



**The Right to Water in Argentina**

*Prepared for Rights and Humanity*

*by Juan Miguel Picolotti*

*With assistance by*

*Lorena Gilli, Marta Juliá, and Andrea Mendyvil*

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(translated from original Spanish version)

### **Introduction**

Water resources, both surface and subterranean, are gaining critical importance due to increasing water demands, and to the diversity of use of this natural resource in industrial, agricultural, mining and recreational activities, among others.

In this context, the new millenium brings with it inevitable future water shortages, and the immediacy and need to modify the way we administer this valuable resource.

Society's analysis of the problem is taking on a new dimension, considering water not only as a natural resource but also as an essential element of the environment and as part of a greater ecosystem which includes a social component. From this perspective, we establish the link between water resources and rights, and hence create an effective tool that enables the identification of sollutions to problems of this nature.

In the context of development models, progress towards sustainable development as understood and deepened over the last quarter century, mirrored by declarations of several international gatherings such as the Earth Summits (Rio 1992 and Johannesburg 2002), the call is on governments and communities to find balanced sustainable paths towards development.

In the context of water sustainability, the challenge with which we are faced is to think globally but act locally (or regionally) to guarantee access to fresh water to society; not only to cover a vital function but more importantly to protect the basic human right to have daily access to a minimun indispensable amount of fresh water, and in order to fully exercise the right to health and the right to quality of life.

This work attmeps to make a small contribution to the objectives set forth in the Millenium Declaration, where governments compromised themselves to reduce by half the proportion of people in the world who lack fresh water by the year 2015. This is a major challenge considering that currently over one billion people have no access to this human right.

This report focuses on the development of the right to water in Argentina, with a brief synopsis of CEDHA's work on right to water.

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## **1. General information about CEDHA and its Right to Water Initiative**

With offices in Córdoba and Patagonia Argentina, CEDHA was founded in 1999, and aims to build a more harmonious relationship between the environment and people.<sup>2</sup> CEDHA carries out activities locally (in Argentina), regionally (in Latin America) and globally.

CEDHA's overall goals are to develop and strengthen the awareness of the linkages between the environment and human rights; and the capacity of state, civil society and private sector actors, to work towards more environmentally and socially sustainable development. Our work focuses primarily at exposing the ill-effects of environmental degradation on communities and individuals. Our activities include research, education, training, legislation promotion and litigation to protect victims of environmental degradation, among others, with the objective of improving access to justice and raising awareness of the importance of protecting human rights and the environment in all development processes.

At the time of CEDHA's founding, society was just beginning to understand development from a rights-based perspective, and had firmly placed the environment and sustainable development at the core of the development debate. In this context, CEDHA posits a clear opportunity to address environmental degradation as a threat to humanity; stressing the importance of addressing human rights violated by environmental degradation, such as the right to life, the right to health, the right to quality of life and the right to a healthy environment.

Our Right to Water Initiative, launched in 2002, has as its main goal achieving greater equity in the realization of human rights affected by the use of water resources.

The Right to Water Initiative works at the local and international level towards:

- the recognition that access to fresh water is a human right.
- promoting stronger water-focused legislation and regulations which incorporate a social perspective;
- capacity building on water and human rights issues;
- setting jurisprudence establishing the links between human rights and water;
- promoting access to justice for victims of degradation of water resources.

From this we are providing free legal advisory services to victims of human rights violations, resulting from non- sustainable use of water resources; undertaking legal actions in defense of victims of water contamination before judicial bodies at the local, regional and international level; training civil society leaders on the existing links between human rights and access to drinking water; and counseling public decision makers on the inclusion of human rights perspective in water management policies and legislation at the local, regional and international level.

Some examples of recent activity are:

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<sup>2</sup> for more information on CEDHA please see: [www.cedha.org.ar](http://www.cedha.org.ar)

- Legal advisory assistance and representation to victims of megadams in Latin America. (Yacyretá and Corpus Christi). We also offer legal advisory assistance to members of Rios Vivos Coalition.
- We are currently working on three publications linking water and human rights, which will be edited and published by end of 2003<sup>3</sup>.
- CEDHA took part in the Fresh Water Caucus at the 2002 World Summit on Sustainable Development and participated as organizer at the Summit's Water Dome, representing the Rios Vivos Coalition.
- CEDHA represented the South Cone in the First Water for the Americas Forum held in Mexico at which we helped draft a declaration presented to the Third World Water Forum which addressed water from a rights perspective.
- CEDHA contributed to comments and revisions of the UN General Comments on the Right to Water of the Economical, Social and Cultural Legal Committee of the United Nations.
- The Right to Water Initiative Coordinator was Fellow for three months at the Interamerican Commission on Human Rights to research water and human rights at a hemispheric level.
- CEDHA participated as panelist at the Water Networks In Latin America event in Costa Rica organized by Fresh Water Action Network.
- CEDHA organized a Right to Water Seminar at the Third World Water Forum in Japan, at which we also organized two poster sessions for the Americas Day.
- CEDHA co-organized an event in Washington, DC to discuss conclusions and a global agenda follow-up to the World Water Forum.
- CEDHA took part in the the Argentine National Water Sustainable Management Meeting where water policy management issues were discussed.
- CEDHA contributed as trainer to a post graduate course International Fresh Water Management, organized by the College of Law of Córdoba National University.
- The Right to Water Initiative offered advisory assistance in the reform of fishing legislation regulating coastal areas in Argentina, particularly in the province of Santa Fe and specifically on socio-cultural aspects affecting of fishermen in these areas.

## **2. Awareness Building on Right to Water**

Context:

Argentines in general have had exposure to human rights issues and understand the need to protect human rights, especially considering the egregious human rights violations suffered during the years of military dictatorship. Following transition to democracy in 1983, Argentine society initiated a process to hold military leaders responsible for the violations of human rights committed during their mandate. Argentina was the only country of the hemisphere and one of the few in the world in condemning abuses of human rights perpetrated by the military government, submitting this historic era to expert opinion and jailing its military authorities. This experience has not only set an important antecedent for international jurisprudence on

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<sup>3</sup> [Environmental Refugees in Santa Fe; Central American Water Court Report; Water and Human Rights in the Americas Situation Report.](#)

human rights, but has also greatly contributed to a more general human rights movement in Latin America.

With respect to water resources in Argentina, and particularly their link to the realization of human rights, processes that incorporate such a concept are gradually being developed. We can identify several measurable advances shown in different social sectors with respect to water and human rights objectives. Among these we can mention the gradual improvements to sanitary infrastructure, the recuperation and maintenance of water resources, movements to recognize, respect and protect the cultures and livelihoods of the riverside inhabitants, and the incipient but gradual awareness and promotion of access to fresh water as a human right.

CEDHA's work on right to water in Argentina largely centers on promoting the awareness of access to sustainable water resources as a human right. We are working to bring other environment, and particularly water-conscious, civil society organizations into advocacy campaigns and actions to promote this conceptual linkage of water as a human right.

The judiciary has pronounced itself repeatedly in favor of the defense of water as an essential human right. Below we offer several examples of judges who, through sentencing, recognize water as a human right.

Even the executive branch of government has shown to be sensitive to the matter. Recently, President Kirchner along with Brazilian President Lula, signed on to a Declaration on Water and Poverty stressing the negative impacts of lacking freshwater and sanitary services and warning of the unscrupulous use that is made of this resource. Both Presidents promised to support and develop programs and projects towards sustainable management of water resources, including the protection of the diverse river basins systems of the region.

### **3. Making use of the Right to Water**

#### 3.1. Legal Framework:

##### International Context:

During Argentina's transition to democracy in the 1980s, the Argentine Government ratified six international human rights treaties. The instruments of ratification of the International Convention of Civil and Political Rights and the International Convention of Economic, Social and Cultural Rights were both deposited in August of 1996; the former containing two statutory reserves and the latter one, neither relevant to the right to water. During the same decade Argentina ratified the Convention on the Elimination of Discrimination Against Woman, in which it also made a reservation in which the Argentine State does not consider itself obliged to submit to arbitration by petition of another state in case of controversy arisen regarding the application or interpretation of this Convention.

