

ARGENTINE CASE STUDY: USING HUMAN RIGHTS AS AN ENFORCEMENT TOOL TO ENSURE THE RIGHTS TO SAFE DRINKING WATER

PICOLOTTI, ROMINA

Executive Director, Center for Human Rights and Environment, Argentina,
romina@cedha.org.ar

SUMMARY

This article exemplifies with a real case how linking environment and human rights can be used to promote enforcement of environmental law. 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.

1 INTRODUCTION

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 fulfill their obligations and achieve the realization of rights that are included in human rights treaties. Likewise, 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 two¹:

- 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.²
- Internationalization. The international community has assumed the commitment to observe the realization of human rights and respect for the environment. From the Second World War³ onwards, the relationship State-individual is of pertinence to the international community. On the other hand, the phe-

nomena brought on by environmental degradation transcend 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.⁴ 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 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.

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,⁵ 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 environmen-

tal degradation, etc.⁶

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 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.⁷

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.⁸

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. In the case that follows we used a human rights strategy to strengthen the access to justice of environmental victims and to ensure environmental law enforcement.

In a research program studying the dimensions of poverty, human rights and environment, [Center for Human Rights and Environment] (CEDHA) [identified] the lack of access to safe drinking water in outlying poor neighborhoods as a critical problem of the city of Cordoba, Argentina. Local research took place over a two year period, targeting specific geographical areas around Cordoba, characterized by high levels of poverty. The study disclosed that the lack of access to safe drinking water is a common and recurring problem in the poorest communities of the local population.

The problem has four principal dimensions:

1. The lack of access to the local water distribution gridmap;
2. The contamination of water distributed by the existing local network, principally due to lacking state control over the contracted cooperative providers who are charged with providing water to poor communities;
3. The contamination of subterranean waters, principally due to lacking sanitation infrastructure, and contaminated water spillover from homemade sanitation systems (household water pits);
4. Contamination of home water storage tanks, principally caused by inadequate covers, poor maintenance and hygiene, lacking regular controls, atmospheric contamination due to the nearby use of agro-pesticides and chemicals in high population density areas, the presence and use of nearby incinerators of patho-

genic waste, crematories, or other industrial pollution.

Considering that we have a favorable judicial system and framework that recognizes human rights as having constitutional hierarchy on health, an adequate standard of living, the right to food, and the right to a healthy environment,⁹ and the great need for the State to perceive the problem of access to safe drinking water as a human rights problem, Center for Human Rights and Environment, Argentina decided to begin to litigate leading cases addressing the various dimensions of the problem in the city of Cordoba.

The criteria Center for Human Rights and Environment, Argentina uses to select cases are: population density, the degree of poverty; existing lack of access to safe drinking water; proximity to the distribution public water gridmap; social organization of the affected community; judicial viability of the case.

The principal obstacles encountered were: the lack of tradition in the court system to enforce these rights, the limited capacity of the judicial sector to believe in, or feel they can influence public policy decisions, the economic crisis of the country, as well as of the provincial and municipal government.

2 FACTS OF THE CASE

The present case addresses the lack of access to safe drinking water in three poor neighborhoods in the city of Cordoba, which are not included in the public water gridmap, and whose subterranean home water pits are highly contaminated with fecal matter, nitrates and nitrites.

The affected neighborhoods are: *Chacras de la Merced*, *Villa la Merced*, and *Cooperativa Unidos* with a population of approximately 4,500. Of these, 49% are women, and 51% men. Average female age is 27, male, 25. Approximately 43% are minors of less than 17, and nearly 5% are persons above the age of 64. Approximately 30% of the neighborhoods population is actively employed, while unemployment surpasses 23%. The average household

monthly income (in families with at least one employed member) is US\$175. The level of illiteracy is nearly 3%.¹⁰

Towards the end of the 1960s, the city built a Sewer-Water Treatment Facility¹¹ (called the *EDAR Bajo Grande*) on the coasts of the Suquia River, two kilometers upstream from *Chacras de la Merced community*, which predates construction of the facility some 30 years. *Chacras de la Merced* borders with *Villa la Merced* and *Cooperativa Unidos* communities. The EDAR facility was inaugurated in 1987, under municipal control, with the capacity to treat 120 thousand cubic meters/hour of sewer water.

