objective from democratic deepening and economic progress (Saito, 2011: 494). Decentralization of decision-making as an alternative mode of problem solving widening opportunities for citizen participation (Saito, 2011: 484-486) could be a criterion to assess the availability and accessibility of the institutions responsible for access to information, public participation and access to justice.

Acceptability or ‘quality’, interpreting the right to health, refers to the object of the right to be flexible enough to adapt to the needs of changing communities and respond to the needs of persons considering their diverse social and cultural settings (UNESCO, wd5: 2), in this case, recalling the right to education, the form and the substance of environmental governance system. While acceptability refers mostly to the goods or service to be culturally appropriate and with certain minimum standards, the quality criterion refers either to the competencies of governmental personnel dealing with the environment, being a bureaucrat, a politician or a judge and the quality of the environment itself. In the light of the input of the Special Rapporteur on Education Tomasevski, ‘acceptability’ also includes identifying an acceptable regulatory role for the state with regard to the enjoyment of a particular right, to set and enforce rights standards (Tomasevski, 1999: para. 62). Therefore the state is obliged to ensure that minimum criteria are developed and complied with by relevant actors, as well as to ensure that these standards are acceptable. The EIA procedures fail to meet criteria of acceptability and quality as seen in the cases of Cobre Panama mine and Barro Blanco dam. In fact, EIA processes are not acceptable as they do not consider the social and cultural specificity of communities, in these cases the indigenous dimension.

The adaptability criterion is similar to the acceptability and quality ones, as it refers to the object of the right being flexible enough. However, it stems from a progressive view of human rights that see rights adapting to new threats and needs (Donnelly, 1989, cited in Freeman, 1994: 505). The right to health for example, does not mention adaptability within its criteria, but it refers to ‘acceptability’ within medical and professional ethics, culturally appropriate and gender sensitive, as well as to ‘quality’ in terms of scientifically robust, appropriate and dignified treatment (UN/CESCR, 2000a). Though, the right to education does, recalling the needs of changing societies and communities and the diverse social and cultural settings (UN/CESCR, 1999: para. 6, d). Adaptability could refer to the need to adapt laws

and regulations to facilitate public participation in a wider range of regulatory activities, such as permitting, enforcement, and development of regulations and policy guidelines (Lucas, 2002: 316). Considering all the man-induced changes in environmental patterns, the adaptability of the RHE refers to the need of making the environmental governance system responsive to the local and global rapidly changing realities, as already pointed out by Ksentini (Tomasevski, 1999: para. 71). Adaptability would also refer to the knowledge, skills and values that the generation of future adults will need to perform successfully in both a local and global environmental governance regime (Tomasevski, 1999: para. 72).

The adaptability criterion is a measure for right implementation with a forward-looking character. In contrast with acceptability and quality criteria, adaptability is a practice driven, rather than content driven, criterion susceptible also to the evolving paradigms of governance and human rights. Adaptability is a relevant criterion for the notion of participation as a permanent and responsible process. In fact, it contributes to the identification and evaluation of categories of involvement and awareness-raising in participatory processes which have multiplying effects on the exercise and enjoyment of human rights (see Table 3).

Evaluation of environmental governance (environmental democracy)	<b>AVAILABILITY</b>	<b>ACCESSIBILITY</b>	<b>ACCEPTABILITY</b>	<b>ADAPTABILITY</b>
<b>Access to information</b>	Recognizable environmental institutions with a clear mandate	Accessible to all and timely	Flexibility in content appropriate to social, cultural and economic context	Flexibility in practice. Timing according to needs. Positive actions for expanding knowledge and provide means for future skills
<b>Public participation</b>		Physically accessible: location and decentralization	Confidence in representatives capacity	Environmental governance system responsive to changes in goals, values and interests. Supporting mechanisms (expertise) for vulnerable peoples.
<b>Access to justice</b>		Economically accessible: free service and allocated resources to unburden the most vulnerable	Establishment of standards of practice and rights standards for regulatory roles. Technical, social science and human rights competencies	Forward looking character: future skills needed

**Table 3** Identification of 4As criteria for procedural rights.

The 4 As criteria might contribute to the participatory effort of civil society in a twofold manner. First, they provide benchmarks to seek redress for public participation violations or to formulate adequate redress mechanisms. Second, the 4 As criteria fill a gap in the procedural approach as they expand the limited interpretation of participation (as merely providing ‘information’) to broader forms of consultation with substantive aims. In fact, these criteria provide the platform for public participation to move beyond consultation to continuous, informed and free consensus. The process to reach consensus unlocks potential for channelling substantive human rights claims that culminate in meaningful participation.

Public participation informed by 4 As criteria can in itself contribute to generating a sense of the public. Also the criteria underpin the idea of reliability as well as awareness, privileging a non-discrimination and equality perspective and ensuring basic standards are met, can advance social justice claims for equal access.

Rowe and Frewer (2004) analyse universal measures to evaluate whether a participatory process, understood as an initiative in which sponsors requires some sort of public input, has been successful or not. Analysing a number of case studies of participation mechanisms’ evaluation, they list general criteria in reference to the effectiveness of the process and/or outcome. They admit that measuring participation effectiveness is difficult as it is a multidimensional process and prone to values bias and subjective interpretation. However, the four As criteria can function as the comprehensive framework to present evaluation criteria of public participation while guaranteeing an objective perspective based on human rights principles of universality, transparency and equality.

Evaluation of public participation processes, regardless of the mechanisms chosen, can be carried out through the application of the 4 As scheme, translating human rights duties and entitlements in categories of evaluation (see Table 4). Availability and accessibility criteria can evaluate processes of participation. Acceptability and adaptability measures can provide evaluation measures for outcomes. Availability criteria of participation can evaluate whether there have been, or have been provided, sufficient opportunities for participation. Non-discrimination and equality in process can be evaluated by accessibility (equal access, physical, economic) criteria. Acceptability criteria can provide a way to evaluate whether participation is context appropriate, but it can also provide a quality check for outcomes. Adaptability criteria measure the capacity of the participatory processes to have public generating and empowering effect.

