



## **Center for Human Rights and Environment**

General Paz, 186 - 10A, Córdoba, 5000 Argentina, [Cedha@cedha.org.ar](mailto:Cedha@cedha.org.ar)  
54 (351) 425-6278 [www.cedha.org.ar](http://www.cedha.org.ar)

### **The Enforcement of Environmental Law from a Human Rights Perspective**

*By Romina Picolotti and Sofia Bordenave*

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[cedha@cedha.org.ar](mailto:cedha@cedha.org.ar)

# **The Enforcement of Environmental Law from a Human Rights Perspective**

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## **Introduction**

The objective of this article is to link environment and human rights at the level of domestic enforcement on the part of States. We start from the basis that human rights law provides substantive and procedural elements as well as institutional mechanisms that can be incorporated by environmental law with a view to achieving effective environmental protection.

Even though the protection of the environment has been consecrated in a number of international instruments and universal recognition has been achieved concerning the need to act in certain areas to prevent the destruction of the Earth, this protection has been based more on rhetoric and good will rather than on enforceability. International environmental law has not provided the mechanisms necessary for individuals to legally claim the fulfillment of the obligations assumed by States in environmental treaties. We understand by environmental enforcement, the ability to claim before a judge the fulfillment of obligations and the realization of rights that concern the protection of the environment.

For its part, international human rights law has been able to advance significantly with respect to enforcement. International justice forums have been created to which individuals can resort in order to demand that States fulfil their obligations and achieve the realization of rights that are included in human rights treaties. Likewise,

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\*Romina Picolotti is co- founder and director of the Access to justice Program of the Center for Human Rights and Environment (CEDHA), an international non/governmental organization located in Argentina dedicated to the development and strengthening of the linkages between human rights and the environment. CEDHA works with representatives of the civil society, public and private actors, and academic institutions. Dr. Picolotti graduated from the National University of Cordoba, and obtained her Masters degree at American University. She has worked extensively in the area of human rights with multilateral bodies and non-governmental organizations in Asia, Latin America, and the United States. Dr. Picolotti is Joint Professor at American University in the LLM. For more information see [www.cedha.org.ar](http://www.cedha.org.ar)

\*\*Sofía Bordenave has a Masters degree in International Public Law. A graduated from the National University of Cordoba and CIDOB, Barcelona, she obtained professional experience in criminal law and children's law. She worked as Legal Advisor of the Secretariat of Human Development of the Municipality of Cordoba focusing on development programs and strengthening the relationship between NGOs and the local government. Today, she is Legal Advisor for the Center for Human Rights and Environment (CEDHA) and heads CEDHA headquarters in Patagonia. For more information see [www.cedha.org.ar](http://www.cedha.org.ar)

international human rights law has succeeded in penetrating into the States' domestic legislation through legislative reforms that recognize and promote its application by local tribunals.

Environmental and human rights law have essential points in common that enable the creation of a field of cooperation between the two<sup>1</sup>:

- Both disciplines have deep social roots; even though human rights law is more rooted within the collective consciousness, the accelerated process of environmental degradation is generating a new “environmental consciousness”.
- Both are purposeful legal systems with objectives of universal consent and of variable content, open to reality and social changes. The contents of both disciplines need be adapted to dynamic social processes, their normative corpus must meet the needs of each social era, with the objective of fulfilling its protective ends.<sup>2</sup>
- Internationalization. The international community has assumed the commitment to observe the realization of human rights and respect for the environment. From the Second World War<sup>3</sup> onwards, the relationship State-individual is of pertinence to the international community. On the other hand, the phenomena brought on by environmental degradation transcends political boundaries and is of critical importance to the preservation of world peace and security. The protection of the environment is internationalized, while the State-Planet Earth relationship becomes a concern of the international community.
- Universalization. Both areas of law tend to universalize their object of protection. Human Rights are presented as universal and the protection of the environment appears as everyone's responsibility.

The advancement of the relationship between human rights and the environment would enable the incorporation of human rights principles within an environmental scope, such as anti-discrimination standards, the need for social participation, protection of vulnerable groups, etc. At the same time, the human rights system would be strengthened by the incorporation of environmental concerns, enabling the expansion of the scope of human rights protection and generation of concrete solutions for cases of abuses.<sup>4</sup> Finally, one of the most important consequences, is to provide victims of environmental degradation the possibility to access to justice. Given the present situation of absolute helplessness suffered by victims of

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<sup>1</sup> See A.A. Cancado Trindade, “The Parallel Evolutions of International Human Rights Protection and Environmental Protection and the Absence of Restrictions upon the Exercise of Recognized Human Rights”, in the Inter-American Institute of Human Rights Magazine, No. 13, January- June 1991.

<sup>2</sup> Alexandre Kiss, Définition et nature juridique d'un droit de l'homme à l'environnement, en Environnement et droits de l'homme, Pascal Kromarek, directrice de publication, 1987

<sup>3</sup> Michael J. Kane, Promoting Political Rights to protect the Environment, The Yale Journal of International Law, Volume 18, Number 1, pgs.389-390

<sup>4</sup> Michael R. Anderson, Human Rights Approaches to Environmental Protection: An Overview in Alan E. Boyle & Michael R. Anderson, Eds., Human Rights Approaches to Environmental Protection 1-4, 21-23 (1996)

environmental degradation, linking human rights and the environment brings such victims closer to the mechanisms of protection that are provided for by human rights law.

