

THE RIGHT TO A HEALTHY ENVIRONMENT AND THE PRINCIPLE OF SUSTAINABILITY

Integrating equity and sustainability within the rights to pollute
under the Kyoto Protocol



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DEDICATION

When this work was finished I was thinking about dedicating it to the person that I love the most, and hence I was thinking about my wife who has supported me throughout this process. I was also thinking about my mom, who taught me with her life how to respect the rights of others, and also how not to abuse my rights. But finally I realized that the main motivation for this work is my future son to whom I dedicate this thesis with the hope that it could serve to improve his future. My additional hope is that he and his descendants in some way will be able to repair the damage that we are currently causing to our home - the earth.

To my future son, and in him to all future generations

LIST OF ABBREVIATIONS AND ACRONYMS:

ACHPR:	African Charter on Human and Peoples' Rights
CBD:	Convention on Biological Diversity
CBDR:	Common but Differentiated Responsibilities
CDM:	Clean Development Mechanism
CIDH:	Inter-American Court of Human Rights
CO ₂ :	Carbon Dioxide
CO ₂ e:	Carbon Dioxide equivalent
COP:	Conference of the Parties
CRC:	Convention on the Rights of the Child
ECHR:	European Convention of Human Rights
ECtHR:	European Court of Human Rights
EIA:	Environmental Impact Assessment
GHG:	Greenhouse gas
IACHR:	Inter-American Commission of Human Rights
ICCPR:	International Convention of Civil and Politic Rights
ICESCR:	International Convention of Economic, Social and Cultural Rights
ICJ:	International Court of Justice
ILC:	International Law Commission
ILO:	International Labour Organization
IPCC AR4:	IPCC Fourth Assessment Report
IPCC:	Intergovernmental Panel on Climate Change
OAS:	Organization of American States
PSS:	Additional Protocol to the ACHR - Protocol of San Salvador
PTD:	Public Trust Doctrine
REDD:	Reducing emissions from deforestation and forest degradation
RHE:	Right to a Healthy Environment
UDHR:	Universal Declaration of Human Rights
UN:	United Nations
UNCHR:	UN Commission on Human Rights
UNCLOS:	UN Convention on the Law of the Sea (1982)

UNEP: UN Environment Programme
UNFCCC: UN Framework Convention on Climate Change
UNOCHA: UN Office for the Coordination of Humanitarian Affairs
WCED: UN World Commission on Environment and Development
WDR: World Development Report (2010)
WMO: World Meteorological Organization
WSSD: Plan of Implementation of Johannesburg Declaration on Sustainable
Development.

1 Introduction

1.1 Thesis Statement and Main Issues

This thesis will develop the main aspects of the following statement: Whether the relationship between the Right to a Healthy Environment (RHE) and the principle of sustainability could facilitate their normative integration and operationalization within the UNFCCC.

This thesis assesses the following main issues:

- a) The legal content and status of the RHE and its relationship with the principle of sustainability.
- b) The legal consistency of atmospheric entitlements, established under the Kyoto Protocol, with the RHE, and the objective to reduce GHG emissions under UNFCCC.
- c) The consistency of the application of the RHE by international courts.
- d) The interconnections of the RHE with the principle of sustainability, and whether it can facilitate its normative integration and operationalization within the UNFCCC and global atmospheric regulations.

1.2 Justification and Objectives

The importance of climate change research is increasing. It is necessary to find ways of decreasing carbon emissions into the atmosphere. To find instruments and arguments to achieve the decision-making in this direction, it is crucial to grant socio-economic development and recover the ecosystem's sustainability that constitutes the condition *sine qua non* for life and development. The potential of the RHE to successfully achieve this purpose is significant and relies on its multidisciplinary nature and the complexity of its interconnections.

The objective of this paper is to analyze the content and legal status of the RHE: its relationship with the principle of sustainability as a fundamental principle of international law; the complexity of its interfaces; and its guiding force in relation to the aim of reducing dangerous human interference with climate systems. The objective is also to determine whether the legal authority of the principle of sustainability could improve the application and amplify the operationalization of the RHE. This could be possible in two ways: Firstly, the RHE could serve as a base to integrate and cumulate justice claims with the aim of restoring the balance of the global ecosystem sustainability, and; Secondly, it could serve as an enforceable instrument to grant the realization of other human rights, with which it has significant interconnections, in order to discourage unsustainable practices and laws.

The RHE has been established in some Constitutions as well as in international instruments. In this thesis, particular attention is given to the formulation of this right under Article 11 of the Additional Protocol to the American Convention of Human Rights - Protocol of San Salvador (PSS). For its realization, it demands coherence at domestic and global levels around three main aspects:

First, the obligation upon both States and the international community to provide information about climate change and to promote participation in preventing it.

The realization of the rights to life, to health and to access to basic public services is diminished by the effects of climate change. The obligation to create public awareness about climate change is established in UNFCCC Article 4.1(f). It plays an important role in discouraging unsustainable patterns and lifestyles associated with the increase in GHG emissions. This is consistent with the obligations to protect, preserve and improve the environment, established in PSS Article 11. To challenge State action based on this duty could lead the operationalization of the RHE by way of litigation or by the empowerment of societies through public participation.

Second, the obligation upon States and the international community to promote sustainable development.

The effects of climate change will have more impact in some areas than others. The socio-economic difference between States and, within States, will leave the poorest parts of the population most exposed. While developing countries have to satisfy the strong developmental demands of its poor and developed countries are under socio-economic pressure to maintain a certain standard of well-being for its citizens: These developmental demands can not be achieved at the expense of the global ecosystem degradation. States should implement both policy and action, in accordance with the obligations they have assumed under UNFCCC Articles 3.4 and 4.1(d), and other human rights instruments. The implementation of these policies and actions are consistent with the obligations established in the PSS Article 11.

According to this, States have the obligation to reshape their development policies in order to prioritize ecosystem sustainability over socio-economic development. Both the obligation to promote sustainable development and the realization of the RHE have the same objective to achieve sustainability. To demand the application of the RHE through concrete State policies and actions is important in order to maintain the sustainability ecosystems. It is also important to reduce social conflicts and achieve socio-economic development on a sustainable base.

Third, the consistency of State decisions with the aim of reducing GHG emissions and the RHE.

The UNFCCC has the objective of achieving stabilization of GHG at a level that would prevent dangerous anthropogenic interference with the climate system. This aim, integrated within the RHE, brings together multiple claims of justice: The sustainability of ecosystems as a base of development, inter and intra generational equity, and efficiency in order to ensure access to basic public services for everyone. Climate change systems should be consistent in meeting these objectives.

The Kyoto Protocol allocates rights to pollute to wealthier States. The allocation of rights over the atmosphere constitutes a cost-effective instrument that seeks to reconcile efficiency, equity and ecological constrains. However, in the light of current scientific advances in the understanding of climate change, these entitlements are premised on

unsustainable levels of GHG emissions. This is reducing the capacity of ecosystems to naturally adapt to dangerous levels.¹ Developments in climate change science now provide the possibility to evaluate with more certainty, current State policies and actions in relation to atmospheric resilience and irreparable damage.² The irreplaceable nature of this information has legal relevance within the RHE to define “atmospheric carrying capacity”, and thus, the ecosystem’s integrity. This information could then be used as a benchmark to evaluate the consistency of atmospheric entitlements under the Kyoto Protocol with the realization of the RHE.

1.3 Methodology

1.3.1 Sources

The main legal sources used in this paper are the UN Charter, ICJ Statute, Charter of the OAS, American Declaration of the Rights and Duties of Man, American Convention of Human Rights, Additional Protocol to the American Convention on Human Rights,³ Statute of the Inter-American Court on Human Rights, UNFCCC and Kyoto Protocol, African Charter on Human and Peoples’ Rights, Convention on Biological Diversity, Vienna Convention for the Protection of the Ozone Layer, UNCLOS, Aarhus Convention, Stockholm Declaration, Rio Declaration, and other declarations and treaties of International Law, International Case Law, text books and journals written by legal scholars and theorists. Scientific reports are also used, especially the IPCC Fourth Assessment Report 2007, the World Development Report 2010 and Millennium Ecosystem Assessment 2005.

1.3.2 Scope and Limitations of the Study

The RHE has the quality and scope to deal with global environmental concerns. This does not preclude more flexible interpretations and applications of this right under international or domestic law according with specific contexts. The use of decisions

¹ World Development Report - WDR (2010): *Development and Climate Change* Available at: http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/EXTWDRS/EXTWDR2010/0,,contentMDK:21969137~menuPK:5287816~pagePK:64167689~piPK:64167673~theSitePK:5287741_00.html [Visited :23.September.2010]

² Ibid, *The Science of Climate Change*.

³ 15 States have currently ratified the protocol: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Mexico, Nicaragua, Panamá, Paraguay, Peru, Surinam and Uruguay. USA, Canada and Venezuela have not ratified it.

and precedents from international courts is important. This paper attempts to find answers especially in the particular context of the Inter-American System of Human Rights. This research will accordingly focus particularly on the decisions of the Inter-American Court and Commission.

1.3.3 Structure of the Thesis

This thesis uses legal analysis to present:

- a) In Chapter 1, the scope, justification and objectives of this analysis.
- b) The legal content and status of the human RHE, its relationship to the principle of sustainability and the consistency of atmospheric entitlements established under the Kyoto Protocol with this right are analyzed in Chapter 2.
- c) Chapter 3 provides: The analysis of the application of the RHE within international courts, and; the assessment of the elements that could guide the normative integration and operationalization of the RHE within the UNFCCC and the global atmospheric regulation under the Kyoto Protocol.
- d) Chapter 4 provides conclusions, suggestions and implications.

2 Legal Framework, Theory and Integration

Environmental rights are difficult to define, because they protect diverse objects, including: Individuals, communities, generations, species and ecosystems. It does not necessarily mean that these objects of protection are entitled to have their rights directly enforced. The creation of more substantive rights in relation with these object of protection, does not necessarily result in better protection of them. This could be possible through better regulation, or access to litigation for existing rights.⁴ However, it is difficult to envisage how to balance the different interests between these conflicting objects of protection. International law should provide a consistent answer.

⁴ Birnie, Patricia and Alan Boyle, *International Law & the Environment*, 3rd edition, Oxford (2009) p.269

2.1 The Right to a Healthy Environment.

The achievement of a certain level of environmental quality is legally formulated within the RHE. National constitutions and international instruments guarantee the RHE.⁵ These instruments use different terms to define the level of environmental quality of the objects they seek to protect: A healthy, adequate or ecologically balanced environment. They provide guidance to define the environment's standard object of protection. The legal content and status of the RHE depends on properly balancing its constitutive elements.

The RHE is formulated as the right for everyone to live in a healthy environment.⁶ It also encompasses the right to enjoy or use the environment.⁷ This right is also an instrument to achieve the objectives of other existing rights. A healthy environment has to be achieved in order to guarantee the right to life, to private life, to health, to water, to food, to housing and to development.⁸ These different formulations make it difficult to define whether environmental health has intrinsic value, whether it is an instrument to achieve other objectives, and; whether it is possible to reconcile both values.

There are three main schools of thought that pertain to this relationship. One supports the view that there are no human rights without such an environmental right. Another sees the right, both as an already existing, and as an emerging one as a highly

⁵ 109 constitutions recognize the right and the obligation to prevent environmental harm. 56 explicitly recognize the RHE. See: Environmental Rights Report.61st session of the UN Commission on HR, Geneva, (2005).37-38
Available at:
http://www.edo.org.au/edoact/submissions/Earthjustice_2005EnvironmentalRightsReport.pdf
[Visited 05.09.2010]

⁶ PSS, Article 11

⁷ Brazilian Constitution, Article 225
Available at: <http://www.v-Brazil.com/government/laws/constitution.html>
[Visited:03.October.2010]

⁸ Spanish Constitution, Article 45
Available at: http://www.servat.unibe.ch/icl/sp00000_.html [Visited:03.October.2010]

questionable proposition. Finally, a further school admits the existence of a RHE, deriving its existence from other human rights.⁹

Whether there are any human rights without the RHE or whether the RHE derives its existence from other human rights will be further developed in the next section. However, the RHE has its own normative development. The Stockholm Declaration states that “man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.”¹⁰ This principle finds support in the UN Charter: The preamble calls States “to promote [...] better standard of life [...]” Article 55 prescribes that:

“With a view to the creation of condition of stability and well-being [...] UN shall promote: (a) higher standard of living [...] (c) Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction [...]”