**Table 4** Identification of 4 As criteria for evaluation of 'meaningful participation'.

View-point of participation	Quality of participation	Availability	Accessibility	Acceptability	Adaptability	Cross-evaluating criteria	
Outcome	Transparency		Disclosure of intended role of participants	Influence or feeling of empowerment	Awareness raising impacts: generation of the 'public'	Adaptability	
	Fairness		Interaction between participants and sponsor and among participants	Perceptions (participants, sponsors)	Involvement in value and interests	Adaptability	
Process	Equality and non-discrimination	Sufficient opportunities	Representativeness of the 'public'	Flexibility of participation: appropriate to social and cultural context	Degree to which policy outcomes match the goals of the people affected (Parkinson, 2006: 23, cited in McLaverty, 2011: 412)	Adaptability	
			Allocated resources			Economic accessibility	
			Positive actions to redress vulnerability: language (translator); education (support with expertise, attention in communication methods and means); gender/racial/power bias (mechanisms for inclusion)			Acceptability	
	Decentralization of decisions	Physical accessibility					
	Transparency	Frequency	Timing and timeframe (when and how long)			Confidence in process legitimacy	Degree to which outcomes achieve normatively justifiable or desirable ends (Parkinson, 2006: 23, in McLaverty, 2011: 412)
Defined mechanisms of participation		Social science methods application		Quality			

A  
v  
a  
i  
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l  
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t  
y

The 4 As criteria of RBA can provide guidance for defining ‘meaningful participation’ and provide access rights the political space to challenge power. The next section evaluates UN Special Rapporteur Knox ‘good practices’ applying the 4 As criteria formulated.

#### **6.2.4 Comparing procedural good practices in environmental policy making and 4 As criteria for the RHE**

Knox (2015) mapped instances of ‘good practices’ of human rights obligations in environmental policy making, which are those practices that “integrate human rights and environmental standards, including the application of human rights norms to environmental decision-making and implementation or the use of environmental measures to define, implement and (preferably) exceed minimum standards set by human rights norms. The practice should be exemplary from the perspectives of human rights and of environmental protection, and there should be evidence that the practice is achieving or working towards achieving its desired objectives and outcomes” (2015: para. 13). The assumption behind this mapping exercise is that human rights obligations are adequate to fulfill environmental purposes, especially in the sector of participation and access to justice. This researcher use these good practices as benchmarks for the definition and implementation of the 4 As criteria elaborated above. Lessons learned from the case studies are also briefly reflected upon. The basic argument is human rights based approaches alone cannot address all the issues of environmental contestation. It also finds overall, that it requires a more complex and progressive practice of rights that is reflected in the RHE.

Concerning the obligation to facilitate participation, Knox (2015) lists four types of good practices: EIA procedures (para. 44), platforms for e-participation (para. 43), interactive maps (para. 45) and consultative councils (para. 46). The first type, or set of good practices are EIA procedures which provide very limited opportunities for participation. The procedures are not a set of instruments to facilitate participation, but a means of reducing participation to minimal information and consultation. If a 4 As approach to RHE (ie. RBA to RHE) was to be applied, the EIA procedures in Panama would not meet minimum requirements of accessibility, availability, acceptability and adaptability.

For what concerns the second and third set of good practices, online platforms and interactive maps can act as useful tools that enable information access and participation. However, vulnerable groups who are most affected, such as indigenous people, are least able to use such tools to exercise access rights. Online platforms and mapping tools might have the counter effect to increase marginalization and exclusion from the participation process.

The fourth set of good participation practices are consultative councils or committees. In Panama, even though prior relevant law existed, consultative committees were not established until recently (2014-2015) with the new government. In fact, these committees depend highly on the government willingness

to ask for opinions and might suffer from conflict of interests, independence and legitimization issues if they lack transparency and accountability mechanisms (see Webler et al., 2001 on responsible leadership).

Mexico has made recent efforts to formulate an index for assessing participation which should evaluate: public participation, transparency, inclusion, equality and citizens' complaints (Knox, 2015: para. 49; SEMARNAT, 2014). The index is purely of quantitative nature. It does not consider the 4 As criteria of a human rights based approaches, limiting itself to the number of people that participate differentiating between men and women to make sure a gender perspective is applied. Indigenous peoples and youth are 'complementary data', which point to a tokenistic status for these groups. They are an afterthought and do not imply special procedures for inclusion and equality. Finally, the index falls short to assess the influence of public participation in the decision-making process.

Knox's 'good practices' for environmental participation therefore appear problematic as it is questionable which are the "desired objectives and outcomes" (Knox, 2015: para. 13). The four types of good practices listed are undoubtedly forward looking and modern tools to feed the procedures and participation as an end in itself. However, they are not sufficient in assessing whether the outcomes of procedures are fair and equal. The application of 4 As criteria would complement these good practice giving due importance to the negotiation of outcomes and equality and non-discrimination in the process.

For what concerns access to justice, good practices listed by Knox (2015) recommends four types: establishment of environmental tribunals (para. 57), judicial facilitators (para. 64), appointment of ombudsperson(s) for future generation (para. 69), investigation and reporting mechanism in regional environmental agreements (para. 71). All these good practices are thought with the aim to ensure access to courts and availability of redress mechanisms. However these mechanisms can only deliver criminal justice. According to Mamdani (2014), the dominant tendency in the human rights movement is to narrow the meaning of justice to criminal justice, applying an individualizing notion of justice in neoliberal fashion. The complex character of environmental disputes and RHE in the context of Sustainable Development push human rights towards wider questions of political and social justice which are qualitatively different in comparison with criminal justice. Political justice aims to reform the political system, affecting groups rather than individuals. At the same time, political justice aims for change, not limiting itself to redressing past wrongdoings or to the categories of perpetrators and victims, but it broadens its reach to the future and the groups that needs to coexist and build a common future. Mamdani uses the term 'survivors' justice' to speak about the desired social and political change in the context of post-apartheid reconciliation process in South Africa. Social justice aims at equality and non-discrimination in the economic and social sphere which deeply influence the notion of political justice. Political reforms should aim to break the cycle of poverty and exclusion that constitute issues that drive violence. Judicial mechanisms that strive towards political and social justice

therefore focus on the link between creating an inclusive political order and an inclusive rule of law order, reflecting on the relationship between politics and law (Mamdani, 2014: 22).

Access to justice practices should strive to adopt a precautionary approach to fit the expansive demands for social and political justice within the limitations of the biophysical environment. The judicial good practices presented by Knox, instead, appear to prefer a violations-centred and criminal-oriented approach which might not be able to redress the shortcomings in access rights or the requirements of social and political justice.

The role of judicial facilitators could provide a softer access to justice approach, preferring mediation. In fact, they are intended to provide technical assistance to individuals in the preparation of claims, mediation between parties, and assisting in the assessment of damages. This good practice has been implemented across Central America by the Organization of American States. However, the aim of the ‘judicial facilitators’ programme is to facilitate access to justice in general and are not dedicated to environmental justice. In addition, judicial facilitators are supposed to be leaders of their communities, which might not redress that power imbalance that is typical of environmental issues.

A promising good practice in Hungary is the establishment of ombudsperson for future generations, which has the authority to initiate or participate in investigations and submit petitions for cases regarding environmental protection (Knox, 2015: para. 69). This future-orientedness reverts to the solidary character of the RHE, highlighting it as an element of human rights obligations (Wellman, 2000).

Having defined evaluation criteria for public participation as well as benchmarks for duties of the RHE, this researcher ventures in a tentative interpretation of the substantive component of the RHE.