Argentina also ratified the Convention on the Rights of the Child, interposing some statutory reserves, but these are also not relevant to Article 24 with respect to the right

of the children to clean drinking water. Argentina also ratified the Convention on the Elimination of Racial Discrimination and the Convention Against Torture and other Cruel or Degrading Treatments; this Convention was not subject to any reservations.

The newly revised Constitution of 1994 assigned constitutional hierarchy to a series of international treaties of human rights, among them the six above mentioned treaties.

In effect, art. 75 para. 22 of the Argentine National Constitution incorporated international human rights treaties within Argentina's constitutional rank. This reform has generated significant changes in the way and reach of jurisdictional protection of these recognized rights stemming from these international instruments, among them the right to water, which through these agreements jurisdictionally grants Argentines the possibility of demanding these rights.<sup>4</sup>

We now consider the normative application of these rights. By virtue of the constitutional character assigned to these human rights treaties, these rights are now part of the National Constitution. Article 24 of the Convention on the Rights of the Child states that: 1) The States recognize the right of the child to the enjoyment of the highest attainable standard of health to facilitate for the treatment of illness and rehabilitation of health ... States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures ...: c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution.

The Convention on the Elimination of Discrimination Against Woman contains a similar norm, forcing the State to guarantee the access to fresh water to the rural woman<sup>5</sup>. The integration of these norms to constitutional stature have raised the bar of development debate in Argentina and would have been unthinkable two decades earlier. This constitutional stature of international human rights law has allowed for deeper analysis of local development problems and offers new inroads into the enforcement of international human rights law, providing jurists with new tools to ensure the exercise of such rights possible.

The right to health, hence, or to quality of life, and the right to the direct access to fresh and salubrious water, are part of this set of norms of constitutional hierarchy. In effect, the judiciary has become the guarantor of international human rights norms, reflecting an increasing tendency in this direction which is already manifest both in human rights doctrine as well as jurisprudence. The judiciary is hence the final protector of human rights before actions or omissions by the various powers of the State. In this respect the tendency is also to revert to international standards when interpreting State obligations with respect to human rights.

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<sup>4</sup> "Ekmekdjian/Sofovich, in Law 1992-C. In this case the exigibility of the right of rectification or answer contained in Art.14 of the American Convention of Human Rights was discussed.

<sup>5</sup> Art.14 - Paragraph 2 Sep.h: The states parts will assure women the right to enjoy proper living conditions particularly in the sphere of water supply.

According to Abramovich<sup>6</sup> and Courtis, “The adoption of international human rights treaties at the highest level of the local normative pyramid and the acceptance of the jurisdiction of international bodies in the area of human rights, obliges the local judicial actors to recognize the interpretation of these treaties that has taken place at international venues<sup>7</sup>.”

With respect to the Right to Water, already recognized specifically in a variety of situations, as previously mentioned, the Committee on Economic, Social and Cultural Right, with the intention to continue advancing the matter, in 2002 released a General Comment<sup>8</sup> to arts. 11 and 12 of the ICESCR affirming among other things, that the access to suitable amounts of clean water for domestic and personal use is a fundamental human right of all persons. It pointed out that this resource is indispensable to have a worthy life and that it is a pre-requirement for the accomplishment of other human rights as they are the right to health and quality of life among others<sup>9</sup>. Finally, obligations were established for the immediate fulfillment by signatory States of the Pact related to the access to fresh water in free and gratuitous form for vulnerable communities.

It is important to emphasize that, although these interpretations made by the authorities that exert control over the compliance of International Human Rights Treaties are not part of the normative human framework, they *are* considered as international human rights doctrine and, as such, they must be considered by State authorities at the time of analyzing these Pacts, and with the ultimate aim of fully complying with the human rights norms ratified by them. In this respect we can say that through the General Comment on the Right to Water a great advance was made on the promotion of the Right to Water.

National Context:

### **Water in the Argentine National Constitution**

The reform of the Argentine National Constitution of 1994 incorporates new rights and guarantees, among them Article 41 establishing the the right to a healthy environment. The description of its text and its conceptual wealth is the first great modification to the system: Article 41 reads:

All inhabitants enjoy the right to a healthy environment, balanced, apt for human development and in a manner so that productive activities satisfy present necessities without jeopardizing those of future generations; and must preserve it (the environment). Environmental damage will generate primary obligation of recomposition, as stipulated by the law.

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<sup>6</sup> Director of Legal and Social Centre of Studies Fund (CELS)

<sup>7</sup> Abramovich, Victor. Courtis Christian: Towards a demandability of economic, social and cultural Rights. Internacional standards and their application in local courts in “The Application of human Rights Treaties for Local Jurisdiction.”

Editors: Abregú Martín and Courtis, Christian, CELS, Del Puerto edition, BA, 1997.p 324 on.

<sup>8</sup> General Observation N°15, December 2002: Right to Water

<sup>9</sup> According to art. United Nations Right to Water- Fresh Water World Year <http://www.un.org/spanish/events/water/Derechoalagua.htm>

The authorities will provide the protection of this right, the rational use of natural resources, the preservation of the natural and cultural patrimony, biological diversity, and environmental information and education. It corresponds to the Nation to dictate the norms containing minimum budgets of protection, and to the provinces, the necessary ones (norms and budget) to complement them, without altering local jurisdictions. It is forbidden to enter present or potentially dangerous residues or radioactive one to the national territory.

The right to a healthy environment has been widely conceptualized in our constitution introducing in its text the most recent international considerations and development on the matter, and formulated as a right-obligation for all the inhabitants to enjoy and to protect the place in which they live.

The authorities must provide among other aspects the protection to the right to a healthy environment, linked to specific resources such as the water, promoting a rational use of natural resources and through dictating norms at national or provincial level to establish policy that protects the resource from misuse.

Consequently, Right to Water as part of right to a healthy environment is integrated within this new structure of third-generation constitutional rights. In Art. 43, the national constitution provides statutory protection to preserve these types of rights, especially including the protection of the environment through this fast and expeditive way. According to the previous conclusion this same format could be used to protect those who suffer the lack of access to fresh water when other means do not exist. We can affirm, hence, that the right of access to fresh water is implicitly recognized within the framework of the Argentine Constitution as part of the right to a healthy environment and, as such, it benefits from all existing legal resources established to defend the right.

In Argentina, as we argue below, statutory protection has been used in numerous cases in environmental affairs and specifically to claim for the protection of the right to water. Jurisprudence has progressed in the consolidation of this right, even in sentences existent prior to the constitutional reform.

The other important reform on this matter is respective of the federal system of government and to the domain of natural resources. As per the government system, the constitution establishes distribution of competence between the federal government and the provinces and specifically in Art. 121 it establishes that the, "provinces conserve all the power not delegated by this Constitution to the Federal Government." This is complemented with Art. 124 which reads in its last section as follows: "The provinces have the right to the original domain of the existing natural resources in their territories." Consequently, after this reform it is specifically established that the natural resources existing in each Provincial State belong to it, having the Nation the only power to dictate minimum general norms pertinent to National Policy, but it will never be able to make use, either physically or juridically, of any natural resource without prior consent of the Provinces. Consequently the superficial and underground water that passes through the territory of each province is of its domain, and therefore each Province will have the power and obligation to legislate on the Right to Water.

### Water and the Civil Code:

Several articles of Argentina's Civil Code refer to issues related to water resources. Velez Sarfield creator of this codified norm, elaborated detailed legislation on the matter, differentiating rivers, navigable and non-navigable lakes, streams and rainfall drainage among other cases.

*Things* in our juridic system are either governmental property or belong to individuals.<sup>10</sup> According to this division, and with regard to water resources included among governmental properties, are: 1) territorial and inner seas, bays, coves, ports and anchorages; 2) subterranean rivers and waters, without harm of the regular exercise of the right of the propiertor to use and enjoy persuant to the present regulation; and 3) navigable lakes and their beds.<sup>11</sup> It is important to emphasize that according to Art. 2341, "Individuals have the right of use and enjoyment of public goods of the State or the States, but they will be subjected to the dispositions of this code and general or local decrees." This Article grants the possibility to individuals of using and enjoying water resources persuant to the present regulation. Additionally, and in accordance to the above mentioned criteria and as per the distribution of powers established by the National Constitution, the mentioned resources belong to the State of each Province.