Other Declarations declare the RHE:

“The right to live in dignity in a viable global environment.”¹¹

“Everyone has the right, individually or in association with others, to enjoy a healthy and ecologically balanced environment [...]”¹²

“Every human being has the right to live in a healthy environment”¹³

It seems that the RHE derives mainly from the human right to life. However, these documents do not declare the RHE as a positive rule of international law. Shelton explains that the Stockholm Declaration “does not proclaim a fundamental human RHE,

⁹ Fitzmaurice, Malgosia. *The Right of the Child to a Clean Environment*. In: Southern Illinois University Law Journal. Vol.23 (1999), pp. 611-656, p.612-3

¹⁰ UN Conference on the Human Environment (1972) Principle 1

¹¹ Hague Declaration on the Environment, The Hague, 11 March 1989, 28 I.L.M. 1308

¹² Bizkaia Declaration on the Right to Environment, UN Doc.30C/INF.11,24.09.1999

¹³ Institute of International Law, Article 2, Session of Strasbourg 1997

but implies that basic environmental health is necessary for the free enjoyment and exercise of recognized human rights.”¹⁴

The Vienna Convention for the Protection of the Ozone Layer, Article 2 states:

“The parties shall take appropriate measures [...] to protect human health and the environment against adverse effects [...] from human activities which modify [...] the ozone layer.”

Article 1 defines adverse effects as:

“Changes in the physical environment or biota, including changes in climate, which have significant deleterious effects on human health or on the composition, resilience and productivity of natural and managed ecosystems, or on materials useful to mankind.”

The CBD, Article 1, sets as its objective: “The conservation of biological diversity, the sustainable use of its components and the equitable sharing of the benefits [...].”

Article 2 defines ‘Biological diversity’ as:

“The variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.”

It also defines ‘Ecosystem’ as “a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.”

These obligations and definitions provide important elements to define the legal content of the RHE. UNCLOS has particular importance in relation to activities in the sea bed where no sovereign rights can be exercised.¹⁵ It establishes that:

¹⁴ Shelton, Dinah, *Human Rights, Environmental Rights, and the Right to Environment*, 28 Stanford Journal of International Law, 1991, p.112

“Necessary measures shall be taken [...] to ensure effective protection of the marine environment [...]: (a) the prevention, reduction and control of pollution and other hazards to the marine environment [...] and of interference with the ‘ecological balance’ of the marine environment [...].”¹⁶

The UNCLOS uses the concept of “ecological balance” to protect the marine environment. The object of protection which it defines is the level of environment adequacy. However, an exact definition of “ecological balance” requires the objectivity of natural sciences.

This is important in order to define the “core” of the RHE. This core needs to respect the nature of the RHE as a human right, with the aim of providing an adequate environment for everyone. It also needs to provide objectivity to protect the environment as another environmental right.

Ecological balance, as defined by the best available scientific information about ecosystems, is sufficiently objective to transcend the cultural relativism of different anthropocentric approaches. Different perspectives of the relationship between human beings and the environment could be in harmony with the environment or not. If they are not, the very existence of humanity is imperiled. This concept provides the possibility to protect the environment in its own right, and it is the condition required to guarantee the human rights of present and future generations.

The existence of the RHE as a customary rule of international law depends on the “evidence of a general practice accepted as law.”¹⁷ In this, the *opinio juris* has to be of general consistency.¹⁸ The process of such a rule’s formation suffers the same danger.

¹⁵ UNCLOS, Article 137

¹⁶ Ibid. Article 145

¹⁷ Statute of the ICJ, Article 38 (b)

¹⁸ Nicaragua v United States (Nicaragua Case (Military and Paramilitary Activities in and Against Nicaragua)) (1986) ICJ

This practice accepted as law could be an expression of cultural relativism and it could be environmentally unfriendly. However, the evidence of a consistent practice to protect the environment by using the concept of ecological balance (or with the same essential meaning), and by using natural science to provide its content, could have the same necessary objectivity.

In sum, the RHE has roots in both domestic and international law. It requires an objective definition of a “healthy” environment to make it applicable. Whether ecological balance or a similar concept serves for this purpose, and what the role of natural science is, will be assessed in the next sections.

2.1.1 The RHE as a Human Right

The relationship between human rights and environment protection could be assessed within the RHE. This relationship has two starting points:

“Mankind is a part of nature and life depends on the uninterrupted functioning of natural systems which supply of energy and nutrients.”¹⁹

Both demand separate analyses:

Humans are an integral part of the ecosystems, which has been defined as:

“A dynamic complex of plant, animal, and microorganism communities and the nonliving environment, interacting as a functional unit.”²⁰

Accordingly, all beings are interdependent and humanity is part of the community of life on the earth.

¹⁹ World Charter for Nature, A/RES/37/7 48th plenary meeting, 28Oct1982, Preamble

²⁰ Ecosystem and their services; In: Ecosystems and Human Well-being: A framework for assessment. (2005) p.49

Mankind is part of the ecosystem and the interest to protect the ecosystem 'includes' the interest to protect mankind.

“Under the concept of an integrated system, the protection of the biosphere is necessarily in the common interest of humanity.”²¹

The interest to protect human life can not ignore its inclusion as a part of the ecosystem.²² However, it is difficult for the law to transcend its social dimension:

“While environmental law could not be derived from an objective 'law of nature', its very existence reflects a commonly held view that the environment is indispensable. In this sense, protecting human life and dignity and protecting the environment follow the same basic concern for life.”²³

In consequence, the confluence of interests of both human rights and environmental protection is around the intrinsic value to protect life. One has its focus on human life, and the other on life as a unit. This confluence must be manifested within the law in order to achieve the beneficial synergy of their integration.

Human life is also dependent on ecosystem “services”: “Benefits people obtain from ecosystems. These include provisioning services (food, water, etc); regulating services (flood and disease control); cultural services (recreational, cultural, etc); and supporting services (soil formation, nutrient cycling, etc).”²⁴

These “services” have a correlation with existing human rights, and environmental protection has a direct effect on the enjoyment of a series of human rights. I.e. the rights to life, to health, to a satisfactory standard of living, to food, to culture, to non-

²¹ Shelton (1991) p.110

²² Bosselmann, Klaus. *The Principle of Sustainability*, Auckland (2008) p.132

²³ Ibid, p.114

²⁴ Ibid. p.49

discrimination, to development, etc.²⁵ However, these rights can only describe a small part of the intense relation of dependence. They fail to protect supporting services that maintain the conditions for life on the earth.²⁶

The enjoyment of all these human rights converges in the concept of “well-being”. Conversely, poverty is defined as “the pronounced deprivation of well-being.”²⁷ The transition from poverty to well-being is defined as a human right to development.²⁸

Although well-being “includes basic material needs”²⁹, development is relative to local, social and personal factors such as geography, ecology, age, gender, and culture.³⁰ All these factors define the manner in which humans interact with ecosystems. It could be in a sustainable manner or not.

In this, a certain standard of well-being could reduce the ecosystem’s capacity to provide services. The aim to enhance human life could now conflict with the aim to protect ecosystems for the future. It would then be necessary to achieve the integration of the human right to development with the obligations derived from the Human Right to a Healthy Environment, which include the obligation to protect human life and the obligation to protect the environment. The ultimate problem becomes one of balancing these competing human rights. The principle of ‘sustainable development’ plays a specific role in this by incorporating its integrative function.

In sum, the RHE has a double dimension: As human right and as an environmental right. As a human right, it demands equity to respect a minimum standard of

²⁵ Ksentini, Fatma Zohra. *Final Report on Human Rights and the Environment*. Presented by Sub-Commission on Prevention of Discrimination and Protection of Minorities, July 1994, §248 <http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/eeab2b6937bcca18025675c005779c3?Opendocument> [Visited:5.Octobre.2010]

²⁶ Ecosystem and their services (2005) p.57

²⁷ World Bank, World Development Report 2000/2001 Chapter 1, p.15

²⁸ UN GA Res. 41/128 of 4 December 1986

²⁹ Ecosystems and their services (2005) p.73

³⁰ Ibid, p.74

environmental adequacy which makes human life possible and the development of well-being. To define this environmental condition, the RHE has to be coherent and adopt a comprehensive focus of life. It must involve the 'community' and 'continuity' of life. In this, the factor of temporality makes it necessary to maintain the integrity of the environment in order to make human life possible in the future.

2.1.2 Anthropocentrism and the RHE.

Anthropocentrism within human rights could be perceived as a limitation in the operationalization of the RHE with an environmental approach. According to this view, the recognition of the RHE can only protect human values, and not the intrinsic value of the environment.³¹

In fact, this limitation could depend on how restricted or comprehensive human life is understood by societies, protected by states and enforced by courts. However, it strongly depends on the legal content of the RHE, and the scope of what 'healthy' environment means.

The identification of the concept of a healthy environment with ecosystems integrity could easily overcome the limitation of anthropocentrism. Nevertheless, it is important to assess the real dimension of anthropocentrism within human rights, particularly regarding the right to life. The complete understanding of the real dimension of human life could strengthen its relationship with the intrinsic value of the environment. It could determine the nature of this relationship in terms of interconnectedness or unity.

If environmental protection depends ultimately upon the reduced anthropocentric way to understand the right to life and the right to development, then, rights to the environment could be instrumented, resulting in serious inconsistencies with the protection of human life.

The RHE, while recognizing that all beings are interdependent, protects every form of life regardless of its worth to human beings. It also protects human life for its own

³¹ Redgwell, Catherine. *A Critique of Anthropocentric Rights*, In: Human Rights Approaches to Environmental Protection, Oxford (1996) pp.71-87, p.71

value, but also as a part of the community of life from upon which it depends. This perspective is the most comprehensive way to protect human life. It leaves intact the next step towards sustainability of life, which includes non-living elements. This is consistent with the idea of the integrity of ecosystems.”³² As Redwell explains:

“To the extent that a healthy human environment is also a healthy non-human environment there is a fortuitous spill-over effect to non-humans in the recognition of such a human right. Such an effect is inevitable even without recognition of non-human rights since it is not possible to separate human interest from the protection of the environment [...] Through as yet this falls short of the recognition of the substantive rights of nature and animals, the dam of anthropocentrism has clearly been breached.”³³

In sum, the RHE, when defined in relation with ecological integrity, overcomes the dam of anthropocentrism and captures the essence of sustainability.

2.1.3 The RHE and the Principle of Sustainability

The right to live is the most fundamental human right and adequate environmental conditions for the realization of this right should be assured.

Some practical and theoretical approaches attempt to define the content of the RHE without being formulated upon a valid scientific base regarding the sustainable limits of the environment. I.e.: “the substance of the environmental right is determined by law.”³⁴ The result is uncertain. It could lead to unsustainable patterns and inequities.

The Aarhus Convention³⁵ “recognizes the RHE without considering a need for establishing an exact formulation or definition for it.”³⁶ This lack of definition could be

³² Bosselmann (2009) p.76

³³ Redgwell (1996) p.87

³⁴ Constitution of the Republic of Korea, Article 35

³⁵ Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Article 1, In order to contribute with the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each party shall guarantee the rights of access to information, public participation in decision making, and access to justice in environmental matters in accordance with the provisions of this convention.