### **6.2.5 Substantive interpretation of RHE**

Drawing from the interpretation of the right to health, the right to a healthy environment, could contain both freedoms and entitlements. The notion of healthy environment is changing and widened in scope (compare para. 10 of UN/CESCR, 2000) and it does not refer to the realm of environmental protection. Resource distribution, gender differences and access to resources are all elements to be taken into consideration as well as participation and democratic decision-making. Economic and social factors, changing lifestyles, dictate a new sense of the environment we live in. The substantive RHE could refer to the right for all individuals to be protected from environmental degradation, which is one of the notions of environmental justice (Pedersen, 2010). Though, the greatest advantage of the concept of environmental justice is that it facilitates debates beyond environmental issues, encompassing also laws and decisions (Pedersen, 2010). Therefore, as a superficial understanding of the RHE might indicate that everyone should be free to live in a non-contaminated environment, the RHE is more

importantly affirming that everyone is entitled to equal and non-discriminating opportunity to participate to environmental decision-making.

The RHE as an inclusive right extends from the environment per se or the human environment to the mechanisms through which underlying determinants of the natural and human environment are affected. These mechanisms refer to the stages of decision-making process that define needs, resources and risks. Thus, the RHE includes entitlements and freedoms in deciding development.

Participation is the core of the RHE as it underpins the notion of human and resources mobilization to overcome inequalities, discrimination and exclusion. Through participation peoples can collectively define their needs and protect, exercise and enjoy their rights, but it must involve “genuine ownership or control of productive resources such as land, financial capital and technology” (UN, 2013: 60). Thus, the RHE spills over to encompass other rights and ultimately questions resource distribution and access, and the right to development (compare para. 11 of UN/CESCR, 2000). Under the RHE, entitlements include the right to a system of environmental governance which provides equality of opportunity for people to enjoy the highest attainable standard of sustainable development. The right to a healthy environment is a right to a system of environmental governance to advance sustainable development based on the principle of precaution, CBDR and equal inter and intra generational access to resources. A healthy environment is achieved when it balances the competing goals of sustainable development, reclaiming the importance of social development as substantive equality in the context of access to resources, benefits and burdens, wealth redistribution and improvement of social conditions (see e.g. Ishay, 2008).

For what concerns the obligations that impose on the state, human rights impose substantive obligations on the states to establish an adequate legal and institutional framework for environmental protection (Knox, 2013a, 2013b, 2014a, 2014b).

Mirroring the right to health (UN/CESCR, 2000: para 37), *The obligation to fulfil (promote) the right to a healthy environment requires States to undertake actions that create, maintain and restore the health of the environment. Such obligations include: (i) fostering recognition of factors favouring positive environmental results, e.g. research and provision of information; (ii) ensuring that environmental procedures are culturally appropriate and that environmental institutional personnel are trained to recognize and respond to the specific needs of vulnerable or marginalized groups; (iii) ensuring that the State meets its obligations in the dissemination of appropriate information relating to environmentally friendly lifestyles, harmful traditional and modern practices and the availability of services; (iv) supporting people in making informed choices about their environment. As violations of the RHE can occur through the direct action of States or other entities insufficiently regulated by States (UN/CESCR, 2000: para. 48), states should have*

the obligation to monitor and control non-state entities that are in charge of participatory process, for instance the EIA.

In the next section, the RHE is explored as a vector of human rights and sustainable development, which recovers human rights indivisibility in an innovative form: challenging the assumption that human rights are individual, apolitical and they are justiciable only upon violation.

### **6.3 Recovering human rights indivisibility: the Right to a Healthy Environment as a vector of development and solidarity rights**

A substantive interpretation focused on a 4 As' RBA points to the following elements that are missing or underspecified in the RHE: benefits sharing, access and use of resources, non-discrimination and equality, precaution and CBDR. The sustainable development context contains all these elements and suggests that the RHE, challenging traditional conceptualization of human rights, might find within the sustainable development paradigm the means to be operational and to convey in an innovative manner universal and indivisible human rights content.

The UN Special Rapporteur on Human Rights and the Environment Ms Fatma Ksentini observed in 1994 that without participatory democracy in environmental matters, the concept of sustainable development (SD) is without substance. This brings into the frame the Right to Development claim that all citizens should meaningfully participate in processes of development, but they must also benefit substantively, without discrimination or exclusion (Sengupta, 2001).

In the following section, the RBA to RHE is described as a vector of human rights complementary to the Right to Development, as it focuses on the process of deliberation and legitimization as well as the outcomes. The RBA to the RHE demonstrates that the notion of indivisibility of rights can be operationalized through the exercise of the RHE and access rights. The substantive base of the RHE becomes more evident in the light of the negotiation process of the SDGs, which shows an attention to the process of collective legitimization of fair and realistic outcomes. Finally, a brief overview of the new human rights/development/governance indicators that are being elaborated is described to highlight the central role of the environmental dimension which calls for a shift towards a more comprehensive policy making.

#### **6.3.1 Indivisibility and futurity of rights: drawing complementarities between the RHE, the Right to Development and Sustainable Development**

The principle of indivisibility of rights indicates that there should be a co-realization of human rights and that no right can be implemented in violation of another. The Right to Development has been the first attempt to vindicate the indivisibility of rights to the point of constituting its substantive nature. The right to development has been defined an umbrella (Malhotra, 2013: 388; Rosas, 2001: 129) or 'vector'

(Sengupta, 2000) right because of its nature of integrated framework of human rights. As Ksentini pointed out (1994: para. 49), the RHE and the Right to Development share the notion of the indivisibility and interdependence of all human rights as underlying links. Ksentini (1994: para. 49) also ventures that it is *impossible to separate the claim to the right to a healthy and balanced environment from the claim to the right to “sustainable” development, which implies a concentration of efforts to combat poverty and underdevelopment*. The progressive and forward-looking understanding of Ksentini in analyzing the state of the relation between the environment and human rights is further reinforced by the application of RBA to the RHE. In fact, because of its strong normative base and its non-discriminatory character, RBA underwrites a meaningful participatory process vindicating the indivisibility of rights, equal distribution of resources, transparency and accountability. The RHE also embraces the characteristics of solidarity rights, taking into consideration the Right to Development of future generations (Draft Declaration, 1994: art. 4) and their right to a healthy environment, to sustainable development and peace.

Ksentini's report, when linking RHE to the right to development, raised questions on the relationship between these two rights and what their interaction might be. Atapattu (2002: 125-126) addresses this relation by suggesting that both rights are mutually reinforcing and a unique right to sustainable development would be more appropriate to reconcile environmental protection, economic development and rights of future generations.