Finally, the Civil Code mentions an exception to the public domain on waters in articles 2350 and 2367 that state respectively: "Streams that are born and die within a state belong in property, use and enjoyment, to the owner of it" (Art. 2350); and "Waters that arise in lands of individuals belong to their owners, who can freely make use of them and change their natural direction..." (Art. 2367)

### Water and the Penal Code:

In penal matter it is considered a crime against the public health to poison or adulterate fresh waters. In this respect, Art. 200 of the Penal Code establishes: "Whoever poisons or adulterates fresh waters or nutritional or medicinal substances destined to the public use or the consumption of a community will face imprisonment or reclusion for 3 to 10 years. If this action were followed by the death of some person, the punishment will be from 10 to 25 years of imprisonment or reclusion."

Here we have a clear sample of how the protection of water resources are achieved with legal tools that are generally utilized to protect other human rights. Additionally, this case exemplifies how legislation intends to protect not only the natural resource, but also the effect that its adulteration may have on people. Clearly, we are dealing with a protective norm of the right to water as in the case the legally protected interest is the social interest against fraudulent or negligent actions that result in potential harm to human health.<sup>12</sup>

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<sup>10</sup> See art. 2339 Arg. Civil Code

<sup>11</sup> See art. 2340 Arg. Civil Code

<sup>12</sup> (Dayenoff, D., 2000)

## Water and Special National Laws:

Legislation on water resources at the national level is abundant, deriving from diverse eras, and was established with different objectives. The set of norms relative to water resources makes reference to various issues, for example; the contamination of waters; public works and activities related to water; water supply; to the controller bodies of water resources, etc. Environmental legislation and water legislation at national level, to a certain extent, share the normative framework that regulates water as a resource and the water as an element of the environment, although their objectives are different and the agencies assigned to the application of the norms are different, they must coordinate actions and strategies for the use and protection of the natural resource.

## Water and General Environmental Law:

The Constitutional reform of 1994, establishes in Art. 41 that the national government must dictate the minimum budgets necessary for environmental protection. In 2002 four minimum budget laws are promulgated, of which we highlight *the general law of environment* and *the water management law*, which are both linked to the right to water as a human right.

The minimum budgets for environmental matters are set by virtue of Law 25,675, which establishes the national environmental policy fixing the objectives and instruments through which it will be executed. A law of public order reorganizes the environmental legal order in Argentina. Among the objectives of national environmental policy, and with respect to the right to water we note the following stated objectives: “To promote social participation in the process of decision making”, “To promote the rational and sustainable use of the natural resources”, “To organize and to integrate environmental information and to assure the free access of the population to it”(Art. 2).

Also through this legislation the principles of prevention, precaution, congruity, and intergenerational equity, among others, are promoted; all of which are applicable to social aspects of water resources.

The law also holds authorities responsible to provide environmental and educational information in accordance to the constitution and they are obliged to report on the state of the environment and of possible effects produced by present or future human activities.

Information, participation and access to justice as elements in the access to fresh water should be understood as guaranteed in the new general law as well as in the new bill of minimum budgets on access to environmental information.

## Water Management National Law - 25,688

This norm was also dictated under the law of minimum budgets, and while it considers innovative aspects regarding minimum budgets, it has been widely

criticized by legal experts deeming that through this law, the Nation infringes on provincial competence and jurisdiction.

This law defines some concepts such as superficial waters and basin integrity, but only advances with respect to aspects related to interjurisdictional waters, management and other aspects, none of which are linked to the right of access to fresh water, and much less to defining water as a human right.

### Environmental Laws Related to Water

While there exists a history of regulation of water as a natural resource, there are also antecedents of protection and preservation of water in environmental legislation. Law 21,172 on avoiding water contamination; Law 22,190 on prevention and vigilance of water pollution or other elements in the environment produced by ships or naval boats; Law 23,615 on the creation of COFAPyS (The Federal Fresh Water and Sanitation Council); Law 24,051 on dangerous residues/waste; and Law 23,879 on evaluation of the environmental consequences that are produced or could be produced as a result of dam construction in Argentinian territory. It must be considered that all legislation mentioned though not containing specific chapters on the right to water, intends to protect and respect different riverside communities that could be affected by any of the activities or constructions forementioned.

### Water and Provincial Legislation

As mentioned previously, provinces retain the domain of the water resources, which is why provincial regulation is so important in relation to water. Provincial constitutions have suffered a reform process started in the 1980s when the provinces incorporated new rights such as the right to a healthy environment and they have regarded water as a natural resources meriting special protection.

Some examples of provincial constitutions referring to hydric resources are:

- Santiago del Estero Province where water is incorporated into the economic and financial regime;
- La Rioja Province where reference is made to the domain, water uses and natural resources policies; other provinces include water in the natural resources domain (eg. Córdoba, San Luis and Salta).
- Chubut Province establishes an extensive water regime in its constitution.

Many provinces empower the legislative power to dictate the code of provincial waters in their constitutions. Of the 23 provinces of the nation, each one has its own constitution as well as specific legislation in the area of water. Most of the provinces have dictated Water Codes or Laws regulating its use and the administration of this resource and protection of its quality.

Some water codes refer to the use of water in relation to people as in the water code of the Province of Córdoba<sup>13</sup> establishing that any person has the right to make common use to the terrestrial waters (Art. 37), common uses have absolute priority over any private usage, being free of payment, rates could only be set when the provision of a service is required. (Art. 40).

As regards management and administration of the resource, each province has its own particularities. In some provinces the authority is empowered to apply environmental laws. In other cases those who manage the usage and administration of the resource are differentiated from those who manage aspects related to the quality of the resource such as the pollution and actions tending to protect and preserve it.

Despite these widely varied provincial regulations, we do not find in these laws any specific articulation from a social point of view, nor do we find explicit mention of water as a human right. Further developments are needed to attain an explicit acknowledgement of this right.

### 3.1 a. Legal cases on the Right to Water

The experiences analyzed in this chapter are grouped in two separate parts, the first of which brings together cases that have actually been brought before a court, and the second part consists of cases which, despite not having been resolved in court (seeking a solution through other means), they have set exemplary precedent and they have many times been referred to in legal actions due to their importance in this topic.

Generally speaking, we can say that the barriers encountered to access justice in conflicts of public concern were due to procedural matters. In Argentina the debate on the active legitimization, burden of proof, costs and the legal basis for the *acción de amparo* (a type of injunction) in issues concerning the environment and human rights is reiterative and inconclusive.

Further to this, and given that the right to water has not been recognized as an internal norm in each specific case of violation of this right, we must rely on the good criteria and interpretation of the judge handling the demand. As is the case and largely thanks to a series of favorable jurisprudence, as we will see below, judges *do* have a legal base, although non-normative, upon which to judge in favor of access to drinking water as a human right.

In spite of this jurisprudencial effort, in some provinces, antiquated private law principles belonging to the 19<sup>th</sup> century have not yet been surpassed. The progress in this area has also met strong institutional resistance, including the lack of sufficient and opportune information to have access to this right on the part of the affected communities.

Let us examine some cases which have recognized in an explicit or implicit way the access to fresh water as a human right.

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<sup>13</sup> Law 5589 modified by law 8928)

### *Case: Paynemil Community*

In this case, the Public Defender of Minors of Neuquén, interposed an injunction (*amparo*) protection in order to guarantee the health and the access to fresh water of children and youngsters of the Paynemil aboriginal Mapuche Community, contaminated by water consumption containing lead and mercury.

The defender interposed the *amparo* protection against the Government of the Province of Neuquén where she demands that the Provincial State provide the necessary fresh water for community survival as this is an unquestionable human right, since, through the right to water we guarantee the total exercise of the right to health. In addition, the suit demanded the diagnosis and treatment of the affected minors and pertinent measures to stop the pollution of the land and water.