Due to the continued growth of the city of Cordoba, the municipality continued authorizing new sewage connections, increasing the volume of sewer water going into the plant. As a consequence, the plant today, has two extremely urgent problems: the first has to do with the lack of basic product supplies to treat the sewer water and the lack of maintenance. The plant is currently operating at 70% of capacity, due to these limitations; the second problem, has to do with the quantity of flow of sewer water into the plant. Assuming the plant were functioning at 100% capacity, it can only treat 120,000 m³/hr, and at present, the plant receives on average between 140,000 and 150,000 m³/hr. *This suggests that the plant is receiving between 600,000 and 800,000 liters of sewage water that it cannot treat, not even if it were to operate at 100% capacity.*

The large gap between the quantity of incoming liquid and the ability of the facility to treat it, results in direct daily spills of untreated sewerage water into the Suquia River.

In July of 2003, a representative from CEQUIMAP laboratory¹², arrived at Chacras de la Merced, by invitation of Center for Human Rights and Environment, Argentina, to take five water samples from the community. The fecal bacterial content (*coliformes fecales*) of the river downstream from the plant, shows a 40-fold increase with respect to the river water sample taken upstream from the plant.

The tests taken from homes in the community are also testimony of severe contamination with fecal matter, with increasing contamination directly proportional to the proximity of the home to the plant. Some of the tests show up to 2000 fecal *coliformes*. The World Health Organization (WHO) establishes that there should be no presence of fecal *coliformes* in water destined for human consumption.

3 LEGAL STRATEGY

The legal strategy chosen in the case parallels Center for Human Rights and Environment, Argentina's general legal strategy, grounded in the objective of enforcing Economic, Social and Cultural Rights (ESCRs). Center for Human Rights and Environment, Argentina is working to create the relevant favorable environmental jurisprudence that would permit the continuous advancement towards the complete enforcement of all ESCRs. In this manner, we distinguish violated rights from rights chosen for their enforcement. At present, while the contamination of the water source resulted in the violation of multiple human rights, we chose only certain rights upon which to claim for judicial enforcement, including, the right to safe drinking water, the right to a healthy environment, the right to health, and the right to an adequate standard of living.

Center for Human Rights and Environment, Argentina chose to present an injunction (*in Spanish, amparo*) based on two main criteria and with a view to expedite the process as much as possible.¹³ The case was limited mainly to secure safe drinking water for the affected parties, as well as to immediately cease contamination of the Suquia River.

The action was filed against the Provincial State, as well as against the Municipality of Cordoba. The action against the State was based on its obligation to ensure that the water of the River Suquia be suitable for human and industrial consumption, and for its obligation to provide direct or indirect access to safe drinking water to the public and in conformity with

internal legislation. The action against the municipality centered on the injurious and treacherous nature of the environmental degradation and its consequences on people. This strategy permitted us to broaden the range of potentially responsible parties for the violation of rights, holding these accountable in differentiated but collective terms. The State, we argued, is the guarantor of human rights, irrespective of the internal structure it might chose to adopt.

Likewise, this approach permitted us to capitalize on existing and ongoing internal conflict between the municipality and the province. Instead of the two political levels claiming innocence in the matter, they proceeded to fingerpoint responsibilities at one another. Nevertheless, this duality and conflict between political levels which at one state of the case was favorable, became problematic at the moment of executing the court order, as the political differences created significant barriers to carrying out the sentence.

As part of the judicial strategy, Center for Human Rights and Environment, Argentina requested the presence of the affected communities at multiple stages of the process, an unusual practice in injunction filings which exerted strong political pressure on all of the parties involved. The filing was made by Center for Human Rights and Environment, Argentina jointly with four community residents, which also lent their homes for the mentioned water sampling.¹⁴

The strategy involved utilizing the action as a political pressure mechanism, with the objective of opening a Pandora's box of subsequent thousand+ filings from other affected community members, in the case that the first action did not result in a permanent solution to the access to safe drinking water problem.

In the end, the case was sustained with evidence coming primarily from the State's own reports on the functioning of the Treatment Facility and the levels of contamination of the Suquia River.

The following international human rights legislation were evoked in the case

filing: The Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights¹⁵, and the Convention of the Rights of the Child.