In the context of the interaction of human rights and development explored by Fukuda-Parr (2009), this researcher believes the RHE is an expression of the RBA to development which refers to the struggle of peoples for development to realize their human rights. In this view, several differences between the right to development and the right to a healthy environment can be identified on both the substantive as well as the procedural level. Despite these two rights sharing the application of the human rights principles of indivisibility and interdependence, participation as well as equality and non-discrimination, different understandings of the substantive components of human rights makes the RHE more practical than, but complementary to, the aspirational Right to Development: a different and more expansive conceptualization of the categories of collective right holder and duty bearer which affects the conceptualization of justice and equity, and a reconfiguration of the multiple development discourses.

The Right to Development might be viewed as a right of less developed states for a more favorable international economic order for development. The duty bearers are those developed states that have benefited, and continue to benefit, from other states' resources through colonization and its legacy. The Right to Development, emphasizing the struggle for control over natural resources and self-determination, gives rise to international obligations of states to formulate appropriate policies – to enable a more equitable economic order - and provide international cooperation (Beetham, 2010). Claims to the Right to Development belong in the international

negotiations on human rights treaties, to exert ‘pressure’ on the richer countries to comply with the obligation of financial aid.

The RHE is configured as both an individual and collective right, which includes more or less defined types of collective from indigenous peoples to non-homogenous public interest driven local and regional communities as well as the global civil society (peoples as distinctive groups separate from state or the territorial entity in question, Alston, 2001: 292). While the co-realization of the constituent rights of the Right to Development requires international cooperation and support, the RHE promotes and engages mainly with national and regional dimensions of citizenry as it emphasizes bottom up approaches to participation. Answering to both traditional and progressive perspectives of human rights, the duty bearer is the state but also a plurality of states within an international order: could it increase the capacity to trace accountability and remediate injustice amid the transnational nature of the environment and the distorting effects of scattered sovereignty, transnationalization of law and plural legal orders (Randeria, 2003a; ICHRP, 2009)? The state and state law retain the centrality of their role as guarantors of human rights (ICHRP, 2009), therefore they have the duty to monitor, manage and equitably share natural resources (art. 22, Draft Declaration, 1994). Access rights challenge the assumption that the state acts in the public interest and provide multiple avenues to hold the state accountable for human rights violations, as Randeria (2003a) explains that states may act as ‘cunning states’, in favour of neoliberal deregulation rather than the protection of citizens or the vindication of their rights. Similar to the Right to Development, the RHE’s duties apply also to individuals, international organizations and transnational corporations (Draft Declaration, 1994). While access rights’ duties are imposed on the state, further obligations on other actors can be identified through the exercise of access rights.

The RHE, complementarily to the Right to Development, might expand claims for equality within and among countries through the application of the Common But Differentiated Responsibility (CBDR) principle, as already described in Chapter 4, section 4. 7. Considering that increased income inequality and poverty are obstacles for the realization of ESC rights (Eide, 2001b: 555-558), full vindication of these rights “would require a redistribution of power and resources, both within countries and between them” (Beetham, 1995: 43, cited in O’Connell, 2012: 207). Socio economic rights call for redistribution of balances of power and resources. By the same token, as many of the constitutive elements of the RHE belong to the ESC rights, the RHE calls for redistribution of power and resources in a more equitable manner. The differentiated obligations of CBDR tackle the issue of substantive equality acknowledging the historical and political nature of states’ relations as well as existing inequalities (Cullet, 2010). The CBDR principle therefore can contribute to the RHE as a solidarity right to recognize and act on this globalized inequality looking both backwards into historical reparation and forward into intergenerational solidarity by virtue of the object of the right, the global environment, viewed as a physical common (Brown Weiss, 2002).

The realization of the finiteness of environmental resources contributes to distinguish the RHE from the right to development and justifies the more expansive and interconnecting conceptualizations of human rights and environmental law principles used by the RHE. The conceptualization of the right to development required a bridging between human rights and development discourses, than becoming itself functional to close the gap between the two. The RHE, instead, is the result of the bridging of several discourses - human rights, democracy, development and environmentalism. These discourses form part of its conceptualization and each one of them contributes to the realization of human rights in different realms of social interactions.

The RHE is rooted in the finite nature of the environment, described by those frameworks determining environmental limits the planetary boundaries approach and the notion of environmental space (Rockström et al., 2009). This leads to two recognition: first, the RHE can be embraced by the sustainability framework which is normally removed from the human rights discourse; second, the RHE can contribute to adopt a radical understanding that human rights violations need to be addressed before rather than after they occurred.

The core difference between the RHE and the right to development is to be found in the critical understanding of the finiteness of environmental resource base (Arrow et al., 1996: 14) and of human actions being the main driver for environmental changes which might be irreversible and abrupt to the extent of leading to a state of the environment less conducive to human development (Rockström et al., 2009: 472). There are different cognitive frameworks to measure environmental limits - carrying capacity, ecological footprint, planetary boundaries and environmental space (Khou, 2013b). The importance of these frameworks for this research is to provide a sustainability policy platform to include human rights through the application of the RHE and to provide these platforms with the necessary tools for participatory decision-making and substantive equality which they lack.

The concept of carrying capacity is traditionally defined in terms of the size of population that could be sustained within a particular ecosystem or region or more generally the capacity of the planet to generate material production in the future (Arrow et al., 1996). Similarly, the ecological footprint concept compares human demand in resource consumption against the earth biocapacity, which is the availability of productive land areas to regenerate (absorbing pollution and waste) and provide useful raw materials (Wackernagel and Rees, 1996; Bührs, 2009; Smith et al., 2014). Despite criticisms of various shortcomings of these measures (Arrow et al., 1996; Bührs, 2009; Smith et al., 2014), these conceptualizations of ecological footprinting bring the precautionary and CBDR principle to policy and practice. The planetary boundaries framework “define the safe operating space for humanity with respect to the Earth system and are associated with the planet’s biophysical subsystems or processes” (Rockström et al., 2009: 472), which are sensitive around threshold levels of key variables. Normative judgement and societies’ risk aversion are involved in determining a ‘safe distance’ from the thresholds (Rockström et al., 2009: 473).

A wider outlook is presented by the environmental space notion which offers a two-pronged framework, respect for ecological limits and equal access to resources, to enhance legitimacy of global environmental governance and contribute to implementation of sustainability policies (Bührs, 2009). Similar to the above-mentioned measures for environmental limits, the environmental space notion aims to determine the level of pollution and waste absorption is ecologically sustainable to calculate the allowable amount of resource consumption on a geographical basis. Though, it widens the reach of the framework promoting equal share of available resources' consumption on a per capita basis. The environmental space notion falls short of, or does not see the benefit in, extending the equity principle to resource ownership.