#### Antecedents of the case:

The first sign of alert signaling that the phreatic layer was polluted took place in October 1995 when, while perforating a well for water on land occupied by the community, hydrocarbon (probably gasoline) was being extracted from subsurface. In 1996, the Commission formed by the University of the Comahue – Assembly For the Human Rights on Aborigines' Land – presented the Director of Hydrologic Resources a note on which he not only reported, “a probable fact of heavy metal water-bearing pollution of the phreatic layer from which the Paynemil community get their water supply,” but also they enclosed analysis of potability of well-water extracted for consumption of the settlers.

During the course of the Judicial Process evidence is given that the Executive Authority knew about the pollution of the water used by the community for their consumption and, in addition, it also demonstrates the lack of diligency from the authorities in giving a solution to the problem. Consequently, as the case was in the appeals process, the Court of Appeals understood that the State failed to act opportunely constituting an arbitrary omission of its responsibility and violating the right to health and the environment.

#### Defense of the Provincial State of Neuquén:

Although the State alleged to have taken some measures and to be studying the causes and the type of pollution present in the water, due to the seriousness of the situation and the urgency demanded by the need to protect affected rights, the Court sustained that the delay of the adoption of the measures to stop the pollution constituted an omission and therefore was not justifiable.

#### Definitive Sentence:

The sentence confirmed the initial ruling, sustaining the *amparo* protection and condemned the Provincial Executive Authority to: I) Supply 250 litres fresh water daily per inhabitant in a term of 2 days. II) Assure the supply of drinking water by any conductive means in a term of 45 days. III) Start the necessary actions to determine if

there are damages caused by heavy metal contamination among the inhabitants and, if so, the fulfillment of the necessary actions for their treatment. IV) Take the necessary measures to assure the preservation of the environment from the pollution derived from the hydrocarbon and gas exploitation.

From this case we can conclude that, it is the State who is obliged to guarantee rights of constitutional roots, such as right to health, to a healthy environment, and especially the right to water as a human right. In the present case, the urgency with which the State was to have acted to guarantee such rights, and its failure to do so, constitute an omission of responsibility and result in the violation of human rights.

*Case: Users and Consumers in Defense against Aguas del Gran Buenos Aires S.A./Injunction*

Antecedents of the Case:

In June 2002, in the city of Buenos Aires, the president of the organization *Users and Consumers*, Alejandro Fiorenza, interposed an amparo (injunction) protection against Aguas del Gran Buenos Aires S.A. in order to declare the unconstitutionality and nullification of interrupting the provision of water as a measure against lack of payment. As a preventive measure, the demanded party is ordered to cease the water provision interruptions and to proceed to the restoration of the interrupted services and to abstain from carrying out such interruptions in the Comunal area of Moreno.

Sentence:

The judge sustained the *amparo* action ruling that the suspension of the provision of drinking water due to lack of payment cannot be addressed in a long process, but must be addressed speedily, as water is vital for life and health. The judge considered, in addition, that even in the case of existing controversy with respect to the legitimation of the actors and the judicial standing of the representative, the Court considers acting on its own initiative in order to weigh in on the importance of the subject.

Regarding the access to fresh water as a human right, the judge considered that this is a right that must be assured to all the inhabitants of the country whether they have the capacity to pay or not for the provision of the service. He emphasized that the deprivation of such service affects explicit constitutional rights to life and health, besides constituting the breach of governmental obligations, assumed in pacts and international treaties of constitutional rank.

This case stands out as an important precedent, and is especially innovative in that it extends the limits imposed by common rules and processes that often obstruct the exercise of our rights. The judge in his decision does not consider the discussion of the active legitimation. In addition he rules with a sentence of general effect, favoring both the applicant and the community and including in his sentence the State obligation of providing drinking water to all citizens of the country.

*Case: Colonia Valentina Norte Rural “Public Defender for Minors Number 3 against Municipal Executive Authority/injunction*

Antecedents of the case:

In July of 1998, the Civil, Commerce, Labour and Mining Court of Appeals – Room 1- First Judicial Circumscription, Neuquén gave place to the *amparo* protection interposed by Minors Defender Office Number 3, demanding that the Provincial Executive Authority provide the minors and their families who live in Colonia Valentina Norte Rural, the amount of 100 litres of fresh water in perfect sanitary conditions per inhabitant, and the means to be stored in those same conditions by families of low resources. In that sentence it was also demanded that the distribution take place within 48 hours from the notification of the sentence clarifying that it was an emergency measure, until the final solution denounced in the ruling was solved. As this was a strong pronouncement, and upon verifying that the State did not comply with the order, the Public Defender demanded the State meet its judicial obligation. In that procedure, the same Chamber in what was an amazing pronouncement, bordering on the illegal or at the very least the illegitimate, modified the reach and quality of the prior sentence which had recognized specifically not only the right to water but also the environment and health as general rights.

Final Decision of the Court of Appeals:

In its final decision, the Chamber reduced the amount of water to be supplied and recognized those rights to a limited number of 56 families that (according to a survey carried out by the government) had legal titles to inhabit the area.

As we can see, in this case there is a clear jurisprudential retrogression regarding the prior sentence, since here the holders of this right are arbitrarily limited considering the problematic of access to water as an individual right and not as a human right based in collective interests. Additionally, the sentence is notoriously discriminatory for deciding based on discretionary criterion that the beneficiaries of this human right would be.

Decision of the Provincial Supreme Court:

The Public Defender appealed the decision to the Provincial Supreme Court which made a remarkable pronouncement founded on Arts. 41 and 43 of the National Constitution and on the Covenant on the Rights of the Child, which severely disqualified the pronouncement of the Chamber, reconfirming the previous sentence. The Provincial Court grounded its argument in the general nature of the human rights at stake in this case, considering the “*pro homine*” and “*erga omnes*” principles that must take priority in the interpretation of international human rights.

In sum, the highest ranking court of the province established the jurisprudence tendency and granting and characterizing the right to water as a human right and as a consequence, demanding the Province to supply water to the community without distinction.

*Case: Association to the Protection of the Environment and Ecological Education 18<sup>th</sup> October against Aguas Argentinas S.A. and others/injunction.*

Antecedents of the Case:

The Municipality of Quilmes together with the remaining districts that form the “Conurbano Bonaerense, Ciudad Autonoma de Buenos Aires and Ciudad de la Plata,” are located on the “Puelches Aquifer” which constitutes one of the most important pluvial subterranean formations. This area has become one of the most exploited water resource used for human consumption in Argentina. The replacement water supply in this region with water brought from the nearby Rio de la Plata, among others, has resulted in a rapid ascent of the levels of the Puelches Aquifer. The same phenomenon occurs with the phreatic layers. Another issue in the case had to do with the impossibility of using water wells due to their high nitrate content and its affects on the environment, manifested by the saturation of domiciliary cesspools, in the areas without sewages.

We can add here the serious breaches of Aguas Argentinas (the local private water company) which failed to construct sewerage channels contemporaneously alongside their extension of the water distribution supply network, that would have allowed to return a the Rio de la Plata (and not to the acquifer layers), the mentioned water resource tapped from the river.

This situation, as already mentioned, has as direct consequence on the elevation of phreatic layers of the acquifer producing important risks to health and tremendous material damages such as the flooding of cellars, garages, tunnels, warehouses and a greater increase in the vulnerability of the acquifer.

Claims presented by the community:

The situation previously described resulted in reiterated and numerous claims before local and national authorities on the part of different local organizations, Non Governmental Organizations of public welfare as well as of the Public Defender of the Municipality of Quilmes, which was largely present in the local media.

Legal Action:

The Association for the Protection of the Environment and Ecological Education “18 of October” promoted an *amparo* action against Aguas Argentinas SA, Tripartite Entity of Works and Sanitary Services (ETOSS), Province of Buenos Aires and the Municipality of Quilmes, in order that they restore the water balance of Quilmes by means of the immediate cease of the deeds, acts and omissions mentioned ut. supra that manifestly harmed the right to enjoy a healthy and balanced environment, and to have access to drinking water and sanitation in a safe and permanent form.