3.1 The Sentence

The case was resolved in the first instance. The judge decided: to accept the standing of the NGO (CEDHA) and the 4 affected residents; that the State was responsible in violating the rights to a healthy environment, to an adequate living standard, to access safe drinking water, and the right to health. It also recognized the human right to safe drinking water, implied by the right to health. The judge explicitly cited the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and General Observation Number 15. He also recognized the immediacy with which the State must address the environmental situation, and that this requires the utmost diligence with a view to avoid irreversible damage to the ecosystem and as a consequence, to those individuals who inhabit the mentioned environment. He also recognize[d] that "the environment is not only a collective good, without requisite sine qua non for [the existence of people], due to which it is an individual patrimony and at the same time, a collective one, with implications for present and future generations, for which not only must we act in defense of present values, but in the name of future persons and environmental values".

With respect to the judicial enforcement of these rights, he stated that "while it is good that in a State of rule of law...that a Judicial entity not conduct activities of the responsibility of the Parliament or Presidency, the discretionary and privative competence of an organ of the State have limits, and that the action of the Judiciary power, faced with the degeneration of those responsibilities, does not imply an invasion of one power over another, but rather the framing of public authority to uphold the Constitution and the law.

Finally, the sentence order[ed]: "that the municipality of Cordoba adopt all

of the measures necessary relative to the functioning of the *EDAR Bajo Grande*, in order to minimize the environmental impact caused by it, until a permanent solution can be attained with respect to its functioning; and that the Provincial State assure the injunction filers a provision of 200 daily liters of safe drinking water, until the appropriate public works be carried out to ensure the full access to the public water service, as per decree 529/94." Case costs are awarded to the plaintiff.

3.2 Execution of the Sentence

We achieved, within the process, that the municipality present an "integral sewage plan" in which US\$1.75 million shall be invested for rehabilitation of the existing infrastructure, and US\$6 million to increase plant capacity. We requested formal clarification of the sentence so that the Judge precisely orders the measures necessary relative to the functioning of the plant, in order to minimize the environmental impact produced by it, until a permanent solution is reached, specifying activities and their implementation timeframe.

In December 2004, the Province of Córdoba commenced public works on the perforation of new water pits, construction of new water storage facilities, the installation of a new hydro-powered tank, as well as the necessary piping to channel water to the neighborhoods, which will eventually provide permanent access to safe drinking water to *Chacras de la Merced*, *Cooperativas Unidos*, and *Villa la Merced*. The municipality has promised to provide the necessary pipes for home connections.¹⁶ Construction work is expected to end in March 2005.

4 CONCLUSION

The request for the provision of permanent access to safe drinking water is not merely the simple request of the provision of a public service. It is rather, founded in the will to assure the full realization of human rights to health, food, an adequate standard of living, and a healthy environment. The judge of the case, wisely, poised

himself as the guarantor of the human rights of the residents of these neighborhoods. We believe that this sentence makes an important step towards the judicial enforcement of these rights.

5 REFERENCES

- ¹ 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.
- ² *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
- ³ Michael J. Kane, *Promoting Political Rights to protect the Environment*, THE YALE JOURNAL OF INTERNATIONAL LAW, Volume 18, Number 1, pgs.389-390
- ⁴ 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).
- ⁵ 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
- ⁶ Judge Weeremantry 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.

⁷ The Additional Protocol to the American Convention on the matter of Economic, Social, and Cultural Rights “Protocol of San Salvador” in force since December 16th 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]

⁸ 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), consti-

tution 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 (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 468 and 508).

⁹ The National Constitution incorporates 11 human rights treaties with Constitutional hierarchy, including: the Covenant on Economic, Social and Cultural Rights, the Universal Declaration on Human Rights, and The Convention on the Rights of the Child.

¹⁰ Stats from “Perfil de la Pobreza en Córdoba”, SEHAS.

¹¹ Henceforth “plant” or “facility”.

¹² A laboratory of the National University of Córdoba.

¹³ No more expedient judicial remedy exists.

¹⁴ We carefully chose those sites where we could clearly construct solid evidence of the contamination of the Suquía River by the plant and the high degree of contamination of the home water pits. For exam-

ple, we took samples from the River before and after the plant, and in one of the local schools of one of the neighborhoods, where approximately 300 children attend school, eat and drink water daily from a local water pit.

¹⁵ Henceforth the ESCR Covenant