The environmental space framework operationalizes the Precautionary Principle by determining thresholds of irreversible damage as well as the equality principle, by advocating for equal sharing of available resources. These characteristics mark a strong complementarity with the RHE. The environmental space notion, as well as the other conceptualizations above mentioned, fall short to consider the complex social, cultural and economic variables that might undermine the capacity to enact equal sharing of both responsibilities for environmental degradation and rights to access to resources. This critical issue of equality is best addressed by a RBA to the RHE, which can enhance the environmental space approach redressing equity over resource ownership to enable equal consumption through democratic choices. Bührs (2009: 130) affirms that the notion of environmental space, formulated in a right within the international law framework, can be used as a basis for processes that enhance democracy and community control over the use of resources. The existing human rights framework and in particular the access rights provided by the RHE have already the required tools for the implementation of participatory processes for enhanced democratic decision-making and fairer outcomes over matters of resources use and access. In sum, this thesis argues that the RHE can contribute to introduce human rights in sustainability policy making and add value by combining the necessary insights on values and interests as well as benchmarks for fair outcomes of sustainability policies.

The RHE provides a platform unifying and operationalizing human rights and environmental principles in a rights based way. A RBA to the RHE can complement any of these technical framework described above as it applies a precautionary approach in virtue of environmental limits and the principle of equality and non-discrimination for the ownership and consumption of resources. The solidarity principle and the CBDR principle can contribute to enhance the global dimension of the environmental space notion (as well as the carrying capacity and ecological footprint). Considering resources as global, the RHE provides the normative platform for both equal access and respect of ecological limits to identify duties and responsibilities and to redress intra and inter-generational inequality within and among countries. On the other hand, local democratization and community control over access to and use of resources is already embodied in the RHE through the application of access rights.

The definition of limits on exploitation and consumption of resources aims to ensure that quality of life is enhanced or maintained (Bühns, 2009: 113). Therefore, these frameworks on environmental limits impose a new approach in evaluating human conduct in order to protect Earth's carrying capacity. If it incorporates the principle of environmental limits, the RHE has the potential to create a shift in how violations should be perceived. As Fallon (2006, cited in O'Connell, 2012: 12) suggests, it is difficult for courts to uphold a substantive right if there are no adequate remedial actions to be taken. Courts that only provide criminal and individual justice fail to characterize substantively the RHE. A notion of justice that redress drivers of violence within existing political, social and economic structures – discrimination in access to, and decision over, resources - to avoid further events of violation might be a more appropriate framework for the RHE. Because environmental wrongdoings have repercussions on the global sphere and future generations, the RHE might be more suitably claimed in a precautionary, rather than in violation-based, manner. It might be argued that the RHE is a vector of human rights that are exercised in the political and social realms in order to prevent violations.

The highly charged political nature of participation transfer to the human rights exercised and enjoyed through the RHE. Participation has its economic, social and political dimensions. It is political because it presupposes a choice and is social as it relates to the process of decision-making (*ex ante* participation). Participation also relates to material outcomes, as it calls for participation in benefits (*ex post* participation) which in turn presupposes a change in the use and allocation of resources in society which renders participation inescapably political (Cohen and Uphoff, 1980: 228). In the same fashion, Precautionary Principle and CBDR interact with participation and human rights as they support calls for political and social justice.

The position this thesis has advanced so far on RHE is in line with the attempts to define a post-2015 development agenda, since it applies a rights based approach to development with the aim to achieve sustainable development through the realization of all human rights, with a particular emphasis on the principles of indivisibility, non-discrimination, transparency and accountability, intergenerational and intragenerational equity.

### **6.3.2 RHE and SDGs: relevant implications on the process of participation**

The arguments made so far about RHE should be both timely and relevant in the light of the negotiation of the new Sustainable Development Goals (SDGs), which should be an important avenue for human rights to be taken into account in a pervasive, meaningful manner (Knox, 2014a). A description of the process, content and early critique of the SDGs suggest that they could be located within the RHE narrative that this research has elaborated as a convergence of human rights

principles – indivisibility, equality and non-discrimination, environmental law principles – Precautionary Principle and CBDR - and 4 A's criteria of access rights.

The SDGs process is one of the outcomes of the Rio+20 Conference (2012f). Building on the Millennium Development Goals (MDGs) and converging with the post 2015 agenda, it was established as an unprecedented, broad and inclusive global development process (UN/GA, 2014: para. 19) "open to all stakeholders, with a view to developing global sustainable development goals" (UN/GA, 2012b: para. 248). The most progressive element of the SDGs lies in that broad consultations have been carried out to include opinions on what they should look like from as many stakeholders as possible. The UN conducted global conversations, international and national consultations, a world survey through a web portal, in order to craft a development agenda that builds on the successes of the MDGs and yet addresses broader challenges related to sustainability.

The universal agenda for Sustainable Development is a roadmap composed by 17 goals to achieve peaceful, just and inclusive societies based on the respect of human rights (Zero Draft, 2015). This agenda for global action is a new "charter for people and the planet", with the potential to redefine the development discourse, focusing on the implementation of realistic standards, bridging the local, regional and global actions, and emphasizing the Common But Differentiated Responsibilities Principle.

The proposed Sustainable Development Goals framework, addressing more systematic barriers to SD –inequality, weak institutional capacity and environmental degradation – and carrying out an inclusive consultation process, has positively distanced itself from the MDGs which failed both these tasks. However, early analysis argues that SDGs would benefit from an overall narrative articulating how the goals will lead to broader outcomes for people and the planet (ICSU and ISSC, 2015). Several authors argue that SDGs' problematic points are the excessive emphasis on resource-intensive economic growth (Bhattacharya et al., 2014; Kumi et al., 2014; Muchhala and Sengupta, 2014; Death and Gabay, 2015), climate change and private sector development funding (Muchhala and Sengupta, 2014; Death and Gabay, 2015). Its global scope also raises some questions on the opportunities and shortcomings SDGs might encounter (Kumi et al., 2014; Death and Gabay, 2015). However, the most evident of these problems is the absence of human rights. Aside from an explicit mention in paragraph 10 of the Declaration, the SDGs themselves are as distant as ever from human rights. However, Ramcharan (2015: 2) notes that human rights are not mentioned but "fully amenable to the adoption of specific language". This researcher notes that the wording describing SDGs as being integrated, indivisible and global evokes the human rights law principles of indivisibility, interdependence and universality. Goal 16, promoting peaceful and inclusive societies for sustainable development, embodies the concepts of governance and access rights. Its targets recall the RHE and its procedural components as it promotes: access to justice (16.3); accountable and transparent institutions (16.6); responsive, inclusive, participatory and representative decision-making at all levels (16.7); broader participation in global governance institutions

(16.8); access to information and protect fundamental freedoms (16.10); promotion of non-discriminatory laws and policies (16.b). Solidarity rights might belong to Goal 10, which reaffirms the principle of inter and intra-generational equity and Goal 15 (target 15.6) which calls for equitable share of benefits and access to resources.