Judicial Decision:

The judge in the first instance imposed to the demanded party the obligation to start the delayed mechanisms and anticipated procedures and that were opportunely decided between the Government of the Province of Buenos Aires and the

Municipality of Quilmes and that were later approved by the ETOSS and the concessionary company Aguas Argentinas S.A.

This resolution was confirmed in the Second Instance, also demanding the obligation to present fortnightly before the court a report on the advance of such works in order to achieve the effective fulfillment of the precautionary measures dictated.

Both courts grounded their verdicts on constitutional principles, on comparative law, and on a variety of international conventions which altogether establish the regime of protection, conservation and handling of the water resource and its relation to the social aspect.

### *Case: Chacras de la Merced*

#### Antecedents of the Case:

Chacras de la Merced is a community neighborhood that started to form in the early 1950s in what was then the outskirts of the city of Cordoba. The quality of the land and the proximity to the Suquia river allowed the development of farms and offered its inhabitants a privileged surrounding. Today, Chacras de la Merced extends along 6km of the margins of the Suquia river. At over 1,500 in population, 95% of these have unmet basic needs, which means that most of the families that live in this neighborhood live well under the poverty line and lack the basic resources for their subsistence. Since this portion of Cordoba's population does not have access to the public water grid, nor any other type of system to provide running water the community has been forced to take water from wells. Three decades ago, Chacras was known for its good quality water. Today it is undrinkable.

By the end of the 1960s, a Sewage System Treatment Plant was constructed (EDAR Bajo Grande) along the border of the Suquia river, 2km upstream from Chacras de la Merced. As the population of Cordoba grew, the local government authorized the extension of the city's water grid and sewage network. The former largely overextending the other by a considerable portion and with this the volume of daily wastewater treated by the plant began to rise considerably, while the capacity of the sewage treatment facility did not.

This unbalanced growth of the public infrastructure to address the city's water supply and wastewater treatment capacity manifested the city's unreasonable and inappropriate municipal policy planning. The sewage treatment facility has been long overloaded in capacity and the liquids dumped by the plant into the river have long been contaminating the Suquia river water which receives the plants overspillage of untreated wastewater.

The contamination caused by the plant to the Suquia river has direct bearing and impact on downstream communities, particularly those living immediately downstream up to to 8km away from the plant. The contamination is also greatly affecting subterranean water supplies, particularly those of the Chacras de la Merced community, which live nearly 2km away from the plant.

Current situation of the community with respect to the right to drinking water:

Today, the Chacras de la Merced community does not have any alternative but to consume publicly supplied drinking water, which as we have indicated, is highly contaminated with a high degree of faecal matter, resulting in enormous risks to the health of the population. The community approached every imaginable and available public agency in order to have their case heard, and have never received a meaningful response or action to their claims.

At this moment, the Center for Human Rights and Environment (CEDHA) is in process of presenting an amparo action against the City and Province of Cordoba grounded on their responsibility in the pollution of the river and to claim for the immediate accessibility to drinking water as a human right, having as basis the mentioned jurisprudence and international treaties ratified by Argentina.

*Case: Yacyretá Hydroelectric Dam:*

Antecedents of the Case:

Located on the natural resource rich Argentine-Paraguayan amazonic border, the Yacyretá hydroelectric dam is one of the greatest infrastructure works in Latin America. It is also one of the most controversial mega hydroelectric projects in the world. Studies for the construction of this dam were conducted in the 1950s. Plans for construction of the dam, and administrative structures that would be in charge of its construction, were completed in the 1970s, while both State partners - Argentina and Paraguay - were governed by dictatorships. What would become one of the world's largest white elephants was built with financial support from the National Treasury as well as large external financing, among them the World Bank and the Inter-American Development Bank. This dam includes a 67km-long containment wall that crosses the Parana River, the border between Paraguay and Argentina, which also holds the water flow in an area of falls of the river. The force of the fall of the water generates electrical energy through large turbines installed in the dam for such purpose. The real and overall magnitude of the dam's social and environmental impacts have yet to be accurately determined as a proper impact evaluation assessment was never conducted. Still, today the dam has strong negative consequences for the communities and environment of the region, particularly that of Corrientes and Misiones provinces in Argentina, especially in the city of Posadas.

Social and Environmental Impacts of the Dam:

The filling of the dam at its present level has produced the flooding of 52,600 hectares of unique natural ecosystems, and agricultural territories of great productivity. It caused the alteration and degradation of habitats of fresh water, loss of quality of water and the drastic decrease of the population of numerous species of fish, representing enormous economic losses for the local population. The social and environmental impact of the work included the relocation of thousands of families as well as the loss of valuable natural resources. It has also destroyed the lives and

livelihoods of the affected indigenous and other rural communities living in the nearby flooded lands, creating a permanent legacy of poverty and suffering.

Claims of the local communities:

The construction of the Yacyretá dam was followed by a great number of complaints from local community stakeholders and organizations representing victims. One of these was the filing of a report before the World Bank Inspection Panel, a mechanism created to receive complaints by victims of World Bank-financed projects. The case was presented by the Paraguayan branch of Friends of the Earth in September 1996 on behalf of victims on the Paraguayan border. Later, Argentine Senator Mario Lozada submitted himself a claim in representation of affected Argentine communities.

The Panel conducted an investigation and produced its report, in which the panel criticized severely the performance of the Bank and the two Governments in relation to the dam. It also evaluated Bank employees' lack of drive in applying measures within their reach when relocation and mitigating environmental measures were not fulfilled as stipulated loan terms of the agreement.

Advice from the Inspection Panel:

The panel advised the need to take immediate action to remedy the damages originated from the violations of banks' policies.

Despite these conclusions, no appropriate or reasonable action has taken place to address the violations resulting from the project. During 2002, a local community organization presented a new claim stressing the continued violation of bank policies. This claim is now being looked into.

Current Situation of the Dam:

The Yacyretá dam is currently working at a water level of 76m above sea level, it was never allowed to reach its maximum and optimal level of operation at 83m as this would only further deteriorate the local environment and further aggravate social conditions in the area. The governments argue that the water level should rise so as to fully maximise electricity production of the dam, which produced an important percentage of the countries' energy supply. They argue that maintaining the water level where it is is not only detrimental to attaining the dam's anticipated economic return, which is underutilized, but also places the infrastructure at risk, since in its optimal design it should hold much more water than it presently does, and this may negatively affect the dam's physical integrity.

Although the undesirable impacts from the dam persist, and while the problem has created monumental public outcry, particularly among stakeholder communities, there is still a plan by both governments to raise the dam water level to its projected height of 83m, what will undoubtedly only further aggravate social and environmental conditions.

In an effort to seek redress for victims of the project, civil society organized two binational teams which are working to obtain more information about the dam and official projects concerning the dam, while increasing public participation in

opposition to raising the dam water level, so as to protect local communities and the surrounding environment.

### Violation of the Right to Water

It is important to mention the following case in the present report since it shows us another situation of lack of protection to the right to water. In this case the focus is not on access to drinking water but rather on a variety of other rights and social dynamics affected by impacts to a vast local water resource. It has to do with the rights of indigenous communities affected by impacts to their water supply and ecosystem, the affects on fishermen and other local population whose livelihoods also depend on the greater ecosystem of the region. The lands affected by the flooding caused by the dam, impacts the lives, culture, wealth and the history of local communities.

#### *Case:: Ituzaingó Anexo Neighborhood Antecedants of the case*

Ituzaingó Anexo is a district located in the south-east outskirts of the city of Cordoba. It holds approximately 4,733 inhabitants. Due to environmental problems in the area, largely related to the contamination of water resources, the community manifests a series of severe problems. The community has an inordinately high presence of human health problems that can be attributed to specific environmental degradation that is taking place in the neighborhood. Some of the most important and most highly visible problems are the existence and impact of outdated and poorly maintained electrical transformers containing PCB, as well as the proximity of the residential area to agricultural fields using highly contaminating fertilizers for certain crop cycles. Added to this, the neighborhood has no running water, and hence, the community is forced to tap water from subterranean wells, which receive no treatment whatsoever. For much of the recent past, community inhabitants had no idea of the quality of this water destined for human consumption.