³⁶ Sueli, Giorgetta. *The Right to a Healthy Environment, Human Rights and Sustainable Development*, In: *International Environmental Agreements: Policies, Law and Economics* 2: 173-194 (2002) p.187

related to the dynamic dimension of its content and its application. However, “the convention might suggest that different conceptual notions make it difficult to achieve a general definition of the RHE.”³⁷ As Sueli explains:

“The desired quality of the environment is a value subjectively judged and difficult to codify in legal language [...] Even where a precise choice will still lie be inherent its interpretation, which will vary across cultures and communities.”³⁸

This approach makes the content of the RHE relative and drags its possible content with the contingency of its application. It finally makes any coherent global application of this right impossible. In our opinion, it hides a misunderstanding of what the RHE means. Apparently, Sueli is using the concept of well-being with the content of the RHE interchangeably. The former concerns the manner in which humans interact with the environment, whilst the latter concerns the level of environmental adequacy that these interactions should maintain. If the definition of the RHE is culturally relative or based on subjective values, some interactions, well-being standards or lifestyles could reduce the carrying capacity of ecosystems. Temporal and spatial interpretations of the rule do not deny the universal scope of a definition that contains sufficient flexibility to allow its local application when taking into account cultural and temporal variables. In consequence:

“The implementation of a right to environment will depend on independent criteria of health and safety, which will vary with scientific knowledge over time and space, yet the right to environment, has a core of meaning which can be defined and made enforceable through legal instruments”.³⁹

The core of the RHE should be fulfilled in accordance with the best available scientific information about the ecosystem, which constitutes an independent view. It is

³⁷ Ibid, p.187

³⁸ Ibid, p.187

³⁹ Shelton (1991) 138

consistent with the principle of sustainability. When natural science defines 'healthy' environment and informs about ecosystem sustainability, the principle of sustainability becomes an integral part of the RHE. The definition of the RHE inevitably protects ecosystem sustainability by the comprehensive understanding of human life: As a part of the community of life or as dependent upon the ecosystem. In both cases, sustainability is crucial in order to allow the community of life to function as a unit, and to keep the carrying capacity of ecosystems stable.

The principle of sustainability as such has not particular provision in an international instrument, but "itself is best defined as the duty to protect and restore the integrity of the Earth's ecological systems."⁴⁰ The "healthy" environment is perfectly described by "ecosystem's integrity", as a state of justice and object of protection. This is consistent with the Rio Declaration, Principle 7: "States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem."

Ecological integrity is a scientific and ethical concept:

"The protection and restoration of ecological integrity requires both best available knowledge about ecological facts and ethical commitments to its overarching importance."⁴¹

The RHE encompasses the obligation to protect the environment, which requires the best available scientific information, and the ethical option to put human existence in its real context as part and dependant of the ecosystems.

In sum, the legal content of the RHE is best defined by the concept of ecological integrity, including its scientific and ethical aspects. In this, the RHE, without renouncing its nature as a human right, is also an environmental right that receives the normative force of the principle of sustainability.

⁴⁰ Bosselmann (2009) p.53

⁴¹ Ibid. p.76

2.1.4 The Article 11 of the San Salvador Protocol

The Inter-American system of human rights prescribes the RHE in Article 11 of the PSS:

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 substantive part of this formulation has a strong relationship with the right to live and access to basic public services. The healthy environment is a base to preserve life and ensure the provision of the ecosystem's services. The term 'public' highlights the nature of basic services as inalienable and entrusted to the State.

Although the realization of the RHE should be achieved progressively,⁴² the Article establishes concrete obligations on State Parties in order to protect, preserve and improve the environment. These should be achieved without discrimination.⁴³ State Parties have also the duty to adopt such legislative or other measures as may be necessary for making the right a reality.⁴⁴

2.2 UNFCCC and Atmospheric Entitlements

The UNFCCC is the most important instrument to face the systemic problem of climate change.

2.2.1 UNFCCC: Objective

The Article 2 states the objective of the UNFCCC, and any related instrument:

The [...] "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system [...] such a level should be achieved within a time-

⁴² PSS, Article 1 & 19

⁴³ Ibid, Article 3

⁴⁴ Ibid, Article 2. See also ACHR, Article 26.

frame sufficient to allow ecosystems to 'adapt naturally' to climate change [...]”.

The integration of the RHE within UNFCCC has its main challenge in formulating the definition of “dangerous anthropogenic interference” with the climate system. In the AR4, the IPCC has established the complexity of this task:

“That definition can only be partially supported by science, as it inherently involves normative judgments. There are different approaches to defining danger, and an interpretation of Article 2 is likely to rely on scientific, ethical, cultural, political and/or legal judgments. As such, the agreement(s) reached among the Parties in terms of what may constitute unacceptable impacts on the climate system, food production, ecosystems or sustainable economic development will represent a synthesis of these different perspectives.”⁴⁵

This approach does not give any guidance about how to balance all these different elements. It recognizes the importance of science, but it does not give due priority to the ecosystem’s sustainability. However, the preamble of the IPCC’s AR4 recognizes that the steps which are required to understand and address climate change will be environmentally, socially and economically most effective if they are based on relevant scientific, technical and economic considerations, and continually re-evaluated in the light of new findings in these areas.⁴⁶

The UNFCCC, Article 1 also defines "adverse effects of climate change" as those changes in the physical environment or biota which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems, or on the operation of socio-economic systems, or on human health and welfare. It also defines "climate system" as the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions.

⁴⁵ IPCC, Fourth Assessment Report (AR4) (2007) *Synthesis Report* §1.2.2

⁴⁶ Ibid, §1.2.2

The definition of 'dangerous anthropogenic interference' with the climate system, must be continually re-evaluated in the light of new findings in natural science. However, as stated in the WDR:

“Defining 'dangerous anthropogenic interference' will be a political decision, not a scientific determination. [...]The term 'dangerous' involves several components – the total magnitude of change, the rate of change, the risk of sudden or abrupt change, and the like-lihood of crossing irreversibly harmful threshold. What is determined to be a dangerous degree of climate change can be expected to depend on the effects on human and natural systems and their capacity to adapt.”⁴⁷

Scientific and ethical aspects within the RHE are important to inform about limits of the atmosphere carrying capacity and provide support for 'precaution' to maintain the ecological integrity of climate systems as a common concern of mankind.

States must take precautionary measures to anticipate, prevent or minimize the causes of climate change,⁴⁸ but scientific uncertainty has often been cited as a reason to wait for more evidence before acting to control climate change. Recent scientific evidence indicates that dangerous effects in the climate system are increasing faster than has been provided for in the IPCC 2007.⁴⁹ In consequence, the existence of uncertainties should activate and not post-pound a precautionary approach to climate change, given the potential for irreversible impacts on the climate system.

2.2.2 UNFCCC: Right to Promote Sustainable Development

The UNFCCC, Article 3 states:

4. “The Parties have a right to, and should, promote sustainable development [...] taking into account that economic development is essential for adopting measures to address climate change.”

⁴⁷ WDR (2010) p.70

⁴⁸ UNFCCC, Article 3.3

⁴⁹ WDR (2010) p.78

The interrelationship between socio-economic and environmental objectives should be balanced:

“Measures to strengthen institutional arrangements on sustainable development should lead to the achievement of integration of the economic, social and environmental dimensions of sustainable development in a balanced manner”.⁵⁰

This approach places economic, social and environmental objectives at the same level. It shows them to be equally interdependent and mutually reinforcing, but it does not guide their integration.

Sustainable development is based on seven core principles.⁵¹ Between them, the most important is the principle of integration, but it does not explain how to achieve integration.

In this, UNFCCC Article 3.4 could provide direction in this integrative process in the sense that measures to address climate change depend on the achievement of economic development. It could also be deduced from Article 3.5 which calls on State Parties:

“[...] to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change.”

Arguably, the priority of promoting economic development without proper focus on sustainability could better address climate change. The realization of the RHE with

⁵⁰ Plan of Implementation of the World Summit on Sustainable Development – A/Conf. 199/20 § 139

⁵¹ ILA New Delhi Declaration, ILA Resolution 3/2002, annexed to UN Doc. A/57/329, The duty of States to ensure sustainable use of natural resources; The principle of equity and the eradication of poverty; The principle of common but differentiated responsibilities; The principle of the precautionary approach to human health, natural resources and ecosystems; The principle of participation and access to information and justice; The principle of good governance; and The principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives.

UNFCCC demands a high integrated new regime ⁵² to properly face the cause of Climate Change.

2.2.3 UNFCCC: Socio-economic and Environmental Policies and Actions.

The UNFCCC, Article 4.1(f) states:

“Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall:

(f) Take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example impact assessments, formulated and determined nationally, with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change.”

To take into account climate change considerations depends on development priorities. This approach provides less developed countries with the possibility of prioritizing development, but it hides the possibility of supporting unsustainable patterns. The lack of priority on sustainability could reduce the carrying capacity of ecosystems.

The view to minimize adverse effects introduces cost-effectiveness as a criterion to protect the quality of the environment. This approach makes social development and environmental protection dependent on the achievement of economic development.

2.2.4 The Kyoto Protocol and Rights to Pollute

The Kyoto Protocol sets a quantitative “cap” on GHG emissions for States included in Annex I of the UNFCCC.⁵³ These emission limitations are quantified with assigned amount units (AAUs) that constitute environmental assets and rights to pollute the

⁵² Cordonier Segger, Marie-Claire and Ashfaq Khalfan, *Sustainable Development Law*, Oxford (2004) p.106-9 In: references with the idea of the conceptual continuum.

⁵³ Kyoto Protocol, Article 3(1)

atmosphere. The Protocol assigns these emission units to Annex I States and allows trading of these units between them.⁵⁴

Annex I States can also receive benefits from projects aimed at reducing anthropogenic emissions and achieving sustainable development in parties not included in Annex I. These projects provide for Certified Emission Reductions (CERs) that Annex I States can use to contribute to compliance with their part of their quantified emissions. These projects are performed and funded within the frame of the 'flexible mechanism' established in the Protocol that are market-based mechanisms with the aim of joint participation of Annex I parties through Joint Implementation⁵⁵, and canalizing resources to Non Annex I parties through the Clean Development Mechanism.⁵⁶

The COP 7th session declares: "The Kyoto Protocol has not created or bestowed any right, title or entitlement to emissions of any kind on Parties included in Annex I."⁵⁷ In our opinion, it should be understood as a political statement.

Rights to pollute or allowances could be explained as private rights or rights with private effects, assigned by international law and implemented by domestic law.⁵⁸

Annex I States, while establishing domestic regimes of emission trading, translate these rights to the private sector. Annex I States finally allow or authorize carbon emissions to private economic actors within their cap of emission units.

The reduction target of 5% under 1990 emission levels of Annex I parties is an important step, but is not enough to prevent dangerous anthropogenic interference with the climate system. The problem is that the "cap" within this system allows for unsustainable levels of GHG emissions. This is reducing the capacity of the atmosphere

⁵⁴ Ibid, Article 17

⁵⁵ Ibid, Article 6

⁵⁶ Ibid, Article 12

⁵⁷ UNFCCC/CP/2001/13/Add.2, Decision 15/CP.7 Preamble

⁵⁸ Voigt, Christina. *Sustainable Development as a Principle of Integration in International Law*, Oslo (2006) p.118-122

to naturally adapt. In addition, many Annex I parties have also increased their emissions. This is not consistent with UNFCCC, Article 2.

2.3 Integration within the RHE

Climate change demands reparation of affected groups, reductions of GHG emissions, fair allocation of the cost and a rule of law perspective on climate change.⁵⁹ The integration of equity and sustainability within the RHE could deal with this task, but it is necessary to formulate certain methodology and strategy.

2.3.1 Atmosphere as a Common Concern of Humankind and the Public Trust Doctrine.

If integration has to take place within the RHE, it needs to be considered in spatial, temporal and factual contexts. Thus, it is necessary that the unity of the global atmosphere and the common interest of all States be recognized when determining the atmosphere's legal status and its regulation.

“Because the atmosphere consists in a fluctuating and dynamic air mass, it cannot be equated with ‘airspace’ which, above land, is simply a spatial dimension subject to the sovereignty of the subjacent state regulated. But this overlap with territorial sovereignty also means that the atmosphere cannot be treated as an area of ‘common property’ beyond the jurisdiction of any state, comparable in this sense to the high seas.”⁶⁰ [Emphasis added]

The concept of ‘shared natural resources’ applied to transboundary air pollution,⁶¹ which involves bilateral or regional State relations, is not appropriate when dealing with global atmospheric problems.

The concept of ‘common heritage’ is applied to outer space and to mineral resources of the deep seabed. It cannot be applied by extension, because global atmosphere is clearly not outer space, and because the UNCLOS, Article 135 provides: “The status of the seabed does not affect the legal status of the air space above that seawater.”