Applying a RHE based approach to SDGs might be beneficial and might contribute to redress imbalances towards ‘green’ economic growth and privatization. As SDGs’ standards are nationally-owned and each country needs to translate and implement them according to financial and cultural context, mainstreaming a RBA to SDGs might impulse a shift from idealistic notions towards a more practical interpretation of rights. Despite the already identified shortcomings of SDGs, the use of participation as empowerment (Arnstein, 1969; Lucas, 2002) for collective identification and legitimization of the SDGs might support the change towards a new era of human rights in practice. Human rights based SDGs might be a much more usable political currency and might provide a ‘global’ framework to balance universality of human rights and the relativity of rights in practice through the application of solidarity, the right to development and the CBDR principle.

For the effective exercise of access rights and the integration of the RHE into the sustainability discourse, structural changes might need to take place. For instance, it is fundamental to build the capacity of the public to be able to access, understand and use relevant information to engage in meaningful participation. Principle 17 of the Draft Declaration proposed by Ksentini in 1994 affirms that right to environmental and human rights education, which is not usually listed with procedural rights, is a *conditio sine qua non* for the meaningful exercise of access rights. Since the role of the state is “to set educational strategy, determine and enforce educational standards, monitor the implementation of the strategy and put in place corrective action” (Tomasevski, 1999: para. 42), states should promptly consider reviewing curricula and providing new instruments for the young generations to exercise access rights. In addition, in order to promote participation by all sectors states should promote environmental awareness and education among the general public for the purpose of contributing to the effective application of access rights, providing people with knowledge, capacity and understanding so they can participate in environmental decision-making (ECLAC, 2015: Article 5; para. 4).

An important indication of more comprehensive policy orientation is provided by the development of new methodologies and indicators of how the environmental dimension matters in human life. Two indicators are promising for the RHE and the SDGs. First, the Environmental Democracy Index (EDI), built on the work of The Access Initiative, is the first comprehensive index designed specifically to measure procedural rights in an environmental context (see Box 2). The International Union for Conservation of Nature (IUCN) is developing the index of Human Dependency on Nature (HDN) to provide policy makers from the development, environment and other sectors with an independent assessment of the degree to which natural ecosystems and wild resources contribute to the needs of rural and coastal

communities as a proportion of total household income and their role for food and nutrition security (IUCN, 2012: 67; see Box 3). The Access Initiative provided a standardized format for contextual description and documentation. EDI with its scoring system, is a step further in classifying and monitoring possible violations of environmental rights, and has already provided insights in regional patterns of rights promotion and violations (see Landman, 2009 on human rights measures). The HDN, recognizing the role of natural resources in livelihoods of vulnerable communities, could contribute to a wider application of access rights, as well as to widen the constituencies of rights holders in practice, and provide new avenues for human rights exercise in policy making.

This chapter attempted to further the understanding of the RHE applying a hybrid rights based approach. In particular, this chapter attempted to elaborate on the substantive component of the RHE detailing 4 As' criteria tailored to the RHE and to 'meaningful participation'. Complementing the RHE with the development framework, the RBA to RHE is expanded through the right to development and the environmental principles of precaution and common but differentiated responsibility, and may contribute to recover the indivisibility of human rights. Lastly, RHE relevance in the current discourses on sustainability and sustainable development is clarified, especially in connection with the recently agreed SDGs and newly designed indicators.

The following chapter concludes the thesis and highlights the critical elements that have been researched and understanding reached.

**Box 3. The Environmental Democracy Index (EDI).**

EDI establishes a centralized hub of legal analysis and implementation data on procedural rights assessed against the international standards set by UNEP P10 Bali Guidelines (2010). The index is featured on an interactive web-based platform allowing users to compare and assess countries' performances at aggregated and disaggregated levels. The index provides a comprehensive evaluation of environmental democracy pinpointing the strengths and weaknesses of states' environmental legislation through guidelines and indicators that are scored individually and supported by legal evidence. The future of EDI is to score on the implementation of access rights and to carry out evaluation every two years to ensure that the scores remain relevant and useful.

At the time of its official launch in May 2015, EDI scores showed that:

- freedom of information laws are widely present;
- environmental cases have been heard before judicial courts;
- the access right to participation still lags behind;
- EIA process is improving but not to a sufficient point for the realization of access rights;
- high EDI scoring often corresponds with high GNP but there are exceptions which suggest

that lack of resources is no excuse to limit access rights' realization.

Overall, countries parties to the Aarhus Convention do score higher than others, suggesting that international legislation on access rights is functional to raise the standards of rights protection and promotion at national level (EDI Webinar, 2015).

Practical limitations of EDI website and analysis are that it does not show in any manner the effect of international environmental legislation on states' score and it does not aggregate regional results. On a substantive level, EDI, as it is stated, does not score implementation of access rights. In addition, the index evaluates only national legislation and does not include subnational laws and regulations, which might hide some legal inconsistencies and overlaps. It will be certainly interesting to see future scoring of EDI on the matter of implementation and how it will affect the advancement and expansion of access rights within environmental context.

**Box 4. The Human Dependency on Nature (HDN).**

The index aims to improve the sustainable management of natural resources to better meet local needs and help target national development and conservation policies (IUCN, 2012: 67). Since the Index will encompass human, socio-economic and cultural dimensions, it might have a positive effect on EIA processes and the social impact assessment. In fact, it fills a gap in the mechanisms for decision-makers to systematically consider use of biological resources flowing from a spectrum of habitats vital to local livelihoods prior to any interventions (IUCN, 2015).

The HDN gives added meaning to the ecosystem services approach, considering the human benefits of natural habitats in terms of food and nutrition, health and medicine, energy, materials and fibres, and clean, safe and available water, but also considering cultural norms, values, identities, and beliefs often underpin this material utility (IUCN, 2015). Measuring the use and reliance on ecosystem services and their contribution to improving local livelihoods and well-being in a more integrated manner might result in a critical change in development policies.

The HDN, focusing on safeguarding sustainable, nature-based solutions embedded in local human-ecosystem relationships, has broad potential for application, with implications for food systems and food and nutrition security, poverty alleviation, climate change adaptation, large-scale infrastructure development and land use planning, and policy relevance for SDGs (IUCN, 2015).

## Chapter 7 Why the RHE matters. Concluding Remarks

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This research has analysed the contribution of the procedural approach – access to information, public participation, and access to justice - to address issues of environmental contestation within a human rights framework. Drawing on elements from different disciplines, it has examined international provisions for a Right to a Healthy Environment (RHE) and the modalities through which procedural rights negotiate competing claims of Sustainable Development (SD). The main research question is whether public participation can deliver meaningful access to decision-making process and inclusiveness.