### Neighbouring Claims

Faced with growing illness and premature death in their community, a group of neighbors of this community organized themselves and started claiming to public authorities to take action to address the severe environmental problems in the neighborhood, as they understood that the severe situation with which they are faced is not of their doing or responsibility and they are being deprived of their rights to health, quality of life and drinking water, among others. Claims included different measures of social pressure and legal action (blocking streets, protests, administrative reports and legal lawsuits).

### Results Achieved:

After struggling for over two years the community, now organized, helped by diverse local NGOs, CEDHA and FUNAM<sup>14</sup> among others, the case as finally received public

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<sup>14</sup> Fund for the Environmental Protection. (Director: Raul Montenegro)

attention, and public authorities are taking steps to address the problems faced by the community.

In this process, the Provincial State carried out a study to determine the state of health of the population, revealing that there is a high level of cancer in the neighborhood. They have also analyzed power transformers finding high levels of PCB that were contaminating the environment. The water consumed in the neighborhood has also been analyzed and found to be high in content of sulphates, carbonates and endosulfán, a highly toxic pesticide described by the United States Environmental Protection Agency as a highly dangerous substance, confirming the suspicion that the Ituzaingó Anexo community had been drinking contaminated water for some unknown period of time. Contaminated by substances such as those found in the state study, including ones long ago forbidden for sale in developed countries.

In April of 2002, after a long and bitter social dispute, the Provincial State agreed to extend the water supply grid to Ituzaingó Anexo, providing running water to the local inhabitants. They have also removed old transforms and replaced them with PCB-free ones.

One problem that still remains is the contamination caused by fumigation of nearby agricultural lands which, despite local decrees prohibiting air-fumigations, still occurs.

#### *Case : Cochabamba “War for Water”*

Due to its relative importance to the region, and to the global impact it has generated, we've chosen to include a case from nearby Bolivia, which helps depict a typical right to water problem faced by local communities addressing the consequence tensions generated from the privatization of water-management. The circumstances of the case is not dissimilar to what one might find in certain parts of Argentina or other localities in the hemisphere, or even the rest of the world.

#### Antecedants of the Case:

In the city of Cochabamba in September 1999, the Bolivian government granted the concession of the running drinking water service to a company called Aguas del Tumor, a multinational company investing in Bolivia's water sector.

Due to what was deemed by the local population to be inequitable and unfair pricing schemes, the presence of this transnational corporation and their management of the local water supply, generated growing and vociferous opposition of the local community. The company set fixed prices, without any consideration for the great disparities of socio and economic circumstances of the local community. Only a small and select portion of the local population could afford to consume the newly privatized water service.

#### Rural Community Reaction:

The inconsiderate, the exclusionary policy, and out-of-reach-for pricing set by the company, led to the helplessness of many users of a water supply system on which

they depended for daily existence. This resulted in the build-up of local general opposition to the private company. Organizations were created solely to oppose the company and its policies, and to defend the rights of the local population. “Coordinadora Departamental del Agua y la Vida” (Local Coordinator of Water and Life) and FEDECOR, together started what was afterwards called: “The Water War”.

In March of 2000 the previously mentioned coordinator Group called for a “popular poll”; in which 90% of the population voted for the cancellation of the concession contract and for the State to carry on managing their water resources.

#### State Reaction:

Unfortunately, the state reacted aggressively to public outcry, and chose to physically repress the protestors. The government ordered police forces to mobilize against protestors and declared a state of siege in the community. The community did not heed presidential orders and thousands of people called “Water Warriors”, housewives, senior citizens, children and many others from all social strata, gathered to resist the measures. A riot ensued which lasted 8 days, and finally, the resistance prevailed, and Aguas del Tunari was forced to leave the city.

The Cochabamba case is exemplary for our focus on right to water, not only because of the tensions generated by privatization of water supply and management, but more importantly because it demonstrates a case where through public participation, common citizens have demanded their right to water, and have mobilized, created institutions, and coordinated actions to exercise this right, refusing to have water transformed into a publicly traded commodity.

It is important to highlight that in this case we find an example of how a community internalizes the idea that water is not only a need but a right and, as such, it belongs to the community. The principle motto used in the campaign against the company was, “Water is Ours”.

#### *Case: Santa Fe: “Right to Water provincial Conference”*

#### Case Antecedents:

In 1996, the government of Santa Fe Province signed a contract granting the water supply service to Aguas Provinciales de Santa Fe SA, subsidiary of La Suez Lyonnaise des Eaux. Innumerable claims were reported from the beginning of their activity based on, for example, the elimination of discounts to pensioners or for overbilling. Moreover, in other parts of the province there were claims problems against the company due to high toxic levels found in the water supply, some of which resulted in legal actions, such as in the city of Firmat where it was concluded that the water was not suitable for human consumption due to arsenic contamination.

#### Community Reactions:

From 2000 to 2001, various cities organized themselves to gather strength and to complain to authorities about the company’s performance. They met in clubs, public audiences in municipal councils and were permanently in contact with the media.

In June 2002 part of the opposition to the company created the provincial Assembly for the Right to Water (APDA) made up of groups of neighbors affected by water supply problems, associations of consumers, ecologists, community assemblies, small and medium businesses, trade unions and professional bodies.

The initial meetings presented a wide variety of diverging interests and intentions, and their conduction was actually quite difficult and complex. These were the meeting points of new and old water rights advocates, with different points of view, from the poorest of neighbourhoods to rich shopping centers. They came together for economic reasons or due to environmental concerns. They include money-lenders to persons struggling against arsenic contamination. Yet these meetings were not discouraged by their complexities, but instead led to the most important popular movement ever recorded in Santa Fe which resulted in the plebiscite of 26<sup>th</sup> September to 1<sup>st</sup> October 2002.

The result of this plebiscite organized by civil society, without State support, was the mobilization of over 700 advocates joined by a vested interest in their right to water. 256,000 votes were registered in 15 cities affected by the private water supply concession. The result was a call for revocation of the contract held with the multinational company.

The constitution of APDA showed that despite living through one of the worst economic and social crisis ever lived in Argentina, and in the midst of one of the worst crisis of representation ever to face the country, rights concerns could generate social cohesion. The plebiscite and the public meetings that preceeded it offered an innovative way to participate in the social construct. Of the process, and with regard to the right to water, two principles of massive social importance surfaced: the defense of the right to water nor any other human right shall not be delegated, and second, that unity amidst diversity must prevail in the face of common objectives.

The result of this process and public outcry in Santa Fe is to date very different than in Cochabamba. The company remains in Santa Fe and maintains support from the government who choose to disregard public opposition to the company and its policies. Nevertheless, civil society continues to pressure the company and the government to cancel the water supply contract. This outcome does not undermine the important movement, social cohesion and energies that were created around the right to water, which serves as an example for future instances where the exercise of a right may need a similar social reaction to occur.

### 3.1.b. Community Actions:

The crisis on world-wide scale over water resources represents a serious threat for nature and for present human life and that of future generations. This situation arises as the result of the irrational public and private abusive use of water resources. The present scarcity of fresh water, and the pressure exerted upon this resource merit special political consideration and commitment to basic conservation and protection of the resource. As the cases above demonstrate, society is increasingly expressing itself in favor of protecting the human right to water; and through public consultation,

mobilization, organization, rights acclamation, and participation in decision-making, is seeking access to justice around this resource.

Non Governmental Organizations (NGOs) play an important role in this process, especially in their actions to educate and advise community actors on the relevant issues in the pursuance of this right.

Next we focus on select Argentine and other Latin American organizations, that are working to protect, in a direct or indirect way, water as a human right.