⁵⁹ Humphreys, Stephen, *Human Rights and Climate Change*, Cambridge (2010) p.40-3

⁶⁰ Birnie (2009) p.337-8

⁶¹ 1979 Geneva Convention on Long-range transboundary air pollution

The Vienna Convention for the Protection of the Ozone Layer treats the atmosphere as a unit without reference to legal concepts of sovereignty, shared resources or common property. The UNFCCC has determined climate change as 'common concern of humankind', giving the international community of States the legitimate interest and common responsibility in protecting the global atmosphere. However, this concept does not properly take into account considerations of inter-generational justice, as the concept of 'common heritage' does. In consequence, sovereignty should be exercised within the framework of global responsibilities set out in UNFCCC and other related instruments; and inter-generational considerations should depend more on how the atmosphere is finally regulated.⁶²

It is necessary for there to be a system of regulation of the global atmosphere as a legitimate interest and this should be the common responsibility of the international community as a whole. This system needs to treat the atmosphere at domestic and international levels coherently.

The 'public trust doctrine' (PTD) could provide guidance for such regulation. The main principles of the PTD imply that the State has to act as a trustee on behalf of all individuals, must take a long-term view of its protection and must ensure with equity and sustainability the access to, and use of resources.⁶³ The lack of a global State does not preclude that elements of the PTD can be applied at international levels in reference to the common concern in the atmosphere, in its unity and limited capacity.

Coplan explains that the principles of PTD have been applied to preclude grants of private interest to the exclusion of public rights and limiting State action to the detriment of the public interest. It also has been applied as State empowerment, to regulate environmental resources for the public benefit. The US courts have relied on

⁶² Birnie (2009) p.130

⁶³ Cullet, Philippe, *The Kyoto Protocol and Vulnerability*, In: Human Rights and Climate Change. Cambridge (2010) p.202

the PTD as an essential attribute of sovereignty and inherent in the sovereign right of the people, not abrogated from the constitutional political contract.⁶⁴

The Indian Supreme Court has also declared the air as a public trust.⁶⁵ This is important regarding the application of PTD to domestic cap-and-trade schemes. At an international level, the progressive realization of the RHE under the PSS has been trusted to States. The PSS incorporates the principles of PDT. According to Article 5, the RHE could be limited in order to preserve general welfare within a democratic society, but only to the extent that those limitations are not incompatible with the purpose of the right. A healthy environment depends on the overall carbon cycling functions of the global atmospheric ecosystem. In consequence, the atmospheric ecosystem integrity and its carrying capacity should be regulated as public trust assets.

The RHE demands that the corpus of these trust assets should be preserved, retained and controlled in the public domain, or used with the purpose of preserving general welfare. This “might prohibit or restrict the contours of a cap-and-trade GHG control scheme that purports to grant private rights in the atmospheric resource.”⁶⁶

The restriction of the cap should define its contours within sustainable levels of GHG emissions. However, States have compromised atmospheric trust assets through allowing unsustainable levels of GHG emission via the cap-and-trade scheme under the Kyoto Protocol.

2.3.2 Efficiency, Well-being and Sustainable Development

“Efficiency” for economists is “a relationship between ends and means.” “Economic efficiency” is measured not by the relationship between the physical quantities of ends and means, but by the relationship between the values of the ends and the values of the means.⁶⁷ Efficiency is meaningful as a means to provide the most vulnerable⁶⁸ with

⁶⁴ Coplan, Karl. *Public Trust Limits On Greenhouse Gas trading schemes: A sustainable middle ground?* In: *Columbia Journal of Environmental Law* (2009) pp.287-336.

⁶⁵ M.C. Mehta v. Kamal Nath, 1997 1 SCC, 388, In: *Cullet* (2010) p.202

⁶⁶ Coplan (2009) p.304

⁶⁷ Heyne, Artur, Efficiency. In: *The Concise Encyclopedia of Economics*. Available at: <http://www.econlib.org/library/Enc/Efficiency.html> [Visited: 15.November.2010]

benefits that otherwise can not be achieved. It demands efficient management and regulation of the carrying capacity of the atmosphere's carbon cycling.

Different types of atmospheric regulations have been proposed, but "emission trading is lauded as a mean to achieve environmental goals at the least overall cost to industry and by extension, to society more generally."⁶⁹ Nevertheless, the scheme adopted under the Kyoto Protocol was heavily influenced by political considerations.⁷⁰ Cullet explains:

"Allocates polluting right based on past or present emissions [...] rewards long term polluters and provides incentives to few countries [...] to increase their pollution levels as fast as they can so that their own emissions levels will be grandfathered."⁷¹

Voigt notes:

"While equality needs to be taken into account in the allocation process, promoting stability and confidence are at least equally decisive [...]. Finding a balance [...] proves to be a challenging task."⁷²

All relevant factors of efficiency should then be properly integrated in a system of atmospheric regulation for the widest global benefit. If efficiency maximizes the benefits that the ecosystem's services offer, patterns of development could have a close relationship with patterns of consumption and standards of well-being. How to maximize opportunities ultimately depends on how development is conceived.

The Stern Review notes:

⁶⁸ UNFCCC Article 3.2

⁶⁹ Coplan (2009) p.296

⁷⁰ Giddens, Anthony. *The politics of Climate Change*, Cambridge (2009) p.197

⁷¹ Cullet, Philippe, *The Kyoto Protocol and Vulnerability*, In: Human Rights and Climate Change. Cambridge (2010) p.203

⁷² Voigt (2006) p.159

“If economics is used to design cost-effective policies, then taking action to tackle climate change will enable societies’ potential for well-being to increase much faster in the long run than without action; we can be ‘green’ and grow. Indeed, if we are not ‘green’, we will eventually undermine growth [...]”⁷³

Economic growth is important in terms of stability and governability, but it has its limitations when that growth is undermining the very possibility of growth. It is necessary for sustainable and efficient lifestyles. This recognizes the limits of resources and maximizes the use of a limited resource. UNFCCC, Article 3.3 states:

“[...] policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, [...]”

These socio-economic contexts ultimately refer to standards of well-being supported by States. A fair system of atmospheric allocations demands an analysis of well-being standards in terms of equity and sustainability. It also demands a systemic change in order to discourage unsustainable human behavior and lifestyles. This systemic change must also address other unsustainable patterns like population growth, inefficient use of land, etc.

Efficiency can therefore not simply be reduced to cost-effective or cost effectiveness analysis. Efficiency must be understood and applied in a comprehensive way to guide decision-making and incorporate those relevant considerations of equity and sustainability within atmosphere regulation.

In reference to climate change: “The benefits of strong and early action far outweigh the economic costs of not acting.”⁷⁴ However, States have an obligation to ensure human

⁷³ Stern, Nicolas, *Stern Review: The Economic of Climate Change* (2006) Introduction, Available at: http://mudancasclimaticas.cptec.inpe.br/~rmclima/pdfs/destaques/sternreview_report_complete.pdf [Visited 23 September 2010]

⁷⁴ Stern Review (2006) Summary of Conclusion

rights and an obligation to protect the environment under the RHE. It is then necessary to achieve sustainable development in order to integrate social, economical and environmental objectives.

Sand notes that: “Sustainable development is accepted as a global policy as an integrated part of international environmental law.”⁷⁵ However, the principle of sustainable development has not been included in an international treaty, nor has it been accepted as a customary rule of international law.⁷⁶ Cordonier comments that “while there is no coherent body of ‘sustainable development law’, its ‘principles, practices and prospects’ can be described in support of the idea of integration.”⁷⁷

The WCED has explained that “the key element of sustainable development prohibits any self-isolation of economic development from the environment.”⁷⁸ This is consistent with the Rio Declaration, Principle 4. Bosselmann also explains:

“It is crucial, however, to realize the ecological core of the concept. Not realizing it means that social, economic and environmental interests have nowhere to go. There is only ecological sustainable development or no sustainable development at all.”⁷⁹

Sustainable development requires integration of these three interests, but how will integration of laws be sufficient to achieve ecological sustainable development? Bosselmann uses an analogy with a child custody case in which, by considering all the various personal and socio-economic issues that it may involve, the concept of the ‘best interests of the child’ ultimately determines the outcome. The ‘best interest’ is the ultimate benchmark; all other factors are relevant, but subject to serving the child’s best

⁷⁵ Sands, P. *Principles of International Environmental Law*, 2nd edition, Cambridge 2003, In: Bosselmann (2009) p.24

⁷⁶ Bosselmann (2009) p.57

⁷⁷ Cordonier Segger, M.C. and Khalfan, A. *Sustainable Development Law: Principles, Practices and Prospects*, Oxford, 2004. P. 103-4

⁷⁸ Bosselmann (2009) p. 31

⁷⁹ Ibid, p.23

interests.⁸⁰ *Mutatis mutandis*, integration by sustainable development requires a benchmark. It needs a system of hierarchy:

“No economic prosperity without social justice and no social justice without economic prosperity, and both within the limits of ecological sustainability. As norm this can be formulated as the obligation to promote long-term economic prosperity and social justice within the limits of ecological sustainability.”⁸¹

The protection of the ecological integrity within the RHE is the benchmark when dealing with cultural relativism of well-being standards and developmental considerations.

2.3.3 Equity and Competing Human Rights

The UNFCCC, Article 3.1 states:

“Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their CBDR and respective capabilities.”

Cullet has explained:

“The basis for an equitable climate change policy should indeed take into account that every single human being has a right to a certain quantity of emissions. These include subsistence emissions such as emissions related to the growing of food [...] or purified water”.⁸²

Voigt also explains:

⁸⁰ Ibid, p.24

⁸¹ Bosselmann (2009) p.53

⁸² Cullet (2010) p.204

“Allocations that are purely based on equality might not necessarily lead to a functioning trading system. Allocations [...] on a per capita basis is widely seen as creating an incentive for increased population levels”⁸³

Creating equitable conditions in order to protect climate systems could become problematic in practice. The RHE and the right to development, both formulated in progressive terms, could compete or be trapped at the human rights threshold without a reference for its integration. Placing both at the same level and stressing their interconnectedness does not solve the problem of how to achieve a balance. In fact, there is no balance. The ecosystem’s integrity is that which sustains every possible human development. Equally, it is impossible to treat the two key concepts of development and environment independently from each other:

“If this were the case, then human needs (of today and in the future) could be met either by Western-style economic development on a global scale – regardless of its environmental impacts – or by a total stop of present development to allow quick recovery of environmental systems. Both these extremes could serve human needs, perhaps even in the future, but only in a very limited understanding of what these needs may be.”⁸⁴

In consequence, a benchmark is necessary to properly integrate developmental and environmental objectives while keeping intra and inter generational equity. Bringing this to climate change, Humphreys explains:

“The capacity to buy or sell emission reductions amounts in effect to a right to emit GHGs [...]. They are alienable [...] and they are not conceived of as universal, but bestowed upon only a comparatively tiny section of the global population. (Nevertheless, in practical terms, such rights amount to quite concrete “rights to develop” as it is access to GHGs that currently, and for the foreseeable future, drives development).”⁸⁵

Atmospheric entitlements under the Kyoto Protocol are an expression of the need to create conditions for human development, but these conditions are undermined if they are based on unsustainable GHG emissions. Achieving economic development at the

⁸³ Voigt (2006) p.159

⁸⁴ Bosselman (2009) p.31

⁸⁵ Humphreys (2010) p.15

expense of the environment is based on the false understanding that economic growth is unlimited. This also creates inequities at both inter and intra generational levels. Bosselman affirms:

“Only environmentally sound development could possibly meet present and future needs. The principle of sustainability is, therefore, paramount”.⁸⁶

The realization of the RHE for everyone demands a hierarchy where sustainability of ecological systems is prioritized over development. It also requires the definition of human development in connection with the definition of well-being. Both should be defined within a range of sustainability in which the capacity of the atmosphere to sustain human development is not affected. It requires the minimum indispensable level of GHG emissions to allow development of present generations; and the maximum, in consideration to the limits of the ecosystem’s sustainability to naturally absorb carbon emissions and allow for development in the future.