This article is organized in the following manner: Section I analyses elements concerning the enforcement of human rights and their incidence on environmental law. Access to justice is identified as one of the main obstacles for the enforcement of environmental law. Section II addresses the role played by the individual in environmental enforcement and the importance of providing individuals access to justice in order to fulfill the role of environmental protector. Section III analyses the concept of access to justice as forged by international human rights law and its implication on the enforcement of environmental law. This Section also analyses the human rights that compose the concept of access to justice from an environmental perspective. Finally, Section IV presents conclusions.

## **I. Enforcement of International Environmental Law and Enforcement of International Human Rights Law**

In actuality, the linkage between human rights and the environment reveals itself clearly and irrefutably. Environmental degradation severely affects the use and enjoyment of most internationally recognized human rights. Thus, for example, the right to life and to health, are critically affected by problems of environmental degradation,<sup>5</sup> the right to equality before the law is affected by the disproportionate way in which certain sectors of the population bear environmental burden - environmental discrimination-, the right to work is affected by environmental conditions in the work place, the right to property is affected by environmental degradation, etc.<sup>6</sup>

Experience in the human rights arena has shown that the way to make rights effective is to promote their enforcement. It is timely to consider which are the elements that made possible advances on the enforcement of human rights and whether these can be applied to environmental law.

The first element stems from the recognition that human rights are fundamental rights: the possibility of social cohabitation is given by the existence of norms and principles that imply the conception of immutable values, of limits that cannot be transgressed, of norms that are internalized within the collective consciousness as unyielding pillars

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<sup>5</sup>It has been estimated that roughly 60 per cent of the global burden of disease from acute respiratory infections, 90 per cent from diarrhea disease, 50 per cent from chronic respiratory conditions and 90 per cent from malaria could be avoided by simple environmental interventions. World Health Organization. 1997. *Health and Environment in Sustainable Development: Five Years after the Earth Summit*. Geneva: World Health Organization

<sup>6</sup> Judge Weeramantry from the International Court of Justice makes a reflection in this vein: The protection of the environment 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. Gabcikovo-Nagymaros Case (Hungary-Slovakia), ICJ, Judgment of Sept. 25, 1997 (Sep. Op. Judge Weeramantry) at 4.

not subject to controversies. Human rights are the trustees of this solid normative nucleus.

The second is the general consent as regards these rights, which implies their legal crystallization at an international scale through treaties and declarations with universal vocation and their hierarchical constitutional incorporation into the domestic judicial systems of States.

The third element resides in the possibility given to individuals to access justice in order to claim for the enforceability of these norms and the application of specific substantive and procedural human rights principles in concrete cases. This access to justice is in itself a human right, of which people cannot be deprived.

When these elements of enforcement are applied to the scope of environmental law, it is possible to sustain, as regards the first of these elements, that the environmental crisis threatens the viability and quality of life on the planet. The fundamental nature of this problem is irrefutable. This has generated the universal consent necessary to elevate the protection of the environment before international public law. Hence, the right to a healthy environment is beginning to be recognized as a human right.<sup>7</sup>

The second element pertaining to enforcement in human rights appears in environmental law in the sense that, most constitutions that have been recently reformed incorporate the protection of the environment, hence, assigning this protection constitutional hierarchy.<sup>8</sup>

It is the third element, dealing with access to justice that has not yet been completed in the area of environmental law; it prevents its enforcement, and thus, the full force and effectiveness of environmental law.

## **II. The role played by the individual in the enforcement of environmental law**

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<sup>7</sup> The Additional Protocol to the American Convention on the matter of Economic, Social, and Cultural Rights "Protocol of San Salvador" in force since December 16<sup>th</sup> of 1999, in its article 11 recognizes: "1. Every person has the right to live in a healthy environment and to be provided with basic public services.

2. The State parties will promote the protection, preservation, and improvement of the environment.. "

The African Charter of Human Rights, in force since 1986, in its article 24 recognizes: "every person has the right to a satisfactory and favourable environment for his development" [la traducción nos pertenece]

<sup>8</sup> This is reflected in most of the constitutions in the region that recognize the importance of the environment: constitution of Bolivia of 1967 (article 137), constitution of Brazil of 1988 (article 225), constitution of Chile of 1980 (article 19), constitution of Colombia of 1991 (articles 8,49, 79,80,86, and 88), constitution of Cuba of 1992 (articles 11 and 27), constitution of El Salvador of 1983 (article 69), constitution of Ecuador of 1983 (article 19), constitution of Guatemala of 1985 (article 97), constitution of Guyana of 1980 ( articles 25 and 36), constitution of Haiti of 1987 (articles 253 and 258), constitution of Honduras of 1982 (article 145), constitution of Mexico of 1917<sup>8</sup> (article 25), constitution of Nicaragua of 1987 (articles 60 and 102), constitution of Panama of 1980 (article 110), constitution of Paraguay of 1967 (article 132), constitution of Peru of 1993 (article 2 inc. 22), constitution of Uruguay of 1997 (article 47), constitution of Costa Rica (articles 46<sup>8</sup> and 50<sup>8</sup>).