### *PROTEGER*

PROTEGER is an NGO with national and regional reach. It was created in Santa Fe, Argentina, on 16 October 1991. It is a member of the World Conservation Union (IUCN), Friends of the International Earth (FoEI) and the Rios Vivos Coalition. PROTEGER works in defense of rivers, marshes and controls various megaprojects since its founding.

Since the early 1990s, PROTEGER-Argentine Federation of Friends of the Earth, has worked in the dissemination of information on the importance, values and functions of marshes and the promotion of the rational use of its resources based on the informed participation of the communities.

At present, this institution is promoting an initiative entitled: Corredor de Humedales del Litoral Fluvial de la Argentina (the Coastal Argentine Wetland Corridor), with the support of the Ramsar Convention, WWF-Living Waters Programme and Wetlands International. PROTEGER is also an international reference on issues pertinent to marshes and fishing in the fluvial coastal region of Argentina. The institution promotes the active design and implementation of sustainable use strategies of water and fishing resources approaching water management from concepts of social equity, protection of biodiversity, legislative consistency, preservation of livelihoods and improvement of the quality of life of local communities.

The focus on marshes is centered on their importance as a vast natural resource that has great economic and social importance, helping satisfy basic environmental and human necessities. For that reason it is urgent to increase the level of social awareness with respect to the irreplaceable benefits that the marshes offer society, and of their unexplored potential for human and development. We must work urgently in their protection from the vast loss and devastation they face daily. In the greater context of its work towards sustainable management of water resources, PROTEGER's program agenda is clearly and directly relevant to the link between water resources and social conditions, working to protect the resource so that it can be used by the communities in a sustainable manner. Its work is a clear application of an ample conception of the right to water.

### *Coalition Rios Vivos:*

Rios Vivos is a non-governmental coalition of organizations and communities articulated to restrain the processes of cultural, social and environmental degradation and to implement sustainable policies that make it possible to create a new relationship between man and the atmosphere. Rios Vivos is today one of the most important networks in Latin America. Its main objective is to strengthen alliances between organizations, networks and the civil society with the perspective of promoting changes in the present model of development. *Conservation, restoration and sustainable use of continental waters* is one of the programmes executed by the institution whose mission is to produce a Latin American vision on 'water' to make possible the development of suitable public policies for this sector. The base on which Ríos Vivos develops its strategy has as its foundation a great experience in the protection of aquatic ecosystems, in the work with traditional and aboriginal communities and in the opposite actions to destructive megaprojects of dams and industrial hydroways.

CEDHA belongs to this coalition, with a view to contribute a human rights based focus to the advocacy work of the coalition, bringing their environmental advocacy work into the realm of social sustainability and human rights. CEDHA's addition to the network posits the protection of water resources through the use of international mechanisms to protect human rights, in this way recognizing water as a basic and indispensable right for life.

### *The Pro Tigre Foundation*

Pro-Tigre Foundation and Cuenca del Plata is a Non Governmental Organization (NGO) with legal identity, non-political function and non-profit aims. It carries out tasks started by Asociación Vecinal Pro-Tigre, founded on 1983 by a group of neighbours of the Partido de Tigre, Province of Buenos Aires, by initiative of her present president, Carlota Sanchez Aizcorbe. Pro-Tigre y Cuenca del Plata foundation began functioning as a neighborhood association in 1983. The organization came to existence through the initiative of a resident of Tigre, who originally met with a group of fifteen women of the area. This meeting was motivated by the high degree of pollution of the rivers that surround the area and the impact this degradation caused on the cultural and architectural identity of the Tigre area.

The objectives of this foundation are; to advise and alert on future consequences of irresponsible water management and water pollution; to make denunciations before public authorities when faced by risks that jeopardizes local populations; to defend water resources through increased information dissemination and education; and to facilitate communications between victims and competent administrative authorities. This institution arises to solve local problems specifically related to the right to water, in a community (Tigre) where the population is much aware of the importance of the water resources of their region, and its vitality for their subsistence and for the River Plate basin.

### *The Wildlife Foundation*

La Fundación Vida Silvestre Argentina (FVSA) is a non-profit and independent private institution dedicated to public welfare, whose main objective is promoting and conserving biodiversity, sustainable development and the change of consumption patterns that affect natural resources. It is made up of people of different professions (academia, biologists, museologists, forest rangers, lawyers, accountants, geographers and specialists in several aspects of the natural patrimony conservation). Aguas Argentinas and Wild Life have joined forces in the launch of a campaign whose objective is to protect. The case of the Foundation Wild Life is a good example of a collaborative relationship between private sector and civil society, despite the differences that usually arise between the Companies and the NGOs on such issues.

### *The Provincial Assembly for the Right to Water (APDA)*

The APDA was created in the city of Santa Fe in June of 2002, integrated by a group of consumer associations, ecologists, neighborhood organizations and assemblies, retailers, small and medium business, unions, professional colleges, and educational schools from several cities of the south of the province. It was created as a reaction by civil society against the irresponsible operation of a water supply concession granted to a multinational company. The aim of this assembly is to defend the right to water as a vital resource for life and to make public its claims before the competent public authorities. This Assembly summoned a plebiscite from 25<sup>th</sup> to the 30<sup>th</sup> of September 2002, in order to revoke the contract with the concessionary company. A total of 251,975 people voted, of whom only 400 voted against. The Governor of Santa Fe has already received over 100 letters from different local, national and international Institutions supporting the initiative of the Provincial Assembly for the Right to Water. This display of activities, the fight and the participation of this Assembly made an impact on internationally recognized specialists in this subject who expressed their satisfaction to support such an important social movement.

### *The Environment and Natural Resources Foundation (FARN)*

FARN was founded in 1985. It is a non-governmental, non-political and non-profit organization whose main objective is to promote sustainable development through politics, law and the institutional organization of the society. The targets of the work of FARN are, mainly, private and public people who are in charge of taking decisions which affect the environment.

FARN's work centers on environmental policy, seeking efficient ways to generate a desirable context for development. FARN works to strengthen environmental legislation and focuses on conservation and protection from the perspective that everyone has rights and obligations with respect to environmental protection; and so that all sectors assume through their respective organizations the tasks and responsibilities that correspond to them in environmental protection.

Citizen participation is one of the main axes of the tasks carried out by FARN and although this institution does not have a specific program dedicated to the protection of water resources, it is one of the oldest Argentine institutions that promote the protection of the environment by means of the exercise of Law. FARN understand citizens to be the main actor that must ensure the fulfilment and obedience of laws, develop appropriate public policy and destine resources to prevent environmental problems.

### 3.2. INSTITUTIONAL POLITICAL FRAMEWORK:

The institutionalization of water in Argentina.

Regarding the present institutional water infrastructure and state of the environment, the National Administration is in charge of carrying out water policies through its Water Subsecretariat<sup>15</sup>, a department of the Public Works Secretary within the Ministry of Economy of the Nation. The body in charge of carrying out environmental policy at the national level is the Secretary of Environmental Policy and Sustainable Development within the Ministry of Health of the Nation.

Among the objectives of the Secretary of Public Works – Water Subsecretariat - we can highlight the following which pertain to the issue in discussion:

- to assist in the elaboration and execution of the national water policy and propose the regulatory framework relative to the handling of the water resources, linking and coordinating other intervening jurisdictions and bodies in the water policy;
- to execute national policy on public services and fresh water supply, evaluation and basic cleaning;
- exercise the faculties relative to the authority of application of the contract of concession of public services between the national government and Aguas Argentinas S.A. within the framework of law 23.696;
- assist the Public Works Secretary in the supervision of the Regulating Body of the Security of Dams (ORSEP) of the tripartite entity of Work and Sanitary Services (ETOOS) and the Water Works of Cleaning entity (ENOHSA);
- supervise the performance of the National Institute of Water (INA).

It is also important to emphasize that among the activities carried out by the National Direction of Projects and Water Works is to assist the regimes subjected to canons, tariffs and rates in the pertinent areas and also to propose the legal framework that regulates the use, advantage and conservation of the resources in the area of its competence.

#### Privatization in Argentina

Until the end of the 1980's the ex-company Obras Sanitarias de la Nación (OSN) was in charge of supplying water and sanitation, and controlling and monitoring of the direct and indirect pollution of the sources of water provision.