There is a wide consensus in considering environmental protection as a pre-requisite to the enjoyment of internationally established human rights, especially the right to life, right to an adequate standard of living, right to health and right to privacy (IACommHR, 1997; ICJ, 1997b; UN/ECE, 1998; Atapattu, 2002; Shelton, 2010b; Knox, 2013a). The procedural approach, or environmental due process (Hunter et al., 2002: 1312), represents the rights-based approach (RBA) that is better suited to address environmental concerns within a human rights framework. Since it promotes a culture of participation in decision-making process that can challenge power (Gready and Phillips, 2009) and widen the political space (Jones and Stokke, 2005), the procedural approach enhances transparency and accountability towards environmental equity. A fair, inclusive and informed participatory decision-making process can be seen as the more viable solution to the protection of human rights and the environment.

Environmental procedural rights, while advancing environmental protection and environmental due process, fall short of achieving substantive protection of vulnerable groups and the substantive realization of the right to a healthy environment even where such rights exist and are enshrined in the constitution, as seen in the case studies of Panama.

There are several problematic points in this type of RBA that makes it not entirely adequate. The inherent limitation of human rights stemming from their narrow focus on individuality, criminal liability and apolitical discourse, contribute to view the environment as a factor or a variable in human rights, but not a critical vector of human development. The anthropocentric approach that identifies the role of the environment as an instrumental means to attain the right to life and health misses the social, economic and political claims that drive issues of environmental contestation. In addition, the environment with its finite planetary boundaries urges us to adopt a precautionary approach which is in stark contradiction with the human rights framework where justiciability depends on defined and specific violations.

The adoption of access rights as the preferred RBA to the environment indicates that the human rights framework can deal with environmental issues but it needs a more complex set of instruments and standards as it has to promote negative as well

as positive obligations, which encompass the notion of progressive realization, non-discrimination and special procedures. The rights to access information and justice are part of well-established civil and political rights and are perceived to be more quantifiable and factual. The procedural right to public participation is the most unclear as the procedural approach fails in providing any substantive goals, making it difficult to define ‘meaningful’ participation.

This research therefore elaborates on this unease about how the human rights framework treats environmental issues and if the RHE can provide substantive directions for the advancement of both human rights and environmental protection. Describing the RHE as a legal standard and the RBAs applied to environmental issues with particular attention to the procedural approach as the preferred RBA to the environment, it becomes clear that there are gaps in the discourse of human rights and the environment: the matter of public participation and the social and economic value of the environment within the sustainable development paradigm.

The RHE should provide the substantive goal of procedural rights, in terms of empowering communities to decide on their environment respecting planetary boundaries treating the environment as a global common, while sharing the benefits of access and use of natural resources. Therefore, this research explores the RHE as a fundamental human right which advancement and realization contribute to sustainable development. It explores its potential to mediate between competing interests within the sustainable development framework through meaningful participation.

The case studies from Panama suggest that issues of environmental contestation transcend the right to life and health encompassing claims of social justice and participation in decision-making. Environmental contestation channel claims fundamentally related to economic, social and cultural rights. The Cobre Panama mine case questions the role of communities within development. The Barro Blanco dam case indicates the need for redistribution of wealth, benefits and burdens. The Cerro Colorado mine case showed that environmental contestation channels claims for inclusive political participation. The Chan 75 dam case questions the capacity of the minority rights framework to deliver human rights protection.

Environmental procedural rights –access to information, public participation, access to justice - constitute an alternative, though still instrumentalist, rights-based approach that views the exercise of certain human rights as an essential means to achieve the goal of environmental protection (Shelton, 2009b). This procedural RBA to matters of environmental contestation is thought to reduce vulnerability and discrimination, promoting transparent processes for fairer outcomes, thus enhancing the political role of human rights. Being access rights at the crossroads between the environmental, democratic and human rights movement (Foti et al., 2008: 14), it is commonly assumed that their promotion automatically leads to a transparent and accountable environmental decision-making that improves environmental policies (UNITAR, 2008: 1; Shelton, 2010b) while it strengthens the role of the public and its

inclusion in the decision-making process towards social cohesion and environmental equity (ECLAC, 2013). The procedural approach is therefore very promising in statement, but it does not reflect the same optimism in reality. The Panamanian cases show that procedural rights framed within the EIA regulatory process can be downgraded to mere procedural requirements without a substantive influence on decision-making. In particular, the vague understanding of ‘meaningful participation’ impedes access rights to be a vector of transparency, accountability and human rights.

The UN Special Rapporteur Knox has continued to portray environmental rights as instrumental to avoid negative impacts on the enjoyment of human rights due to environmental harm (Knox, 2012, 2013b, 2014a). His main contribution lies in the advancement of understanding of human rights as a support to environmental policy making through access rights (Knox, 2013a). Yet, the human rights framework falls short of addressing substantive matters of sustainable development, self-determination, justiciability of ESC rights. In sum, procedural rights do not address claims for substantive equality and participation in sustainable development.

So far, it is the former UN Special Rapporteur on Human Rights and the Environment Ksentini (1990-1994), who has applied the most progressive approach to the analysis of human rights and the environment, reflecting on the link between the RHE and the Right to Development as well as the general environmental and development realms. Ksentini (1994: para. 244) came to the conclusion that the whole debate on environment and human rights rests on the notions of indivisibility and interdependence of all human rights. The Panamanian case studies demonstrate the deficiency in assuming a basic commensurability between environmental claims and developmental claims where the latter may exacerbates social conflict and polarize public opinion. Ksentini (1994: para. 49) builds a strong case for the relation between environment, human rights, development and democracy based on the common effort to combat poverty and underdevelopment. Recalling Article 28 of the Universal Declaration of Human Rights, which reads “everyone is entitled to a social and international order in which the rights and freedoms set forth in this declaration can be fully realized” (1994: para. 5, 48), Ksentini indicates the need for a structural political and social change to allow for the reconciliation of rights and the effective realization of human rights’ interdependence and indivisibility.

This leads this researcher to understand Ksentini’s contribution in the light of calls for political and social justice rather than criminal retribution. In fact, the application of human rights to environmental issues aims to facilitate the achievement of a “coalescence of the common objectives of development and environmental protection” beyond anthropocentric/ecocentric reductionist approaches (Ksentini, 1994: para. 5) and aims to tackle the environment “from a universal angle, involving a global economic, social and cultural approach to which it adds the human dimension” (Ksentini, 1994: para. 7). In this view, human rights are a means for political and social justice. Special attention is to be granted to minority groups

which are most vulnerable to environmental degradation and face dire prospects if human rights fail to reintegrate them in a social and international order where all human rights can be realized. Critical in this view is also the concept of meaningful participation: the process and the outcome of the process has to be determined by peoples themselves and has to achieve a consensus among social strata of population. This consensus, or adherence as she calls it, cannot be gained on the basis of denying basic rights (Ksentini, 1994: para. 68-69).

The difference between the Ksentini and Knox approaches is symptomatic of a renewed focus on procedural rights, contextually facilitated by the Rio +20 outcomes and the efforts to negotiate the Latin American agreement on Rio Principle 10 implementation. However, cases in Panama show how proceduralism cannot be an end in itself. There is still the risk of the environmental and human rights debate falling back on the assumption that civil and political rights have precedence over economic and social rights. Procedural rights have to achieve substantive goals to be meaningful.