The protection of the environment exceeds in many instances, the capability of States' administrative structure, which is why it requires that individuals assume the role of monitoring and protecting rights as well as duties.

The essence of the role of the individual resides in the ability to make environmental law enforceable. This not only promotes but also realizes protective legal action. Given the destruction or the imminent destruction of the environment that surrounds the individual, the individual aware of the vertiable force that he/she possesses finds himself/herself compelled and motivated to take action.

With the no small task of clarifying the role of the individual, we will analyse what is the object of protection and what is the practical implication of the exercise of this role.

The protection of the environment can be the product of actions that are aimed at preventing or repairing damages caused to a person or a group of persons, or actions that are intended to safeguard collective interests based on the right to a healthy environment.

In the first case, there are directly affected persons suffering a detriment of their rights due to environmental problems; in the second, the environment is protected as a public good, and because it is of social interest.

Therefore, when we refer to environmental protection, we face two legal objects that are interdependent: on the one hand, the environment as an autonomous legal object that can be enforced, and on the other, the scope of human rights that are affected by environmental damage or degradation<sup>9</sup>. As individuals we have two objects to protect: the environment as an autonomous legal object and the human being<sup>10</sup>. The interdependence is clear, as the final object of protection is always the human person, and hence environmental law naturally integrates with human rights law.

We now turn to elucidate the second question, that is, what is the practical implication of exercising the individual's role of protecting the environment?

It is impossible for the individual to perform his/her role if he/she is not complemented by specific duties imposed on persons or agents to ensure their execution. If there are no defined duties imposed on specific persons to ensure access to justice in environmental matters, then the individual's role dissipates.

The individual's task will not be fulfilled if the State does not implement appropriate and effective mechanisms to access justice. This is what Kant defined as "the perfect duty", contrary to "the imperfect duty" which is general, ambiguous and non-compulsive. The current vision of environmental law generates imperfect duties. An

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<sup>9</sup> In this last object of protection, the concept of traditional victim acquires greater strength.

<sup>10</sup> When he refers to the expression 'green men' Jury Moisset Iturraspe states: "it is one of the many manichean expressions referred to further. The green man, advocate of a healthy environment –and fighter on behalf of this cause –, consisted initially of only a few, who fell into extremisms and were accused of unrest; today, intelligent persons from all over the world comprise a new legion of green men" J. Moisset Iturraspe, T. Hutchinson, E.A. Donna, *Daño Ambiental*, Tomo I, Eds. Rubinzal-Culzoni, Introduction, page. 13, note 1. [translated from Spanish]

integral vision that links these duties with the concept of access to justice contained in human rights law is what will enable us to move from imperfection to perfection or, in other words, from the lack of enforcement to the achievement of enforcement.<sup>11</sup>

### **III. The content of the concept of access to justice forged by international human rights law**

Having dully valued, hence, the individual's role of protecting the environment and the obligation of the State to provide the tools necessary to perform this role, the concept of access to justice appears as a *sine qua non* condition for the enforcement of environmental law.

The individual that accesses justice is he/she who, through an 'effective remedy' obtains from a 'competent, impartial, independent judge', in a 'reasonable time' and with a 'guarantee to a fair trial', a 'decision on his/her right and the duty that constitutes the object of this right'.

We will now analyze each of the components of this concept of access to justice elaborated by international human rights law, in light of environmental law.

#### ***The human right to an 'effective remedy'***

The European Convention of Human Rights states:

#### **Article 13 - Right to an effective remedy**

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Likewise, the American Convention on Human Rights recognizes

#### **Article 25. Right to Judicial Protection**

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

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<sup>11</sup> The particular characteristics of environmental problems make clarification necessary: enforcement does not only imply the creation of procedural paths but also the application of principles of environmental law that will make protection effective .

2. The States Parties undertake:

a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;

b. to develop the possibilities of judicial remedy;

The Inter-American Court of Human Rights made reference to the concept and scope of the human right to a judicial remedy in the Velasquez Rodriguez case,

Velasquez Rodriguez Case

63. Article 46 (1) (a) of the Convention speaks of “generally recognized principles of international law.” Those principles refer not only to the formal existence of such remedies, but also to their **adequacy and effectiveness....**

64. **Adequate domestic remedies are those which are suitable to address an infringement of a legal right.** A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted. A norm is meant to have an effect and should not be interpreted in such away as to negate its effect or lead to a result that is manifestly absurd or unreasonable.

66. **A remedy must also be effective --that is, capable of producing the result for which it was designed.**

[Emphasis added]

IA Court HR, Case Velasquez Rodriguez, sentence of July 29<sup>th</sup>, 1988, series C, n°. 4, paragraphs 63, 64 and 66.