2.3.4 Sustainability and Atmospheric Carrying Capacity

The object of protection of the RHE is to ensure access to basic public services to everyone and to protect the ecosystem’s limited capacity to provide their services. Sustainable development also seeks to achieve these objectives. As Voigt explains:

“By constituting these essential ecological conditions as a *de minimis* requirement of sustainable development, the concept inhabits a non-derogable core. At this core lie the 'unchanging and universal laws of nature' with which human activities need to be brought and kept in harmony. This core can be used as a point of departure and a '*principled priority*' guide on how these 'widely divergent priorities' need to be balanced. [...] sustainable development is about reconciling development (the meeting of human needs) with the environment by recognizing the limited capacity of the environment to absorb negative impacts while remaining in a stable state and by securing the basic functioning of ecosystems.”⁸⁷

⁸⁶ Bosselmann (2009) p.31

⁸⁷ Voigt (2006) p.58

The “limited capacity of the environment” could also be defined in reference to the maximum of individuals or population growth that the environment could carry, and also to the maximum rate of resource consumption and waste discharged.⁸⁸ These ‘maximums’ should be taken into account when defining the limits of the carrying capacity of the atmosphere. The realization of the RHE and its integration into any cap-and-trade scheme depends on the respect for those limits. Current scientific knowledge should play a decisive role in defining these maximums.

The use of scientific information for this purpose lies in UNFCCC, Articles 4.1 (f) and (i), and Article 6. Articles 13.4 (a) and (b) require the COP to keep under regular review, the implementation of the Kyoto Protocol. They also require the COP to periodically examine the obligations of the Parties, giving due consideration to any reviews required by Article 4 of the UNFCCC in the light of its objective, and the evolution of scientific and technological knowledge.

The use of scientific information as legally relevant is also supported in other treaties: The 1991 Convention on Transboundary Environmental Impact Assessment, the 2003 Protocol on Strategic Environmental Assessment, UNEP’s EIA Goals and Principles, Article 3 and 8 of the 1991 Protocol on Environmental Protection to the Antarctic Treaty, CBD Article 14, Principle 17 of the Rio declaration and others instruments. In case of the marine environment impact, assessments are required by customary law and reinforced by the UNCLOS article 206.

For nearly 1 million years before the Industrial Revolution, the CO₂ concentration in the atmosphere ranged between 170 and 280 parts per million (ppm). Levels are now far above that range - 387 ppm – higher than the highest point in at least the past 800,000 years and the rate of increase may be accelerating.⁸⁹

⁸⁸ Ibid. p.58 footnote 171

⁸⁹ World Development Report – WDR, Focus A, The science of climate change. (2010) p.70, In: reference of the IPCC’s Fourth Assessment Report 2007.

“Sustainability of ecological systems can be defined as the state justice.”⁹⁰ It meets intra-generational, inter-generational and inter-species considerations and keeps the interaction between human activities and ecological systems stable. Human activities have left this state of justice. From this state, it is possible to identify two different thresholds of remoteness:

The threshold of natural resilience: Global ecosystems suffer severe alterations and the atmosphere’s ability to naturally adapt is under stress by the aggregate pressure of human activities. This increases not only the frequency and magnitude of natural disasters already occurring, but also the probability of catastrophic disruptions.⁹¹

The point of no return: Human activities have caused an irreparable damage in ecosystems. A process of unstoppable degradation is occurring which may have catastrophic consequences. Ecological systems shift to a different level, causing the potential for severe environmental and societal dislocations to increase accordingly.

In reference to the IPCC’s Fourth Assessment Report (AR4), Humphreys observes that:

“Keeping emissions to 450 ppm CO₂e presents an immense political challenge and few rich country governments are currently aiming at national emissions targets consistent with a global peak of 2°C. The consequence of overshooting [...] is likely to destroy life and livelihoods on some small island and certain Arctic regions [...]. According to IPCC AR4, even a loose target of 490-535 ppm CO₂e is formidably daunting. For that, total global emissions must still peak by 2020, and then fall sharply by 2050, by between 50 and 85 per cent from 2000 levels. Over that same period, the world’s population is expected to increase by about 50 per cent, to 9 billion or so, while economic growing, particularly in fast growing economies such as China’s, will drive energy demand ever higher. Viewed in this light, the mitigation task is truly gargantuan.”⁹²

⁹⁰ Voigt (2006) p.85

⁹¹ WDR (2010) p.70; See also: Climate Change and Natural Disasters: Scientific evidence of a possible relation between recent natural disasters and climate change (IP/A/ENVI/FWC/2005-35) EU Policy Department Economic and Scientific Policy. Available at: http://www.europarl.europa.eu/comparl/envi/pdf/externalexpertise/ieep_6leg/naturaldisasters.pdf [Visited:15.October.2010]

⁹² Humphreys (2010) p.20-21

However, recent scientific research observes that the picture is worse than what is described above. The earth has heated up 0.8°C on average since preindustrial times. For the next few decades the global average temperature is projected to increase 0.2-0.3°C each decade, a rate of change that will test the ability of species and ecosystems to adapt.⁹³

The resilience of many ecosystems is likely to be exceeded in the coming decades by a combination of the effects of climate change and other stresses, including habitat degradation and air and water pollution. Major changes are projected in ecosystems as climate change shifts the ideal geographic ranges of plant and animal species. Productivity of agriculture, forest and fisheries will be affected, as will other ecological services.⁹⁴

At the current global average temperature, extreme events are already increasing. Both evaporation and precipitation are increasing and will continue to increase globally. Among the likely additional consequences will be shifts in storm tracks, more intense tropical cyclones and extreme rainfall events.⁹⁵

Many studies conclude that stabilizing atmospheric concentrations of GHG at 450 ppm CO₂, or its equivalent, will yield only a 40-50% chance of limiting the global average temperature increase to 2°C above preindustrial levels. However, in order to ensure that a particular temperature will not be exceeded, emission reductions must be even steeper. The best estimation of a 2°C increase cannot exclude the possibility of hitting 4°C.⁹⁶

Even if temperatures reach 2°C above preindustrial levels, water availability will be reduced for 0.4-1.7 billion people, most coral reefs will die and some crops, particularly cereals, will be unable to grow successfully in altered climates prevailing in low latitudes regions. About a quarter of plant and animal species are likely to be at

⁹³ WDR (2010) p.70

⁹⁴ Ibid, p.74

⁹⁵ Ibid, p.79

⁹⁶ Ibid, p.79

increased risk of extinction. Communities will suffer more heat stress and coastal areas will be more frequently flooded.⁹⁷ Hansen also concludes:

“If humanity wishes to preserve a planet similar to that on which civilization developed and to which life on Earth is adapted, paleoclimate evidence and ongoing Climate Change suggest that CO₂ will need to be reduced from its current 385 ppm to at most 350 ppm, but likely less that. [...]If the present overshoot of this target CO₂ is not brief, there is a possibility of seeding irreversible catastrophic effects.”⁹⁸

If the aim of a global peak of 2°C⁹⁹ is unsustainable, then the cap established for the carbon market under the Kyoto Protocol is even more so. To compare: In the Kyoto Protocol the wealthier countries agreed to reduce emissions on average by 5.2% from 1990 levels over the 2008-2012 period, whereas total global emissions would need to decline by 4-8% each year in order to limit warming to about 2°C.¹⁰⁰

To conclude, with a policy based on 2°C or more, ecosystem services are seriously reduced and it constitutes a dangerous anthropogenic interference with the climate system. It is not consistent with obligations to protect, preserve and improve the environment under PSS Article 11 and the UNFCCC’ objective. Taking into account the effects of what a rise in temperature will have on humanity and the sustainability of the ecosystem, it also constitutes a systemic human rights violation on a global scale.

3 Application and Operationalization

The RHE could be used as an instrument to challenge State policy and action at both domestic and international levels in order to achieve sustainability.¹⁰¹

⁹⁷ Ibid, p.77

⁹⁸ Hansen, Jim, Target Atmospheric CO₂: Where should humanity aim? Atmospheric Science Journal, (2008), 2, 217-231

⁹⁹ European Council, Climate Change strategies 2005.
Available in: <http://register.consilium.eu.int/pdf/en/05/st07/st07242.en05.pdf> [Visited 3 October 2010].

¹⁰⁰ WDR (2010) p.79

¹⁰¹ Environmental Rights Report (2005) §258

The RHE could also guide decision-making to raise the priority of the protection of the ecosystem's sustainability as a real base of socio-economic development. This is important in order to ensure the rule of law and the proper regulation of the atmosphere as a trust asset.

3.1 International Courts

The international community, with the aim of respecting human life and dignity as the main values of humankind, needs to preserve the ecological base.

3.1.1 Procedural Aspects and the RHE

Human rights have often been categorized into three generations. This classification gives no guidance regarding the relation between human rights and environmental protection. In fact, "all human rights involve correlative duties for individuals, groups and governments."¹⁰² Indeed, "environmental rights do not fit neatly into any single category or generation of human rights."¹⁰³

The RHE could be legally formulated: As a procedural right, allowing individuals effective access to environmental information, judicial remedies and public participation.¹⁰⁴ As a socio-economic right with programmatic status, but establishing concrete State duties to protect and repair environmental quality,¹⁰⁵ and; As a collective right giving people the right to determine how their environment and natural resources should be managed.¹⁰⁶

"The obligations generally imposed upon states in human rights instruments demand both abstentions and positive actions."¹⁰⁷ The CIDH has concluded that the State's

¹⁰² Shelton (1991) p.124

¹⁰³ Birnie (2009) p.269

¹⁰⁴ The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters – Aarhus Convention

¹⁰⁵ PSS, Article 11

¹⁰⁶ 1981 African Charter on Human and Peoples' Rights, Article 24. "All peoples shall have the right to a general satisfactory environment favourable to their development."

¹⁰⁷ Shelton (1991) p.123

obligation to respect human rights also requires the obligation to ensure that the rights are guaranteed.¹⁰⁸

The implementation of the RHE is not merely a policy statement. It demands negative and positive duties from the State, but also from individuals, communities and the international community.¹⁰⁹ The Preamble of PSS notes:

“[...] the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion if they are to be fully realized, and the violation of some rights in favor of the realization of others can never be justified.”

The double dimension of the RHE could guide its application within the UNFCCC at different levels: The procedural aspect requiring access to information¹¹⁰ and the obligation to perform an impact assessment play a decisive role in providing information about sustainability.¹¹¹ While defining the ‘healthy’ environment in climate change, the RHE incorporates the best available scientific information about the ecosystem’s limitations. It creates a reference to objectively assess the legality of the State’s measures to protect the public interest at domestic and international levels.

The objectivity of that information transcends socio-economic and politic arguments based on sovereignty. It demands that the State play an active role to protect the ecosystem’s integrity for present or future generations. Even in cases in which a population, although duly informed, adopts harmful interaction with the environment, the State has the obligation to discourage unsustainable patterns.

Individuals and communities could challenge State inaction or unsustainable States’ policies, actions or laws. Specific domestic and international formulations of the RHE

¹⁰⁸ Velásquez Rodríguez Case, 4 Inter-Am. Ct. H.R. (ser. C) at 155 (judgment of July 29, 1988. §168-175

¹⁰⁹ Ksentini Report (1994), §254

¹¹⁰ UNFCCC Article 4.1(i), Article 6.

¹¹¹ UNFCCC Article 4.1(f) and Preamble

should determine the obligation of States to follow the scientific parameter of sustainability as the best base possible to achieve joint compliance and implementation of international treaties, mechanism, policies and programmes. Inconsistencies with this obligation could generate a responsibility upon States to protect human rights.

If 'healthy' environment is undefined, it merely constitutes an ideal that has no point of reference. All actors tend towards that ideal, but it could not be enforced. It could be avoided in favor of other socio-economic purposes. Conversely, when it is defined by science, the limits are clearer and the margin of discretion is dramatically reduced.

3.1.2 Ecological Perspective and Obligation Erga Omnes.

“Many human rights are suited to being applied from an ecological perspective, whether those rights are political, civil, social, economic or cultural, and whether they are exercised individually or collectively.”¹¹² This is important to provide criteria to properly enforce the obligation derived from the RHE.

Civil and political rights are necessary preconditions for mobilizing environmental issues, and making claims to protect the environment effective.¹¹³ The focus is on individual violations. It empowers individuals, facilitates participation in decision-making and compels States to meet minimum standards of protection. The IACHR and CIDH have interpreted the rights to life, health and property to afford protection from environmental destruction and unsustainable development.¹¹⁴

Collective rights empower peoples to determine how to develop their environment and natural resources. Protection of indigenous rights has significant environmental implications; i.e. The CIDH held that Paraguay has failed to duly ensure the property rights over ancestral land of the indigenous community, Xákmok Kásek. It left the members of this community in a serious state of health, including food vulnerability,

¹¹² Environmental Rights Report (2005) §243

¹¹³ Anderson, Michael, Human Rights approaches to environmental protection: An Overview. In: Human Approaches, Oxford (1996) p.4-5.