Acknowledging both Ksentini (1994) and Atapattu's (2002) promotion of a right to Sustainable Development, this research concludes that the human rights regime is coherent in promoting the Right to Development and the RHE separately, but could promote them in tandem. The Right to Development and the RHE are not mutually exclusive and both represent an evolving understanding of human rights that advances the principle of solidarity. This research contributes a wider view that synthesises the RHE with the Right to Development. A synergy between the human rights and environmental law principles contributes to recovery of the indivisibility of rights through the RHE within the paradigm of sustainable development. Recalling Ksentini and her citation of Alexander Kiss, "international law must be based on values, the fundamental values of this century being human rights and the environment [...] these values are intrinsically bound up with development seen as a worldwide phenomenon resting on various pillars such as peace, equity, progress, social justice and participatory democracy at all levels" (Ksentini, 1994: para. 257). This research clearly is inclined towards a constructivist approach, viewing human rights as social interventions and the product of the balance of power of political interests at a particular point in history and in particular social context (Short, 2009: 95).

The RHE, not fitting in the traditional conception of human rights, embodies the challenge of human rights in practice at this point in history, and embodies the obvious, but difficult, practice of the indivisibility of human rights. It is an evolution from the aspirations and claims of the right to development to the realization and exercise of human rights to actively contribute to a situation of development respecting intra and intergenerational equity, respecting and advancing environmental sustainability, and realizing economic, social and cultural rights through the exercise of civil and political rights. The RHE promotes a participatory practice of accountability and transparency, imposing obligations on governments,

but also urging the development of a more conscious and multilevel citizenry that uses human rights to engage in both local and global political realms. While the Right to Development has been largely retrospective and overly focused on international responsibility and the consequences of historical wrongs between states, the RHE can be focused on the current situations of actually existing unsustainability (Barry, 2012) as well the immediate and long term future. A hybrid RBA to the RHE (see Chapter 2) ensures that both retrospective and forward looking approaches are taken into consideration and that minimum standards are established, vindicating the interdependence, interrelation and indivisibility of human rights and the systemic causes of human rights violations.

The core of the RHE is public participation understood as a participation that can influence the outcome within a legitimate, transparent and inclusive decision-making process (Webler et al., 2001; Dietz and Stern, 2008; Foti and Silva, 2010) with an explicit requirement for informed and free consensus (Webler et al., 2001; Arnstein, 1969; Fung, 2006, cited in Dietz and Stern, 2008: 17) gained through the exercise of basic rights (Ksentini, 1994). Meaningful participation is participation that fuels public interest activism to challenge knowledge and social values. The substantive aim of meaningful participation is to secure opportunities for different outcomes in decision-making, redefining the notions of benefit and burden-sharing through a rights based approach. Meaningful participation ultimately aims to achieve socially and politically just outcomes, addressing the concerns of political and social contestation at their source.

This research further elaborates hybrid RBA to the RHE debates formulating 4 As criteria for access rights to contribute to the definition of minimum standards for access rights in general and public participation in particular. Evaluation criteria for public participation are also presented under 4 As format, providing a much needed RBA to support the evaluation of meaningful participation. The exercise of a continued (permanent), informed and deliberative participation contributes in the long term in creating and strengthening public interest activism through awareness raising, increased involvement, sharing and building common values.

The RHE poses a challenge to the legal positivist approach which neglects the inherently political character of human rights, affecting both agreement and application of human rights norms (Freeman, 2002). The frameworks of environmental limits - planetary boundaries and environmental space - and the duty to preserve environmental conditions conducive to human development for future generations force the RHE to be a right based on precaution. Comprising the application of the Precautionary Principle and the CBDR principle, the RHE pushes the boundaries of legalism and opens new trails for enhanced human rights protection towards effective and timely redress instead of limited compensation. This researcher believes that RHE contributes to ensure natural resources use and access to be governed by the respect, promotion and protection of equally enjoyed economic social and cultural rights without discrimination. The RHE might provide

guidance to define in practice ‘sustainable development’, what kind of development is acceptable and what is not, balancing competing interests and values, benefits and burdens, short and long consequences.

The importance of this research at this moment in time can be related with the formulation of the new Sustainable Development Goals. Since the environmental discourse has evolved into a space of contestation over alternative visions of development (Peet and Watts, 2004, cited in Woodhouse and Chimhowu, 2005: 194-195) and environmental degradation problems are rooted in development processes (Escobar, 1995: 195), a broader understanding of the RHE might be instrumental to a new conceptualization of development. The SDGs will provide a new platform to test and reinforce environmental rights and the RHE, since through participatory process they might contribute to reshape the vision of the global environment from a more collective and democratic perspective, rather than reflecting the perception of those who rule (Escobar, 1995: 194). However, the focus that SDGs have put on economic growth might lead to contradictory positions. Mainstreaming an RBA to the RHE in sustainability policies and the SDGs could contribute to moderate economic growth policies and re-orient them towards just outcomes. RHE might contribute to prevent the SD discourse from continuing to reinforce colonizing approaches that impose exogenous and discriminating forms of environmental management (Escobar, 1995: 196-198; see also Goldman, 2001).

The RBA to RHE that emphasizes the centrality of meaningful participation re-contextualize environmental degradation and contestation in relation to human rights and development. First, it frames the issue of environmental degradation as a choice rather than a side effect of development, stressing the importance of precaution as “environmental harm can hardly be redeemed” (Kiss and Cañado Trindade, 1995: 289). Second, even if it might not always guarantee the highest standards of environmental protection, RBA to RHE will support the idea that environmental degradation is not acceptable unless benefits and burdens are equally and globally shared (Baxi, 2010). Inequalities in conditions of life among human beings and countries bind human rights and the environment together (Kiss and Cañado Trindade, 1995: 289). A constant affirmation of the principle of equality and non-discrimination constitute an approximation between human rights and environmental protection (Kiss and Cañado Trindade, 1995: 289). Third, RBA to RHE frames environmental contestation as complex multidimensional disputes on equality of benefits and burdens, pressing for forms of participatory democracy engaging with individual and collective responsibility for human rights and environmental promotion and protection as well as building paths of sustainable development. The means is provided by meaningful participation amounting to permanent, informed and deliberative consensus on matters of public policies, where the wider ‘concerned public’ can extend its awareness on issues of public interest, engage its values in a continued process of deliberative consensus to form public interest values to secure fair outcomes that share equally benefits and burdens.

The RHE narrative elaborated in this thesis suggests that the RHE matters and should not be underestimated within the human rights framework or substituted by other rights. The RHE matters because it channels human rights and environmental law principles in an experimental manner to deliver long awaited human rights objectives of justice, fairness and equality within environmental limits.

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