Returning to the issue at hand, the enforcement environmental law, an adequate judicial remedy must be suitable to protect the environment from abusive actions. If we apply the criterion of the Court, an effective judicial remedy in the environmental scope must meet at least the following characteristics:

- It must be **prompt and simple**. In order to prevent it from becoming illusory it must be **founded on the principle of prevention** as much as possible, decisions must be taken anticipating and preventing environmental damage “...in the scope of environmental protection, vigilance and prevention impose themselves based on the, in many cases, irreparable character of the damage caused to the environment,

and on the inherent limits to remedy mechanisms in these types of damage.”<sup>12</sup>.

- It must similarly contemplate **wide legal capacity**; this is, not only of the direct victim of the environmental degradation but also of every individual that wishes to exercise his/her role of protecting the environment.
- It must, undoubtedly, take into account the **cost to initiate the remedy**, which shall be **reasonable and accessible to the common individual** and foresee the possibility in certain cases of no-cost access.<sup>13</sup>
- In order to protect the environment, the precautionary approach shall be widely applied by States according to their capacity. “Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”<sup>14</sup>
- It must recognize the **importance to access to scientific information**, which must be available to the parties and to the tribunal. In case that there is no information as such, the State shall take whatever measures necessary for its production.

In terms of the Court, in addition to being adequate, the remedy must be effective. For a remedy to be effective in the environmental scope, it must reconsider the concept of relationship of causality currently used in domestic law, which would become more flexible so as to contemplate the impossibility, in many environmental cases, of establishing this relationship in accordance with current standards of domestic law.

Likewise, guaranteeing the effectiveness of the remedy requires the incorporation of an environmental variable into the social concept of private property. This implies that, when a certain use of property is environmentally abusive and non-sustainable, this use must be prohibited or restricted.

An effective judicial remedy in the environmental scope requires reconsideration of the moment the prescriptive period begins, since in many environmental cases much time may transpire between the moment that the 'first damage' occurs and its 'clear' manifestation..

The conception of responsibility also varies in environmental law, incorporating a future dimension, that is: we are responsible to future generations for our acts and their interests must be taken into account in the judicial process.

Finally, it is necessary to reconsider the burden of proof, in the sense that, the party performing the supposed environmentally damaging activity must prove that he/she is not harming the environment. This last point is of vital importance, since victims can hardly access the information and resources necessary to establish causal nexus and prove the damages suffered.

It is worth highlighting that, in this sense, jurisprudence of international human rights bodies not only serves as a guide to environmental law in order to create effective

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<sup>12</sup> The International Court of Justice, *Affaire relative au projet Gabčíkovo-Nagymaros (Hongrie/Eslovaquie)*, Arrêt du 25 de septembre 1997, par. 14. [Translated from Spanish]

<sup>13</sup> On indigence and access to justice, see the herein article page 17

<sup>14</sup> Principle 15 of the Rio Declaration on Environment and Development

judicial remedies within domestic law, but also opens a new way of enforcement of environmental law: the internationally enforceable obligation of the State to provide this remedy in environmental matters.

If in an environmental case we do not have an effective judicial remedy within domestic law as stated by international human rights bodies, as individuals we have the possibility to resort directly to the corresponding international human rights justice forum and make a legal claim for the violation of the right to an effective judicial remedy basing our arguments on the international responsibilities assumed by the State. This would have an enormous impact on the enforcement of environmental law, since the remedy for the damage in a concrete case would include the necessary reforms of domestic legislation to provide an effective and adequate judicial remedy in environmental cases and thus prevent future violations of this human right.

### **'competent, impartial, independent judge'**

Access to justice, as we mentioned *ut supra*, requires a judge or tribunal of competent, impartial, independent justice. This guaranty is recognized in the Basic Principles of the United Nations Organization on Judicial Independence<sup>15</sup>, in the Provisional Declaration of the United Nations Organisation on the Independence of Justice<sup>16</sup>, in the International Covenant of Civil and Political Rights, in the European Convention of Human Rights, and in the American Convention on Human Rights.

#### The International Covenant of Civil and Political Rights, Article 14

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<sup>15</sup> *Basic Principles on the Independence of the Judiciary*

*Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders*

*Principle 2*

The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

<sup>16</sup> Provisional Declaration of the United Nations on the Independence of the Judiciary:

Article 4

... The administration of justice shall be independent from the Executive and Legislative powers...

Article 5

( h ) The Executive should not have control over judicial functions of the Court in the administration of justice.

( i ) The Executive should not have the faculty of suspending the operations of the Court.

( j ) The Executive should refrain from any action or omission that alters any judicial resolution of a conflict or that frustrates the appropriate execution of a judicial decision.

Article 6

No law or executive decree shall retroactively revert specific judicial decisions or modify the composition of the Court to determine its decision making.

[Translated from Spanish]

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

The European Convention of Human Rights,

#### Article 6

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial Tribunal established by law, which shall decide on his civil rights and obligations or on the foundations of any criminal accusation directed at his person (translated from Spanish)..."

The American Convention on Human Rights,

#### 8. Right to a Fair Trial

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

We now analyze the jurisprudence of the European System of Human Rights and the Inter American System of Human Rights as regards the independence and impartiality of a tribunal.