¹¹⁴ Maya Indigenous Community of the Toledo District v. Belize, Case 12.053, Report No 40/04, Inter-Am. CHR.OEA/Ser.L/V/II.122 Doc.5 rev.1 at 727 (2004) See also: Yanomami Indians v. Brazil, Inter-Am. CHR. Case No 7615, resolution no 12/85, 5 March 1985

threat to life and community disintegration. The CIDH also held that Paraguay had violated the right to life:¹¹⁵

“[...] the water supplied by the State during the months of May to August 2009 was no more than 2.17 liters per person per day. In this regard, according to international standards most people require a minimum of 7.5 liters per person per day to meet all basic needs including food and hygiene.”¹¹⁶

The African Commission of Human Rights held that the peoples’ right to a general satisfactory environment favorable to their development¹¹⁷ imposes an obligation on the State to take reasonable measures “to prevent ecological degradation and secure ecologically sustainable development.”¹¹⁸ In addition, the peoples’ right to the best attainable standard of health¹¹⁹ included:

“Ordering independent scientific monitoring of threatened environments, requiring and publishing environmental and social impacts studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities.”¹²⁰

Finally, the Court ordered the “comprehensive cleanup of lands and rivers damage by oil operations.”¹²¹

Concerning a dam project in the Danube River, the ICJ found:

¹¹⁵ ICHR, Article 4.1

¹¹⁶ Case of the *Xákmok Kásek v. Paraguay*, Judgment of August 24, 2010, Inter-Am. Ct. H.R., (Ser. C) No. 214 (2010). §195

¹¹⁷ ACHPR, Article 24

¹¹⁸ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, ACHPR, No.155/96 (2002) [Ogoniland Case] §52-53.

¹¹⁹ ACHPR, Article 16

¹²⁰ Ogoniland Case (2002) §54

¹²¹ Ogoniland Case (2002) §69

“The project's impact upon [...] the environment is of necessity a key issue [...] the Parties together should look afresh at the effects on the environment of the operation of the Gabčíkovo power plant”.¹²²

In his separate opinion, Weeramantry affirms:

“It is thus the correct formulation of the right to development that that right does not exist in the absolute sense, but is relative always to its tolerance by the environment.”¹²³

Weeramantry also explains:

“The right to development and the right to environmental protection are principles currently forming part of the corpus of international law. They could operate in collision with each other unless there was a principle of international law which indicated how they should be reconciled. That principle is the principle of sustainable development which, according to this opinion, is more than a mere concept, but is itself a recognized principle of contemporary international law.”¹²⁴

In relation to the protection of the environment, he affirms:

“[It] is [...] 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”.¹²⁵

Weeramantry affirms: “There is a duty lying upon all members of the community to preserve the integrity and purity of the environment.”¹²⁶ He explains:

¹²² Case Concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia) ICJ 1997 Reports 7, Summaries of Judgments, p.7-8

¹²³ Hungary/Slovakia (1997) Sep. op. Weeramantry, p.89

¹²⁴ Hungary/Slovakia (1997) Summaries of Judgments p.8

¹²⁵ Hungary/Slovakia (1998) Sep. op. Weeramantry, p.88-89

¹²⁶ Ibid, p.107

“I believe a distinction must be made between litigation involving issues *inter partes* and litigation which involves issues with an *erga omnes* connotation.

When we enter the arena of obligations which operate *erga omnes* rather than *inter partes*, rules based on individual fairness and procedural compliance may be inadequate. [...] International environmental law will need to proceed beyond weighing the rights and obligations of parties within a closed compartment of individual State self-interest, unrelated to the global concerns of humanity as a whole.”¹²⁷

In our opinion, it is possible to infer that Weeramantry gives the duty to preserve the integrity and purity of the environment *erga omnes* character.¹²⁸ In accordance with this, Birnie stresses:

“While obligations of global environmental responsibility may have an *erga omnes partes* character, in the sense that they are owed to all states acting through collective institutions of treaty supervision, in the Nuclear Test Cases the ICJ was unsympathetic to the notion of an *actio popularis* allowing high seas freedoms to be enforced by any state, and it did not follow its earlier dicta.”¹²⁹

It seems that this decision does not deny the difference made by Weeramantry. The ICJ was unsympathetic with the possibility of litigation through *actio popularis* on issues which involves an *erga omnes* connotation.¹³⁰ However, it does not deny the *erga omnes* character of the obligation lying upon the international community to preserve the integrity of the environment. Neither does it affect the nature of the coherent answer that the international community should give when the global environment is threatened.

For example, the ICJ has stressed the difference between the obligation to recognize the illegality of the failure of a State to fulfill an obligation arising under a peremptory norm, and the precise determination of the acts permitted within the competence of the

¹²⁷ Ibid, p.114

¹²⁸ Belgium v. Spain (2nd phase) (Barcelona Traction case), 1970 ICJ § 33

¹²⁹ Birnie (2009) p.233 Birnie refers the Nuclear Test Cases. Australia v. France; New Zealand v. France (1974) ICJ Reports 253, 475 [The ‘earlier dicta’ was in Gabčíkovo-Nagymaros Case]

¹³⁰ ICJ Report 1974 In: Birnie (2009) p.131

appropriate political organs of the United Nations acting within their authority under the Charter:

“[...] the termination of the Mandate and the declaration of the illegality of South Africa’s presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of the situation which is maintained in violation of international law. In particular, no State which enters into relations with South Africa concerning Namibia may expect the United Nations or its Members to recognize the validity or effects of any such relationship.”¹³¹

While the ICJ was unsympathetic to the notion of an *actio popularis* when the global environment is threatened, the *erga omnes* character of the interest and the obligation upon all members of the international community to preserve the ecological integrity has not been denied. The realization of this obligation that is included within the RHE could provide a coherent answer from State parties of the PSS or from the international community as a whole. States should not recognize as lawful, atmospheric regulation based on unsustainable levels of GHG emissions. States should collectively bring it to an end by lawful means. For instance, States should not render assistance in maintaining such a situation. The application of economical measures should be further assessed, but is not a matter which will be addressed by this paper.

3.2 Inter-American System of Human Rights

The Charter of the OAS and the American Declaration on the Rights and Duties of Man (“The Declaration”) were adopted in 1948. The 1969 American Convention of Human Rights (“The Convention”) gives competence to the Inter-American Commission of Human Rights (“The Commission”) and the Inter-American Court of Human Rights (“The Court”) which were formulated in order to ensure that States comply with their obligations established in the Convention.

The Commission can receive individual petitions alleging human rights violations perpetrated by members of OAS. The Commission has contentious and promotional functions.¹³² It may carry out investigations (including on-site visits and hold hearings)

¹³¹ Legal Consequences for States of the continued presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970) Advisory Opinion, ICJ Report (1971)§117-133

¹³² ACHR, Article 41 & 42.

and may prepare confidential reports with recommendations to the respondent state. If the state has not taken any action, the Commission may decide either to prepare a second report that may be public or take the case to the Court.

Only the Commission and parties to the Convention may bring cases before the Court. Proceedings may only be initiated against States that are parties to the Convention and which have recognized the Court's jurisdiction. However, the Declaration is considered to have binding legal effect on all OAS member States¹³³ that includes United States and Canada.

3.2.1 Inter-American Commission of Human Rights

The Commission enjoys jurisdictional competence over the PSS to protect the RHE and other socio-economic rights. The PSS Article 19 gives the Commission competence to apply all these rights to State parties under its promotional mandate,¹³⁴ and is competent only to apply the right to unionize¹³⁵ and the right to education¹³⁶ under its contentious mandate. However, Melish explains:

“The extensive catalogue of other social rights guaranteed in the Protocol may be used in petitions lodged against states parties only to the extent they are invoked to assist in the interpretation of the scope and content of the congruent but less precisely defined social rights consecrated in the Convention, particularly those guaranteed under article 26.”¹³⁷

Article 26 states that State parties must adopt measures to achieve progressively, by legislation or other appropriate means, the full realization of the rights ‘implicit’ in the socio-economic standards set forth in the Charter of the OAS.

¹³³ Advisory Opinion OC-10/89, July 14, 1989 Inter-Am. Ct. H.R. (Ser. A) No.10 (1989). §47

¹³⁴ PSS, Article 19.7

¹³⁵ Ibid. Article 8.1

¹³⁶ Ibid. Article 13

¹³⁷ Melish, Tara. *The Inter-American Commission on Human Rights In: Social Rights Jurisprudence*, Cambridge, (2009) p.344. See also: Ana Victoria Villalobos et al. v. Costa Rica, Report No. 25/04, Case 12.361, Inter-Am. Comm. H.R., OEA/Ser.L/V/II.122 Doc. 5rev. §70

Within this context, the Commission has the opportunity to consider a complaint submitted by the Inuit Circumpolar Conference.¹³⁸ The legal basis of the Petition was based on climate change harm affecting human rights, and the fact that the United States has not taken substantial reduction measures to reduce GHG emissions.

The petition was rejected because the information it contained did not satisfy the requirements contained within its rules of procedures. Specifically: “The information provided does not enable us to determine whether the alleged facts would tend to characterize a violation of rights protected by the Americana Declaration.”¹³⁹

The Commission also renounced other remedies: “Like encourage the parties to negotiate a solution. If that fails, it could undertake an independent investigation of the facts underlying the claim and issue a report, setting out its conclusion concerning the relationship between climate change and human rights.”¹⁴⁰ It could assess admissibility issues such as the exhaustion of domestic remedies, where the burden is on the respondent government to prove the existence of a domestic remedy, and the failure to exhaust it.¹⁴¹

In fact, after the rejection, the Supreme Court of the United States granted a claim brought by a dozen States of the United States, challenging the Federal Government’s failure to regulate GHG under domestic law. The Supreme Court held that “petitioners have standing to challenge the Environmental Protection Agency’s denial of their rulemaking petition.”¹⁴²

¹³⁸ Sheila Watt Cloutier v. United States, Petition No. P-1413.05 Inter. Am. Comm. H.R.
Available at: http://www.ciel.org/Publications/ICC_Petition_7Dec05.pdf [Visited:4.November.2010]

¹³⁹ Ariel E. Dulitzky OAS. 16.November.2006
Available at: <http://www.nytimes.com/2006/12/16/world/americas/16briefs-inuitcomplaint.html>
[Visited:4.November.2010]

¹⁴⁰ Wagner, Martin and Donald Goldberg, An Inuit Petition to the IACHR for Dangerous Impacts of Climate Change, Earthjustice. p.4
Available at: http://www.ciel.org/Publications/COP10_Handout_EJCIEL.pdf
[Visited:4.November.2010]

¹⁴¹ Rules of Procedure of the IACHR, Article 31.3

¹⁴² Massachusetts, et al., petitioners v. Environmental Protection Agency, 549 US 497 (2007) p.22

Article 1.1 of the Convention states that the Parties "shall secure to everyone within their jurisdiction the rights and freedoms [...] of this Convention." The term "jurisdiction" in this Article is not limited to national territory. Rather, "a state party to the American Convention may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that state's own territory."¹⁴³

3.2.2 Promotional Mandate

The Commission enjoys promotional functions that allow it to extend its more limited contentious jurisdiction to directly address the more generalized or structural manifestation of human right abuse. The generalized claims or issues not appropriate for case-based adjudication can always be brought to the Commission.

PSS Article 19 also states that the Commission may formulate such observations and recommendations as it deems pertinent concerning the status of the economic, social and cultural rights established in the present Protocol, in all or some, of the State Parties, which it may include in its Annual Report to the General Assembly, or in a special report, whichever it considers more appropriate.

These mechanisms, particularly when used in conjunction with discrete litigation initiatives, may address the larger structural, contextual and historic dimensionality of human rights violations. It allows regional awareness to be raised about issues of grave concern (such as climate change), stimulating media interest, and organizing constituencies on the ground.¹⁴⁴

3.2.3 Inter-American Court of Human Rights

The Court is charged in applying and interpreting the Convention and has both contentious and advisory functions.¹⁴⁵ As with the Commission, the Court has the competence to apply the PSS to individual petitions and direct adjudication only in

¹⁴³ Victor Saldano v. Argentina, Petition, Report No. 38/99, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 289 (1998) §17

¹⁴⁴ Melish (2009) p.340

¹⁴⁵ Statute of the Inter-American Court on Human Rights, O.A.S. Res. 448 (IX-0/79) Article 1 & 2

relation with article 8.1 and 13 of the Convention.¹⁴⁶ The Protocol also assists the Court in the interpretation of the content and scope of others rights granted in the Convention, particularly Article 26, pursuant to the interpretative mandate of Convention, Article 29.b.

