Judicial Perspectives on Human Rights and the Environment

The Honourable Mr Justice Winston Anderson, Judge of the Caribbean Court of Justice

First Session of the United Nations Environmen Assembly's Global Symposium on Environmental Rule of Law

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The United Nations Environment Programme (UNEP) is the leading global environmental authority that sets the global environmental agenda, promotes the coherent implementation of the environmental dimension of sustainable development within the United Nations system, and serves as an authoritative advocate for the global environment. Inger Andersen is the Under-Secretary-General of the United Nations and Executive Director of the United Nations Environment Programme.

Remarks

By

The Honourable Mr Justice Winston Anderson, Judge of the Caribbean Court of Justice,

on the occasion of

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Your Excellences, Distinguished Ladies and Gentlemen, Colleagues:

It is my great pleasure to be with you in Nairobi at this important Symposium on the Environmental Rule of Law and I extend my profound thanks to UNEP and the other organizers for making my attendance possible.

I have been given a very short time to speak about ***"Judicial Perspectives on Human Rights and the Environment"*** and I must therefore go immediately to my first point which is that the recognition of the inherent linkage between environment and human rights is one of the most impressive achievements of global jurisprudence over the last seventy years.

Inter-linkage between environment and human rights

Without environmental integrity any reference to human rights is largely illusory. The foundational documents of the modern human rights era i.e., the United Nations Charter (1945); the Universal Declaration of Human Rights (1948); and the regional human rights conventions in Europe (1950) and in the Americas (1967) contain no mention of the environment. However, the watershed 1972 UN Conference held in Stockholm irreversibly altered the global psychology by recognizing the

fundamental human right to an environment of quality. Less than a decade later the African Charter (1981) pronounced in Article 24 that, "All peoples shall have the right to a general satisfactory environment favourable to their development"; as we know, Article 24 was critical to the ground-breaking decision by the ECOWAS Court of Justice in *SERAC v Nigeria* (2002).

Since the African Charter, the number of international instruments and, especially, national constitutions recognizing environmental rights has grown exponentially.

Principle 10 of the 1992 Rio Declaration gave „soft law" recognition to rights of participation and this was expanded in the 1998 Aarhus Convention. A 2007 UN Declaration recognized Environmental Rights of Indigenous Peoples, and the supplemental Protocol of San Salvador to the American Convention on Human Rights explicitly provides for a right to a healthy environment. This has been the basis for several important environmental decisions by the Inter-American Court of Human Rights.

At present over 70 constitutions around the planet explicitly recognize a "right to environment" for individuals, or groups or communities, including several constitutional amendments or re-enactments in the Caribbean: Haiti (1987); Suriname (1987); Guyana (2003); British Virgin Islands (2007); Cayman Islands (2011); and Jamaica (2011). The *Virgin Islands Environmental Council v Attorney General* case in 2007 discussed human rights to environmental quality as the basis for disallowing the construction of a hotel and marina in a protected marine area but the British Virgin Islands court held that as the decision to allow the development was taken *before* the new constitutional provision came into force, that provision could not influence the court"s decision.

Derivation of environmental rights from human rights

A consequence of recognizing the linkage between environment and human rights has been the preparedness of judiciaries around the world to derive environmental rights from traditional civil and political rights to life, property, and privacy and family life. This jurisprudence began with the European Court of Human Rights in such early decisions as *Lopez Ostra v Spain* (1994) and is now reflected in a body of over fifty cases decided by that Court. The ECHR‟s approach has been adopted by many international and domestic tribunals. In the Caribbean case of *Cal v Attorney General* (2007) a Belizean Court accepted that the government‟s failure to recognize and protect Mayan interests in their traditional lands violated the security of their being, compromised their right to life, and denied them the protection of the law under the Belizean Constitution. Aspects of this decision are on appeal to my court, the Caribbean Court of Justice, and I am therefore not able to say anything further about that case.

On the other side of the ledger from *Lopez Ostra* and *Cal*, there is sometimes reluctance, especially by tribunals in the common law tradition, to read environmental rights into traditional human rights documents. In the Trinidad and Tobago case of *Fishermen and Friends of the Sea v The Environmental Management Authority and Atlantic LNG* (2004), a judge disagreed that an illegal grant of a certificate of environmental clearance could breach the constitutional rights of residents to life, protection of the law, and respect for family and private life since the granting of constitutional rights was a matter for Parliament.

Positive aspects to codification of environmental rights

This judicial comment provides a neat segue into my third point. There is still significant value to positive codification of environmental rights in a constitution or convention. The enhanced status

accorded to constitutional and conventional rights legitimizes their application in the judicial process. In *Fishermen and Friends of the Sea*, the Trinidad and Tobago judge refused to elevate common law environmental entitlements into rights entrenched in the Constitution because, he said, the "inevitable trade-off between economic and ecological values is a subject which is inherently political and … best left to the legislature." By comparison, judges in Latin America, empowered by their constitutional guarantees have stated without reservation that the right to a healthy environment is a fundamental human right. This enables them not merely to move the right up the hierarchy of human rights by recognizing the *fundamentality* of the environmental right, but also empowers them to give definition and content to that right *vis-à-vis* other competing interests.

The refusal by the European Council of Ministers in 2010 to include an explicit right to environment in the European Convention was followed by the *Di Sarno* case (2012) in which the European Court held that Italy had an obligation to safeguard the applicant"s "right to a healthy and protected environment". However, many would probably agree that amendment of the Convention (as was done in the Americas) remains preferable to judicial decree.

Potential of Fundamental Environmental Rights

I would like to end these brief remarks by mentioning additional potential of recognizing fundamental environmental rights. Firstly, access issues such as *locus standi* (standing to bring environmental actions) and rights of public participation (including the right to environmental information) either disappear completely or become significantly easier to overcome. In fact, with codification of environmental rights, actions can be brought not just for environmental injuries that have already been sustained but also in respect of anticipated environmental damage.

Secondly, related rights such as equality before the law and protection of the law can be secured for indigenous peoples, women, minorities, and the poor who become entitled to assert their fundamental right to environmental integrity. In this way environmental rights become the platform for asserting intra-generational environmental justice and also intergenerational environmental equity. Several of the cases of the Inter-American Court may be instructive in this regard.

Thirdly, some longstanding impediments to effective transnational litigation can be overcome. Where environmental harm is caused by foreign actors it may be permissible for judges to consider the inherent environmental rights of the victims in deciding whether to retain jurisdiction and hear the case, or to dismiss proceedings on the ground of the *conveniens* of the forum. Such consideration could have led to a different result in for example, the *Bhopal Gas Leak* in India (1984); or the *DBCP Incident* affecting banana workers in Latin American and the Caribbean (1998).

Finally, a transnational culture of fundamental environmental rights could warrant a closer examination of international judicial decision-making. In our increased era of globalization more and more transnational activities adversely affect the natural environment, including illegal trade in wildlife, climate change, and pollution of the global commons. National courts are not always equipped to deal adequately with these issues which probably require adjudication by a dedicated international judicial body. Unfortunately, no such body exists inviting the question of whether the time has come for consideration to be given to the establishment of an international environmental court.

With these brief remarks, I thank you.