#### The European Court of Human Rights

##### *Case of Campbell and Fell v. United Kingdom*

In determining whether a body can be considered to be "independent" - notably of the executive and of the parties to the Case (see, inter alia, the Le Compte, Van Leuven and De Meyere Judgment of 23 June 1981, Series A no. 43, p. 24, para. 55) -, the Court has taken into account the manner of

appointment of its members and the duration of their term of office (ibid., pp. 24-25, para. 57), the existence of guarantees against outside pressures (see the Piersack Judgment of 1 October 1982, Series A no. 53, p. 13, para. 27) and the question of whether the body presents an appearance of independence (see the Delcourt judgment of 17 January 1970, Series A no. 11, p. 17, para. 31).

The factors which were relied on in the present case as indicative of the Board's lack of "independence" will be considered in turn.

European Court of Human Rights, sentence of June 28<sup>th</sup> of 1984, serie A n° 80.

### *Case of Piersack v. Belgium*

Whilst impartiality normally denotes absence of prejudice or bias, its existence or otherwise can, notably under Article 6 § 1 (art. 6-1) of the Convention, be tested in various ways. A distinction can be drawn in this context between a subjective approach, that is endeavoring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that determines whether he offered guarantees sufficient to exclude any legitimate doubt in this respect.

(a) As regards the first approach, the Court notes that the applicant is pleased to pay tribute to Mr. Van de Walle's personal impartiality; it does not itself have any cause for doubt on this score and indeed personal impartiality is to be presumed until there is proof to the contrary (see the Le Compte, Van Leuven and De Meyere judgment of 23 June 1981, Series A no. 43, p. 25, § 58).

However, it is not possible to confine oneself to a purely subjective test. In this area, even appearances may be of a certain importance (see the Delcourt judgment of 17 January 1970, Series A no. 11, p. 17, § 31). As the Belgian Court of Cassation observed in its judgment of 21 February 1979 (see paragraph 17 above), any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. What is at stake is the confidence which the courts must inspire in the public in a democratic society.

European Court of Human Rights, sentence of October 1<sup>st</sup> of 1982, serie A n° 53

### *Inter-American System of Human Rights*

#### *Case of Loayza Tamayo vs. Peru*

107. The European Court of Human Rights, for instance, has developed wide and consistent jurisprudence on this matter. The analysis of this practice enables the deduction that, for a body as an independent Tribunal to be qualified, some conditions must be met from a structural as well as functional perspective.

From the functional point of view, the independence is manifested in the actioning exempted from any type of pressure or interference, either of the Executive power or the Legislative power. Structural independence can be evaluated by means of the examination of a series of criteria such as:

- Method of election of judges;
- Terms of mandate;
- Irremovability of posts;
- Professional (legal) remedy of judges;
- Inconsistency between judicial function and exercise of other functions.

The common denominator between international human rights law cited before and jurisprudence is that judicial independence, in order to be independent, requires freedom to exercise its function regarding executive and legislative power interferences. The judge's irremovability and the stability of his post appear as essential conditions to ensure his independence and impartiality.

A judge's competence is determined by adequate legal training and the experience necessary to assume the responsibility of administering justice. In the environmental field, the judge's competence requires, therefore, that he/she is sufficiently qualified to exercise local and international environmental law and that he/she has acquired enough experience to address environmental matters. Such competence can be achieved by training judges on existing forums, or creating a specific –an environmental tribunal– forum. These actions do not exclude one another, much on the contrary, they must be integrated, since the protection of the environment is cross-sectoral in nature including all areas of law (constitutional law, civil law, administrative law, etc..)

### **"reasonable time"**

This guaranty is recognized in the International Covenant of Civil and Political Rights, in the European Convention of Human Rights, and in the American Declaration on Human Rights.

The International Covenant of Civil and political Rights refers to a reasonable period of time when it establishes the procedural guaranties of a criminal trial.

#### Article 14

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(c) To be tried without undue delay;...

The European Convention of Human Rights

#### Article 6 - Right to a fair trial

1. ... everyone is entitled to a fair and public hearing within a reasonable time  
...

## The American Convention on Human Rights

### Article 8. Right to a Fair Trial

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, ...

The European Court of Human Rights made reference to the reasonableness of the length of the proceedings in the case *Guillemin v. France*<sup>17</sup>

38. The reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case, which here call for an overall assessment, and having regard to the criteria laid down in the Court's case-law, in particular the complexity of the case and the conduct of the applicant and of the relevant authorities (see, as the most recent authority, the *Katikaridis and Others v. Greece* judgment of 15 November 1996, Reports of Judgments and Decisions 1996-V, p. 1687, para. 41).

Similarly, in the case of *Genie Lacayo v. Nicaragua*, the Inter-American Court of Human Rights expressed:

77. Article 8(1) of the Convention also refers to reasonable time. This is not an easy concept to define. In defining it, one may invoke the points raised by the European Court of Human Rights in various decisions in which this concept was analyzed, this article of the American Convention being equivalent in principle to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. According to the European Court, three points must be taken into account in determining a reasonable time within which the trial must be conducted: a) the complexity of the matter; b) the judicial activity of the interested party; and c) the behavior of the judicial authorities (See, *inter alia*, *Eur. Court H.R., Motta judgment of 19 February 1991, Series A no. 195-A*, para. 30; *Eur. Court H.R., Ruiz-Mateos case v. Spain judgment of 23 June 1993, Series A no. 262*, para. 30).