Article 26 of the Convention, prescribes socio-economic rights in a broad substantive scope and 'separated' from civil and political rights.¹⁴⁷ It could suggest that the rights prescribed in Article 26 have a different way of protection by the system. In this regard, the Court has recognized that: "Economic, social and cultural rights are the same in substance as political and civil rights. All derive from the essential dignity of man, all are inalienable right's of the individual, and all must be promoted, guaranteed and protected nationally, regionally and globally."¹⁴⁸ In practice, it has some nuances, as Melish comments:

"Despite the Court's express jurisdictional competence to apply these autonomous social rights in the individual petition process, the Court has nonetheless tended to shy from pronouncing upon article 26 of the Convention, preferring instead to use civil and politic rights, read broadly or used as procedural devices, to protect social rights.

It is critical to underscore that this approach does not reflect any judicial antipathy by the Court to the protection of socio-economic rights. Rather, it reflects a particular reading of the text of Article 26, one currently ascendant in the system, that conflates its formal title, 'progressive development', with the autonomous rights it protects and, concurrently, their corresponding obligations."¹⁴⁹

In our opinion, this concurrency of protection does not preclude the possibility of an *actio popularis*. This approach relies on a particular interpretation of rules that could be coherent with the indivisible nature of human rights. However, Melish affirms that the

¹⁴⁶ PSS, Article 19

¹⁴⁷ ACHR Articles 3-25

¹⁴⁸ Inter-Am. Ct. H.R., Annual Report of the Inter-American Court of Human Rights 1986, OEA/Ser. L/III.15 Doc. 13 (1986) §14.

¹⁴⁹ Melish (2009) p.375

rule of individualization¹⁵⁰ and individualized proof of harm¹⁵¹ precludes this possibility.¹⁵²

In fact, the Court has required that alleged victims must be individualized and duly identified with the purpose of granting 'effective' protection. If this is not done, the Court will proceed in considering the case only with respect to the named victims.¹⁵³ Conversely, in case of provisional measures,¹⁵⁴ the Court has stated that: "In consideration that is not judging the merits [...]. It is sufficient that the beneficiaries are "determinable" for the purposes of granting such measures of protection."¹⁵⁵

This approach is consistent with the aim of compensating those victims whose rights have been violated. Nevertheless, in those cases which relate to environmental matters, the Court's decisions¹⁵⁶ which are aimed to prevent individual or collective rights violations could have various effects: Not only on those most affected, who are easier to identify and therefore entitled to be compensated, but also on an indeterminable (spatial and temporal) number of persons, who will receive the benefits of the protection of the ecosystem's integrity. The Court's requirement to duly determinate direct victims does not preclude the decision's indirect effect on the protection of the diffuse interests inherent in the RHE.

For example, the Court found that Nicaragua had violated Articles 21 and 25 (Right to property and Right to Judicial Protection) of the Convention to the detriment of the Mayagna (Sumo) Awas Tingni Community. The Court ordered the State to adopt legislative, administrative, and any other measures necessary to create an effective

¹⁵⁰ Rules of Procedure of the Inter-Am. Ct. H.R., OEA/Ser.L/V/I.4 rev.9 (2003) Article 23

¹⁵¹ ACHR Article 63.1

¹⁵² Melish (2009) p. 380

¹⁵³ Case of Children's Rehabilitation v. Paraguay, Judgment of Sept.2, 2004, Inter-Am.Ct.H.R. (Ser.C) No.112, §109-110

¹⁵⁴ ACHR Article 63.2

¹⁵⁵ Case of Children's Rehabilitation v. Paraguay (2004) §108

¹⁵⁶ ACHR Article 62

mechanism for demarcation and titling of the community's property. In addition, until that delimitation had been done, the State was ordered to abstain from any acts that might lead the agents of the State itself or third parties acting with its acquiescence, or its tolerance, to affect the existence, value, use or enjoyment of the property of the Community. Finally, the Court ordered that the State must invest, as reparation, the sum of US\$ 50,000 in works or services of collective interest for the benefit of the Community, under supervision by the Commission.¹⁵⁷

Therefore, in relation to climate change which demands effective protection, not only of individual and collective human rights, but also of the diffuse interest inherent in the RHE, the problem is not one of the individualization of victims or to the problem of granting effective protection to duly identified victims. The problem is one of grading the damage and determining what grade of global environmental damage of GHG emissions into the atmosphere is harmful enough to identify a victim as a 'victim' of human rights violations, thereby activating the competence of the Court. As was mentioned in Chapter 2, science and law are clear in determining the harm and victims of climate change. It is left to the Court to advance beyond anthropocentric limitations and use the principle of sustainability within the human RHE to objectively determine human rights violation. The Court could bring effective protection, not only through compensation, but demanding from the State appropriate measures and laws.

This approach is also consistent with an important precedent¹⁵⁸ of the Court in relation to the obligation to respect and ensure human rights as established in the Convention:

169. According to Article 1 (1), any exercise of public power that violates the rights recognized by the Convention is illegal.

171. This principle suits perfectly the nature of the Convention, which is violated whenever public power is used to infringe the rights recognized therein. If acts of public power that exceed the State's authority or are illegal under its own laws were not considered to compromise that State's obligations under the treaty, the system of protection provided for in the Convention would be illusory.

¹⁵⁷ The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment of August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001).

¹⁵⁸ Velásquez Rodríguez Case, 4 Inter-Am. Ct. H.R. (ser. C) at 155 (judgment of July 29, 1988. §169, 171

Negotiation and adoption of atmospheric regulation at an international level by State parties can then not infringe rights recognized by the Convention. Trespass the limited capacity of the atmosphere to naturally absorb GHG emissions results in negative effects on human rights, thereby exceeding the State's authority and constituting an illegal exercise of public power by the State. The Court must ensure that the system of protection provided for in the Convention is not illusory.

3.3 Operationalization of the RHE

The role of court decisions is fundamental in order to correct State policies and actions and make them consistent with international obligations. Nevertheless, protecting and respecting the environment should also be part of the social conscience.

3.3.1 Rights-based Approach and the Atmosphere's International Regulation

“The so-called rights-based approach treats international human rights law chiefly as a conceptual framework that is accepted by the international community and that can provide a coherent system of principles and rules in the field of development.”¹⁵⁹

The OHCHR has specified three different ways in which human rights can be relevant to these strategies: Constitutive relevance (the right to food, to water, to health), instrumental relevance (rights of participation or information) and constraint-based relevance (fundamental human rights that limit those grounds of State-action permissible).¹⁶⁰ This approach challenges the State on the ground that inaction to provide essential rights is illegal or by ruling out State interventions on the grounds that they are legally inadmissible.

Under this framework, the OHCHR explains that the idea of progressive realization has three major strategic implications: 1) The realization of human rights may have to occur

¹⁵⁹ Abramovich, Victor, The Rights based approach in development, policies and strategies. CEPAL Review 88, April (2006), pp.33-48, p.34 Available at: <http://www.eclac.cl/cgi-bin/getProd.asp?xml=/revista/noticias/articuloCEPAL/6/26316/P26316.xml&xsl=/revista/tpl-i/p39f.xsl&base=/revista/tpl/top-bottom.xslt> [Visited:02.November.2010]

¹⁶⁰ Human Rights and Poverty Reduction, A conceptual framework, OHCHR, New York (2004) Available at: <http://www.ohchr.org/Documents/Publications/PovertyReductionen.pdf> [Visited:02.November.2010]

over a period of time; 2) set priorities among different rights, while ensuring the non-retrogression of the rest, and; 3) obligations that require States to ensure certain minimum levels of enjoyment of various human rights (the right to life, to water, and to be free from starvation). These core obligations must be treated as binding constraints, with no trade-offs being permitted with regard to them. The progressive realization of these human rights requires targets, indicators and benchmarks.

The double dimension of the RHE provides essential benchmarks in order to face climate change in an efficient, equitable and sustainable manner. These benchmarks define the illegality of States' inaction to address climate change, and the legal inadmissibility of the use of public power regarding cap-and-trade systems, based on unsustainable levels of GHG emissions.

Climate change is dangerously reducing the ecosystem's capacity to support the enjoyment of human rights of constitutive relevance. The obligation to protect the ecosystem's integrity should be prioritized and monitored by time-bound indicators in relation to efficiency, equity and sustainability.

In light of new scientific advances in climate change science, understanding States' policies and actions should be more consistent and substantial. A 300-350 ppm CO₂ target could be a move in that direction. This demands fundamental changes in energy policies, with substantial and differentiated policies to reduce CO₂ and non CO₂ GHGs.¹⁶¹

The concept of a cumulative budget also provides a framework when considering targets in the short and long term. This concept also permits the equitable distribution of emissions to allow the fulfillment of fundamental human rights, and the distinction between survival and luxury emissions.¹⁶² For example, keeping the heating of the earth's atmosphere caused by CO₂ alone to 2°C will require limiting cumulative CO₂ emissions to 1 trillion tons (Tt) of Carbon (3.7 Tt CO₂). The world has already emitted

¹⁶¹ Hansen, Jim (2008) p.226

¹⁶² WDR (2010) p.79

half that amount over the previous two and a half centuries. For the 21st century, a business-as-usual path, would release the remaining half a trillion ton in 40 years, requiring future generations to live in a world in which essentially zero carbon was emitted.¹⁶³

3.3.2 Procedural Aspects and Global Governance

“Procedural-base right is more effective since it guarantees participation in decision-making on one hand, and *locus standi* before national court and tribunals on the other.”¹⁶⁴ States’ obligations to perform EIA, to provide information and to comply with the right to education, could play a decisive role in improving the realization of the RHE and facing climate change. The ICJ found:

“In order to evaluate the environmental risks, current standards must be taken into consideration [...]. New norms and standards have been developed [...]. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. [...] the Parties together should look afresh at the effects on the environment.”¹⁶⁵

The obligation to perform EIA is dynamic because it demands continuous monitoring and openness in order to receive the best available information. Current scientific information constitutes an integral part of this obligation in the sense that it could not legally be avoided. This information brings benchmarks to measure due diligence and precaution when a State exercises its public power over public assets.

The obligations derived from the RHE demand precaution and informed decision-making, which is achievable by EIA. The RHE defines its object of protection with the same dynamism: continuous monitoring and openness to receive the best available information.

¹⁶³ WDR (2010) p.79

¹⁶⁴ Fitzmaurice (2009) p.614

¹⁶⁵ Hungary/Slovakia (1997) Summaries of Judgments p.7-8

To achieve the realization of the RHE within the UNFCCC demands that the best available scientific information be taken into account for important reasons: to define 'dangerous anthropogenic interference,¹⁶⁶ to guide decision-making,¹⁶⁷ and to take climate change considerations into account,¹⁶⁸ but also to promote education, training and public awareness related to climate change and to encourage the widest participation.¹⁶⁹

These later commitments are crucially important in relation to the rule of law. They are important conditions for raising legitimacy and give legality to States' policy and action. This leads to better levels of governability within democratic processes. The State's role as a public interest trust holder to protect public assets (including the global atmosphere) also demands joint compliance with those obligations. The State's failure to grant these duties affects the fundamental rights of minorities, indigenous peoples and others that are the most vulnerable to climate change. The IACHR concludes that:

“[T]he State, by granting logging and oil concessions to third parties to utilize the property and resources that could fall within the lands which must be delimited, [...] or protected, without effective consultations with and the informed consent of the Maya people and with resulting environmental damage, further violated the right to property [...]