81. In addition to the examination of possible delays at the various stages of the proceeding, in determining what constitutes a reasonable time throughout the entire process, the European Court has employed what it refers to as a "*global analysis of the proceeding*" (*Motta, supra* 77, para. 24; *Eur. Court*

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<sup>17</sup> Eur. Court of HR, sentence of February 21st of 1997, Reports of Judgments and Decisions 1997). Also see, et.al., *Eur. Court H.R., Motta judgment of 19 Feb. 1991, Series A no. 195-A*, par. 30; *Ruiz Mateos v. Spain, judgment of 23 June 1993, Series A no.262*.

*H.R., Vernillo judgment of 20 February 1991, Series A no. 198 and Eur. Court H.R., Unión Alimentaria Sanders SA judgment of 7 July 1989, Series A, no. 157*). Even without taking into account the police investigation and the time spent by the Office of the Attorney-General of the Republic of Nicaragua in bringing the case before the court of first instance, that is, between July 23, 1991, on which date the court issued the order to initiate the proceeding, and the present time at which a firm judgment has still not been rendered, more than five years have elapsed; the Court deems this period to exceed the limits of reasonableness prescribed in Article 8(1) of the Convention.

Inter-American Court of Human Rights, case *Genie Lacayo*, sentence of January 29<sup>th</sup> of 1997, serie A n° 30.<sup>18</sup>

The application of exigency of a reasonable time in environmental matters presents certain particularities determined by the characteristics of the environmental damage. Such environmental damage can hardly be remedied and its effects tend to become worse and multiply in the course of time. This is why, if we are to apply the prevention and precautionary principles, it is first necessary to have a prompt and effective intervention of justice. This intervention must halt the activity originating the environmental damage and take the necessary measures to ensure that the effects do not continue over time. During a second procedural stage, which is related to the remedy of caused damages, the reasonable time must take into account, on the one hand, the needs of victims that may require health care or any other urgent assistance, and, on the other, the production of all necessary studies and reports to acknowledge the real dimension of the damages suffered, considering that such environmental damages are not always evident from the onset.

Lack of reasonable time for the resolution of the case, consistent with international human rights jurisprudence, could generate international liability of the State for the violation of the guaranty of “reasonable time”. Here the door remains open for the achievement of environmental enforcement by means of individual claims for deprivation of justice, in the concrete case, before international human rights protection bodies.

### **'Right to a fair trial'**

Likewise, access to justice requires the right to a fair trial, recognized in the International Covenant of Civil and Political Rights<sup>19</sup>, in the European convention of Human Rights<sup>20</sup>, and in the American Convention on Human Rights<sup>21</sup>.

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<sup>18</sup> On this topic, IACourtHR, Case Suárez Rosero, sentence of November 12<sup>th</sup> of 1997, serie C, n° 35, paragraph 72

<sup>19</sup> Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded

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from all or part of a trial for reasons of morals, public order (order public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

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<sup>20</sup> Article 6. Right to a Fair Trial

- 1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
- 2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
- 3 Everyone charged with a criminal offence has the following minimum rights:
  - a to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
  - b to have adequate time and facilities for the preparation of his defense;
  - c to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
  - d to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - e to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

<sup>21</sup> Article 8. Right to a Fair Trial

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.
2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
  - a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
  - b. prior notification in detail to the accused of the charges against him;
  - c. adequate time and means for the preparation of his defense;

Regarding these rights, the Inter-American Court on Human Rights in its Advisory Opinion number 11 stated:

24. Insofar as the right to legal counsel is concerned, this duty to organize the governmental apparatus and to create the structures necessary to guarantee human rights is related to the provisions of Article 8 of the Convention. That article distinguishes between *accusations[s] of a criminal nature and procedures of a civil, labor, fiscal, or any other nature*. Although it provides that [e]very person has the right to a hearing, with due guarantees . . . by a . . . tribunal in both types of proceedings, it spells out in addition certain *minimum guarantees* for those accused of a criminal offense. Thus, the concept of a fair hearing in criminal proceedings also embraces, at the very least, those *minimum guarantees*. By labeling these guarantees as *minimum guarantees*, the Convention assumes that other, additional guarantees may be necessary in specific circumstances to ensure a fair hearing.

28. For cases which concern the determination of a person's *rights and obligations of a civil, labor, fiscal, or any other nature*, Article 8 does not specify any *minimum guarantees* similar to those provided in Article 8(2) for criminal proceedings. It does, however, provide for *due guarantees*; consequently, the individual here also has the right to the fair hearing provided for in criminal cases. It is important to note here that the circumstances of a particular case or proceeding -its significance, its legal character, and its

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d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;

e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;

f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;

g. the right not to be compelled to be a witness against himself or to plead guilty; and

h. the right to appeal the judgment to a higher court.

3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

4. An accused person acquitted by a non-appealable judgment shall not be subjected to a new trial for the same cause.

5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

context in a particular legal system- are among the factors that bear on the determination of whether legal representation is or is not necessary for a fair hearing.

IACourtHR, exceptions to the exhaustion of domestic remedies (Arts 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights), Advisory Opinion OC-11/90 of August 10,1990, Series A N° 11, paragraph 28.

In this advisory opinion, the Court not only recognizes that the right to a fair trial is extended to other proceedings than those of a criminal nature – but also, that the court understands that the **minimum** guaranties of the criminal proceedings are extended to proceedings of other nature. Some of these guaranties are of great importance in proceedings of environmental nature. Thus, for example, Article 8.2 mentions that:

- **The right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court** (article 8.2.a). This is of great importance in cases where the petitioners are members of indigenous communities. One should remember that these such cases apply in a large portion of environmental jurisprudence reflecting the symbiotic and particular relationship of indigenous communities to their land.
- **The inalienable right to be assisted by counsel provided by the State.** (article 8.2.e). This right is particularly important in cases of environmental degradation. The disproportionate way in which certain sectors of the population suffer environmental burden, has forged the concept of environmental discrimination. These vulnerable sectors have a common denominator: Poverty. Without economic resources, access to justice dissipates; a directly proportional relationship exists between poverty and impunity to contaminate, and with increasing poverty, increasing degradation. In these cases, the state of vulnerability of the victims of environmental pollution could be reduced by applying the criteria of the Inter-American Court as regards minimum guaranties of a fair trial, which includes the right to be assisted by counsel provided by the State. Here, the obligation of the State is not exhausted when it provides not only free legal assistance but also when it covers the costs necessary to access justice.<sup>22</sup>

On this matter, in its advisory opinion n° 11, the Court said:

30. In its submission the Commission states that it *has received certain petitions in which the victim alleges that he has not been able to comply with the requirement of the exhaustion of remedies set forth in domestic legislation*

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<sup>22</sup> **This situation has generated the social movement born in the United States known as "environmental justice" which fights against the disproportionate way in which the State distributes environmental burden among Afro American communities. To obtain more information, see among others B. Goldman & L. Fitton, TOXIC WASTES AND RACE REVISITED (1994); R. Bullard, DUMPING IN DIXIE: RACE, CLASS AND ENVIRONMENTAL QUALITY (1990), J. D. Taillant "Environmental Discrimination", Center for Human Rights and Environment, November 2000, Working Paper at [www.cedha.org.ar](http://www.cedha.org.ar)**

*because he cannot afford legal assistance or, in some cases, the obligatory filing fees.* Upon applying the foregoing analysis to the examples set forth by the Commission, it must be concluded that if legal services are required either as a matter of law or fact in order for a right guaranteed by the Convention to be recognized and a person is unable to obtain such services because of his indigence, then that person would be exempted from the requirement to exhaust domestic remedies. The same would be true of cases requiring the payment of a filing fee. That is to say, if it is impossible for an indigent to deposit such a fee, he cannot be required to exhaust domestic remedies unless the state provides some alternative mechanism.

31. Thus, the first question presented to the Court by the Commission is not whether the Convention guarantees the right to legal counsel as such or as a result of the prohibition of discrimination for reasons of economic status (Art. 1(1)). Rather, the question is whether an indigent may appeal directly to the Commission to protect a right guaranteed in the Convention without first exhausting the applicable domestic remedies. The answer to this question given what has been said above, is that if it can be shown that an indigent needs legal counsel to effectively protect a right which the Convention guarantees and his indigence prevents him from obtaining such counsel, he does not have to exhaust the relevant domestic remedies.

IACourtHR, exceptions for the exhaustion of domestic resources (Arts. 46.1 and 46.2. of the American Convention on Human Rights), Advisory Opinion OC-11/90 of August 10<sup>th</sup> of 1990, Serie A , No. 11, paragraphs 30 and 31.

Thus, for example, if in an environmental case a human right recognized in the American Convention is affected, and it is impossible to access justice due to the incapacity to afford legal assistance and/or the obligatory filing fees, we can immediately resort to the Inter-American System of Human Rights and claim an effective protection of our human right.

▪ **The right to appeal the judgment to a higher court** (article 8.2. h).

The American Convention on Human Rights is the only international human rights system that consecrates the right to appeal judgment to a higher court. This right provides the person affected by a non favorable judgment the possibility to review the judgment that has the object of judicial control, if it has been a rational result of a fair trial, in accordance with the law and the guaranties of due process.

In this respect, in its request to the Court in the Case *Guillermo J. Maqueda v. Argentina*, the Inter-American Commission on Human Rights stated that:

Moreover, Article 8.2.h makes reference to the minimum characteristics of an appeal to control the correction of the judgment materially as well as formally. In this sense, from a formal point of view, the recourse to appeal set forth in the Convention, must examine the unfounded appeal, lack of application or wrong interpretation of norms of law that determine the resolution of the sentence. The Commission also considers that, in order to ensure the right to be defended, this recourse must include a material revision in relation to

the interpretation of the procedural norms that could have influenced the judgment of the matter when these have produced an irreparable annulment or resulted in defenselessness, as well as the interpretation of norms regarding the evaluation of evidence, provided that it has resulted in a wrong application or lack of application of the norms.