[...] and constitute violations of several other rights under international human rights law, including the right to life [...], the right to a family and to protection [...], the right to preservation of health and well-being [...], and the “right to consultation” [...], and the principle of self-determination.”¹⁷⁰

The right to consultation is implicit in ICCPR Article 27 and the ADHR Article XX and is a corner stone of democratic participation. In this direction, the IACHR concludes in relation to Article 13 proclaimed in the Inter-American Democratic Charter that:

¹⁶⁶ UNFCCC, 2

¹⁶⁷ UNFCCC, 4.1(d)

¹⁶⁸ UNFCCC, 4.1(f)

¹⁶⁹ UNFCCC Article 4.1(i) and Article 6

¹⁷⁰ *Maya indigenous Communities of the Toledo District v. Belize*, Inter-Am. Comm. H.R. Report No. 40/04, Case 12.053, OEA/Ser.L/V/II.122, doc.5 rev.1 (2004).§154

“[...] development activities must be accompanied by appropriate and effective measures to ensure that they do not proceed at the expense of the fundamental rights of persons who may be particularly and negatively affected, including indigenous communities and the environment upon which they depend for their physical, cultural and spiritual well-being.”

To deal with climate change as a common concern of humankind challenges State sovereignty and the classical understanding of democracy as an internal matter of States in relation to their citizens. Climate change is a global problem that demands a global policy, but also local implementation.

This makes it problematic for States to understand their role as public interest trust holders in reference to global environmental concerns. It demands ways of social understanding that transcends a State's own citizens. It demands participation of the cosmopolitan global society. Anthropocentric arguments could lead to unnumbered multicultural answers to address climate change. Once again, it is necessary here to use the benchmark of ecological sustainability, as informed by science.

David Held provides three tests to help filter and guide policy issues to the different levels of governance: 1) The test of extensiveness (which examines who are significantly affected by a collective problem within and across delimited territories), 2) The test of intensity (which assesses the degree to which the problem impinges on a group of people at a local, national or global level), and 3) The test of comparative efficiency (which assesses the availability of alternatives, the cost and the consequences).¹⁷¹

The UNFCCC objective is an obligation upon States parties, but most importantly, it constitutes a right. It empowers the global society and those most affected by climate change to receive information, education and training about this global problem. It also empowers them to participate in the decision-making about the availability of alternatives, cost and consequences regarding matters that are affecting them directly or indirectly.

¹⁷¹ Held, David, *Democracy and the Global Order*, Cambridge (2005) p.236

The atmospheric regulation of GHG emission also demands public participation at a global level. States do not have restrictive discretion on this matter, nor exclusive prerogatives. Due monitoring and public participation aimed at reducing GHG concentrations in the atmosphere should involve different levels of political interaction and interconnectedness. Cap-and-trade systems (domestic and global) could not affect the population without granting them duly and informed participation.

4 Conclusions

4.1 Conclusions

The RHE has significant potential to deal with climate change because of its multidisciplinary legal content and status. The RHE has a double dimension: As a human right and as an environmental right. As a human right, it demands equity to respect a minimum standard of environmental adequacy which makes human life and the development of well-being possible. To define this environmental condition, the RHE has to be coherent and adopt a comprehensive focus of life. It must involve the 'community' and 'continuity' of life on the planet. To be sustainable this minimum needs to be objective and escape from cultural relativism. It needs to contain a benchmark to measure behaviors and States' policies.

The "healthy" environment, as defined in reference to the integrity of the Earth's ecological systems collects the essence of ecosystems sustainability and gives the RHE a special connection to the principle of sustainability. The RHE obtains the legal authority and normative force of the principle of sustainability when it seeks the protection of the integrity of the Earth's ecological systems.

The healthy environment in the RHE is the benchmark of environmental adequacy when defined by the best available scientific information about ecosystems. In this, important international instruments use natural sciences to define ecosystems and its carrying capacity as objects of protection. The use of the best available scientific information about ecosystems is also important to properly fulfill the obligation to perform EIA.

This information serves as an objective and independent benchmark to give content and defines the core of the RHE's object of protection. This makes it possible for the RHE to transcend the anthropocentrism of human rights and gives priority to environmental protection over socio-economic development.

The obligation to protect the integrity of global ecosystems is the most foundational obligation of the global order and it derives from the RHE. Its realization is a "legitimate interest" that the international community owns as a global common concern, but it is also the "legitimate interest" that every human being owns, because it constitutes the base for our most fundamental rights. This gives the obligations to protect the integrity of ecosystems *erga omnes* character. Although it has not been declared as such by International courts, it constitutes the *sine qua non* condition to ensure the future of humankind. This obligation looks to all sectors for its realization but mainly the State in its role as a public interest trust holder.

The relationship between the RHE and sustainability requires transcending the individual rights-base approach of the human rights courts, so as to intensify the indivisibility of human rights. Its interconnectedness facilitates the normative integration of the RHE within the UNFCCC. The realization of the RHE demands integration at different levels: 1) In terms to achieve the balance between socio-economic development and environmental protection; 2) In terms to achieve equity between generations, between humanity and ecosystems, between lifestyles and fundamental rights and between capacities and responsibilities; and also 3) In terms of prioritization between efficiency, equity and sustainability within decision-making in climate change.

Integration within the RHE increases levels of legal consistency to deal with climate change. To the extent that climate change is dangerously reducing the ecosystem's capacity to support the enjoyment of fundamental human rights of constitutive relevance, the obligation to protect the ecosystems integrity demands its priority and time-bound indicators in relation to efficiency, equity and sustainability. The realization of the RHE requires the prioritization of the protection of the ecosystem's sustainability and integrity. This prioritization should be performed by States at domestic and international levels through policies, actions and laws. The inconsistency

with this priority could be challenged by litigation or by public participation. The prioritization demands continuous monitoring and openness to receive the best available information for defining the legal core of protection of the RHE and the limits or indicators that this information could provide.

The application of the RHE faces the nature and legality of those atmospheric entitlements established under the Kyoto Protocol directly by introducing both human rights and sustainability analysis in order to differentiate luxury emissions from developmental emissions. While the former exceeds the limits of atmospheric sustainability and falls outside of the legality, the latter constitutes development in a sustainable base to fulfill fundamental human rights. In this context, States have compromised atmospheric trust assets through allowing unsustainable levels of GHG emission via the cap-and-trade scheme under the Kyoto Protocol. In light of the best available information about climate change, the level of emission established in the cap constitutes a dangerous interference with the climate system. This is inconsistent with the realization of the RHE.

4.2 Suggestions

State Parties of the PSS should take into account the guiding elements of the RHE in the negotiation and implementation of international instruments. The aim to reduce GHG concentrations in the atmosphere should be consistent with the realization of the RHE. Cap-and-trade schemes, which have the same purpose, should be consistent with the duties demanded by the RHE. These schemes should respect and not trespass the limits of the atmosphere to carrying human development and well-being as a cornerstone to achieve temporal, spatial and ecological equity.

The “cap” under the Kyoto Protocol allows for unsustainable levels of GHG emissions. This is reducing the capacity of the atmosphere to naturally adapt. This system must be re-evaluated, taking into account the need to prioritize sustainability over development. The establishment of rights to pollute the atmosphere, its legal nature and the base over which they have been assigned, should be consistent with the RHE. The best available scientific information should be taken into account to define the consistency of obligations derived from the RHE.

The Kyoto Protocol is not an expression of a profound systematic change in societies. The current system under the Kyoto Protocol is still allowing unsustainable and harmful amounts of emissions as an externality in favor of developed countries. It is not compromising developing countries with the aim of discouraging and limiting unsustainable patterns. This system could engender serious discrimination for the most affected by climate change. It is necessary to introduce elements of equity in favor of populations living in poverty in order to allow them human dignity and a minimum standard of welfare.

The causes of climate change are intensively linked to the socio-economic structures in the world. Improving global awareness about climate change has to be directed to reshape socio-economic structures and global governances. There are concrete commitments in the UNFCCC to promote education, public awareness and to encourage the widest participation related to climate change.¹⁷² The concrete implementation of these commitments is crucially important to achieve a systemic change that could lead into the realization of the RHE. PSS, Article 19 allows the IACHR to apply its contentious functions to individual petitions in relation to violations of the right to education.¹⁷³ This could be used to challenge State inaction in order to implement UNFCCC commitments, and to inform societies about State policies and actions which are inconsistent with the Protocol. The promotional mandate of the IACHR is also important to this task.

The Public Trust Doctrine inherent in the RHE imposes limits on the sovereign power to regulate public assets that could be enforceable by domestic court and by the Inter-American system of Human Rights in application of the PSS, Article 5. It also constitutes fundamental and compulsory guidance to re-shape global atmospheric regulation based on sustainable levels of GHG emissions.

The "human rights" component of the RHE lends itself to immediate implementation by the Inter-American system of Human Rights. The practice being developed within this

¹⁷² UNFCCC, Article 4.1(i) and Article 6

¹⁷³ PSS, Article 13

body is important to give the RHE content and stresses its interconnections with other rights as means to improve its application. States parties should not renounce to fulfill obligations that they have undertaken under the PSS. It requires the achievement of consistency with obligations assumed in other instruments. The realization of the RHE has to achieve a high degree of consistency with fundamental and human rights related, like the right to food, indigenous rights and rights of the child. They can not be restricted or limited by means of laws or international instruments that are incompatible with the purpose and reason underlying those rights. Even more so, the general welfare within State Parties should be achieved in consistency with the purpose of those rights. These interconnections exceed the limits of this thesis, but require further investigation.

4.3 Implications

The RHE is a mechanism that seeks to achieve sustainability like the principle of sustainable development. In this task, the RHE does not renounce to its nature as a human right. It gives the RHE a larger potential to succeed. The RHE serves as a holistic instrument to establish concrete obligations to the State.

The RHE strongly links sustainability within and through human rights. It provides a base to achieve inter and intra generational equity. It also implies the interference and pre-eminence of the best available scientific information about ecosystems within the sphere of the human rights debate. The RHE introduces a benchmark to analyze and sets limits to human rights. The integration of the RHE within the rights to pollute under the Kyoto Protocol implies that development and well-being are defined within a range of sustainability in which the capacity of the atmosphere to sustain human development is not affected. It requires the minimum indispensable level of GHG emission to allow minimum standards of well-being to present generations; and the maximum, in consideration to the limits of the ecosystem's sustainability to naturally absorb carbon emissions and allow for development in the future.

The realization of the RHE finally depends on the obligation to protect ecosystems as a minimal base for the enjoyment of human rights. The content of this obligation depends on the best available scientific information. In consequence, despite specific legal formulation, the RHE could use human rights tools as part of a systematic strategy to achieve sustainability, equity and efficiency within human rights. This permits the

integration of obligations derived from human rights and environmental rights, and facilitates its mutual instrumentalisation. Finally, the substantive and procedural instruments of one could be used to enforce the realization of the other.

A rights-based approach to climate change must confront the pre-eminence of the principle of sovereignty in the international system. The global atmospheric regulation should be global, limit or transfer sovereign rights, set coherent and enforceable targets, and promote and protect human rights. Basing cap-and-trade schemes on unsustainable levels of emissions makes the Kyoto Protocol inconsistent with the realization of the RHE. It implies that State parties of the PSS have the obligation to reshape atmospheric regulation in order to protect the ecosystem's integrity at sustainable levels. The realization of the RHE within global atmospheric regulation schemes implies the incorporation of more elements of analysis than mere cost-effectiveness: Population and economic growth, the definition of well-being standards in reference to fundamental rights and discouragement of unsustainable patterns in general. It is a more comprehensive, profound and democratic way of facing climate change. All these elements bind State decision-making to future negotiations and the adoption of new schemes. Compliance with these elements could be measured to define the legality of these decisions.

The RHE is a substantive right that enables the enjoyment of fundamental rights for everyone. It implies that individuals also have the duty to behave consistently and accordingly with this right. In this, procedural rights have a complementary purpose to create awareness about unsustainable behaviors in order to discourage them. This also has importance to raise corporations' accountability in order to prevent them from using the argument of "complicity" with consumers so as to avoid accountability for carbon emissions. Unsustainable patterns of consumption should be intensively discouraged to reduce unsustainable production.

In sum, the RHE imposes more duties than rights. The false unlimited freedom of individual rights finds its limitations in the sustainability of ecological systems. The RHE, when projected in socio-economic development, challenges human behavior and reconciles efficiency and equity in order to preserve the ecosystem's sustainability. The

RHE has an important role in working against institutional inertia and systematic delays from States and international organizations. The RHE demands concrete and substantive policies and actions from States to directly address the causes of climate change.

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