Hence, the right set forth in Article 8.2.h requires the availability of recourse to revision that, at least, enables legal revision, by a superior tribunal, as regards the judgment and all significant case proceedings, including authenticity of evidence, and enables the tribunal in charge of the revision to examine, in a relatively simple manner, the sentence validity

Considering the innovative nature of environmental law and the procedural figures that it requires for its enforcement, the capacity to appeal a judgment in an environmental case is indispensable to ensure a proper administration of justice.

At this point, the door of international human rights enforcement is opened once again to environmental matters that have lacked some minimum guaranties concerning a fair trial.

**'decision on his/her right and the obligation constituted by the object of this right'**

Finally, access to justice requires the existence of the obligation to remedy. International law has considered the obligation to remedy as one of the basic principles in current law of persons conferring to it a status of a customary norm<sup>23</sup>.

The American Convention on Human Rights recognizes,

Article 63

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

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<sup>23</sup> Factory at Chorzow, Jurisdiction, Judgment No.8, 1927, P.C.I.J., Series A, No. 9, page 21, and Factory at Chorzow, Merits, Judgment No. 13,1928, P.C.I.J., Series A, No. 17, page 29; Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, page 184, IACHR, Case Velasquez Rodriguez, Remedies (art. 63.1 American Convention on Human Rights), sentence of July 21<sup>st</sup> of 1989, serie C, n° 7, para. 28, and IACHR, Case Godínez Cruz, Remedies (art. 63.1 American Convention on Human Rights), sentence of July 21<sup>st</sup> of 1989, serie C, n° 8, para. 23)

Regarding the obligation to remedy, the Inter-American Court settled the following jurisprudence:

The remedy for the damage caused by the infraction of an international obligation requires, when possible, full restitution (*restitutio in integrum*), which consists in the reestablishment of the prior situation. If this is not possible, the international tribunal can order the adoption of measures that ensure the infringed rights, remedy the consequences that the infractions produced, as well as establish the payment of an indemnization as compensation for the damages caused<sup>24</sup>. [translated from Spanish]

*Inter-American Court on Human Rights; Case Barrios Altos (Chumbipuma Aguirre and others v. Peru) Remedies; (Art.63.1 American Convention on Human Rights); Sentence of November 30<sup>th</sup> of 2001*

Unfortunately, when environmental damages occur, the possibility to take things back to their previous state (which would correspond to the concept of *restitutio in integrum*) becomes impossible. As we have stated before, this gives environmental law a great preventive character, and the remedy of the damages caused must also incorporate this element. The remedy must take into consideration the damages suffered by the affected persons in the most complete way possible, including not only the direct loss of property but also those related to moral damage and long term effects that damage can cause<sup>25</sup>. The preventive tone of the remedy would be given by the incorporation of punitive damage, which operates as a persuading measure for those who cause the damage. Punitive damage must be applied with a restrictive character, its inclusion of indispensable nature when the damage has been maliciously produced and has affected human rights.

## Conclusion

The effectiveness of environmental law treaties depends to a large extent on the impact that they have in domestic law of the States parties. The States parties have the obligation, emanating from a general principle of international law, to take all measures necessary to ensure the effective protection of the rights consecrated in these treaties.

Yet, the fulfilment of the individual's role of protecting the environment depends not only on already existing constitutional or legislative provisions, but also requires that States train individuals under their jurisdiction on the exercise of this role, and take

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<sup>24</sup> Cfr. *Case Cesti Hurtado. Remedies*, supra note 3, paragraph 33; *Case of "Niños de la Calle" (Villagrán Morales y otros). Remedies*, supra note 3, paragraph 60; and *Caso de la "Panel Blanca" (Paniagua Morales y otros). Remedies*, supra note 3, paragraph 76.

<sup>25</sup> Examples of long term consequences can be found not only in the aspects of damage to health through chronic diseases but also in the cultural and economic loss that some communities suffer when the damages affect resources that are indispensable to subsistence. This is evident in the case of coastal or rural communities that have their environment contaminated.

legislative and administrative measures in ways to eliminate obstacles, gaps, and facilitate access to justice.

Scarce protective action at the local level and a deficient level of effectiveness puts us on the alert as regards the utilization of existing procedural tools on the part of the individual and highlights the need to create new tools. Proper, adequate, efficient, innovative procedural instruments suitable for preserving the object of protection of environmental law, sanctioning abusive attitudes concerning the environment, and imposing an integral remedy for damage caused. Tools that will be used against inoperative, negligent or accomplice States and against particular irresponsible contaminators. Prompt, simple actions suitable to prevent environmental damage and efficient actions, are needed that arrive on time and not when the damage has already been caused. They need be generous as regards active legitimacy (legal capacity), burden of proof, precautionary principle, etc.. In short, actions are needed that ensure the human right of the individual to access justice in environmental cases.

Finally, we recall that the fulfilment of the State obligation to provide adequate and effective procedural tools in the environmental field generates the liability of the State for the violation of human rights that compose the concept of access to justice at an international level. This opens a new field of enforcement in environmental law and its victims against States, namely international and regional systems of human rights protection.

*Translated by Maria-Candela Conforti*