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<sup>15</sup> According to the decree 2693/2002 with the approval of the organizational structure - January 2003

Since a process began to privatize public services in Argentina, the concession of fresh water and sewage drainage was granted to Aguas Argentinas S.A. The regulatory framework of the concession considered among its objectives quality assurance and continuity of public service and the protection of public health, water resources and the environment.

From the decree of law 23,696, in August 1989 there began a deep reform of the state and an emergency is decreed with respect to public service provision, starting a process of full decentralization, deregulation and privatization<sup>16</sup>. The deregulation of the economy, beginning in 1991, is the backdrop to this context.

Regarding fresh water and sanitation, except for exceptional cases there have not been important advances over the past 20 years. There has been only a small increase in the coverage of the system and it has generally been obtained at the cost and deterioration of the existing systems. Access to fresh water as a human right was guaranteed by the national judges, who based on theory of implicit rights did not need any other legislation to guarantee this right in the different cases they have decided.

Privatization in Argentina outpaces most Latin American countries of the region, especially over the period 1990-2000. Each instance and process of privatizing a public service generally presupposes the assignment of the function of monitoring of the provision of the service in a state or quasi-state body, a process which normally has been carried out by creating a regulating entity in each circumstance. The effectiveness of these regulatory bodies varies widely by sector and province.

### Institutional Reforms

Several important institutional reforms took place over the past decade, some of which we can mention in the context of our topic: the Constitutional reform of 1994; the promulgation of the law of dangerous waste, 24051; the creation of the Water Subsecretariat Office (SRH) in 1994, which passes from the Ministry of Economy to the Secretary of Natural Resources and Sustainable Development (under Ministry of Economy) in 1996. In 2000 all the bodies related to the water resources of the Water Subsecretariat such as ENOHSA, ETOS, COREBE, ORSEP, INA, and several other areal programmes<sup>17</sup> are incorporated.

In the Water Subsecretariat and within the National Direction of Water Policy a document on the ruling principles is currently being drafted aiming to reach agreement on the handling of superficial and subterranean water under federal jurisdiction. Due to the institutional fragmentation in the national and provincial spheres of the water sector, and as a result of the great number of bodies that are in charge of the management of the resource, which also includes the various executing units of internationally financed programs, the present preference is to unify the management of these in the national and provincial water authorities<sup>18</sup>.

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<sup>16</sup> (Llop, 2001, p.3)

<sup>17</sup> (Llop, A. "Program 21 in the integral management of the hydric resources in Argentina", CELA, Mendoza, 2003)

<sup>18</sup> <http://www.mecon.gov.ar/hidricos/conclusiones2/20/10/03>

Pertinent to the most recent institutional changes, it has been established that in water resource matters, all activities carried out must be coordinated with the national environmental sector, i.e. with the Environmental and Sustainable Development Secretary.

The figure of the Public Defender

The Public Defender, as a new actor, was incorporated in texts of the reformed Provincial Constitutions in the 1980s.

The Public Defender figure at national level is created in the 1994 reform; it is incorporated in Art. 86 of the Constitution: “The Public Defender is an instituted independent body under the National Congress, that will act with total functional autonomy, receiving instructions from no authority. Its mission is the defense and protection of human rights and other rights, guarantees and any other interest protected in this constitution and the nation’s laws, before facts, acts or omissions of the administration; and the control of the exercise of public administrative functions.”

The National Public Defender has led important investigations and has reported environmental issues specially related to pollution and the spilling of sewage liquids in the different water resources throughout the country.

The constitution legitimizes the Public Defender, in Art. 43, to interpose injunction protection (*amparo*) against any form of discrimination and all matters pertinent to environmental rights.

### 3.3. Empowerment and Community Development:

The work of Non Governmental Organizations:

Non Governmental Organizations have had a very active roll in the defense of environmental rights and their performance in the past two decades has been significant. As far as the right to water is concerned, we found several cases worthy of mention, some of which have been cited above.

The case of “Fundación Pro Tigre and Cuenca del Plata against Municipality of Tigre and others/injunction protection”. First Chamber of Appeals in the Commercial and Civilian and of the Judicial Department of San Isidro. 9/6/98.

In this case, the Foundation Pro Tigre and Cuenca del Plata called for an injunction (*amparo*) against the Town Hall of Tigre and condemned the Town Hall for the pollution of subterranean water demanding it to be sentenced to provide fresh water to affected neighbors<sup>19</sup>.

In another similar case<sup>20</sup> presented by a non-profit foundation an injunction was interposed ordering Public Works to abstain from exercising the faculty to interrupt

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<sup>19</sup> Valls. M. *Jurisprudencia Ambiental*. Ugerman Editors, BA, 2000, p17.

<sup>20</sup> Acknowledgement: Dr. Nestor Cafferatta (Synthesis of the present sentences)

water provision, in the context of intimidations for payments of debt of service, considering this practice abusive. With respect to this sentence, the judge ruled that: “Fresh water is elemental to life and the health of people constituting a constitutional right of roots” (Arts. 20, 28, 36 apart. 8 and 38 of the Provincial Constitution).<sup>21</sup>

In another similar case where the Company provider of the service wanted to interrupt the provision of water to a group of users who could not to pay for it, the Court ruled: “There exists elementary reasons of general interest in which the service of fresh water and sewers is provided to the greatest possible majority for reasons of public hygiene and environmental sanitation. The same Court considered further on, that the benefit of the public service of fresh water and sewers is considered of first and vital necessity, of obligatory use for all possible beneficiary, closer to the concept of *uti universi* than the more traditional *uti singuli*”<sup>22</sup>.

Finally, in an instructive sentence, the National Supreme Court ruled: “...The injunction filed by the user against the concessionist against the interruption of water service supply due to non payment, is of federal competence, and that the case merits the precision of the sense and the reach of norms of obvious interjurisdictional character....”<sup>23</sup>

These are some individual examples from the legal point of view of how society is developing and reinforcing itself in the sphere of the right to water, slowing in this manner, the tendency of some corporations, for example, of inequitable and unfairly controlling the right of access to this natural resource.

#### **4 Research:**

CEDHA as part of its program Right to Water Initiative is carrying forth diverse research projects focused on the links between human rights and water resources.

##### **a) Central American Water Tribunal:**

CEDHA is studying the utility of the use of available mechanisms to access environmental justice. The tribunal in particular was created by a group of Central American civil society organizations and addresses cases related to the degradation of water resources and the social impact of such degradation in that continent. If the Court decides to take the case, a process of construction of evidence is initiated, and subsequently evaluated in a hearing where it summons the parts involved in the case, for conciliation or agreement. If an agreement is not reached the Court dictates a resolution condemning or acquitting the denounced party, and although this resolution is not coercive, it has great impact due to the national and international public

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<sup>21</sup> (Civil and Commerce Code, Mar del Plata, room 2, 27/04/98-ACIDECON/OSSE M.D.P upon statutory protection) BA B 1402428. Voting magistrates: Oteriño, Dálmaso, Zampini.

<sup>22</sup> (Supreme Court of Justice Mendoza, Room 2º, 05/02/1990, “VILLAVECHIA DE PEREZ LASALA, teresa v. OBRAS SANITARIAS DE MENDOZA S.E upon statutory unconstitutionality”, Mendoza, 45525, magistrates: Nanclares, Salvini in J.A. 1990-111-117.

<sup>23</sup> (CSJN, 06/02/97, Rodríguez. Hugo Manuel v. Aguas Argentinas upon protection law 16986, Sentences T. 320, p46, magistrates: Moliné O’Connor, Fayt, Boggiano, López, Bossert. Voto: Vázquez. Abstention: Nazareno, Belluscio, Petracchi.

repercussion it is given. This investigation was financed by the Environmental Law Institute (ELI), of Washington DC, which invited CEDHA to offer a panel presentation on the utility of the tribunal as a mechanism for accessing justice, in the context of a seminar on Water and Participation held in March 2003 in the University of Charlottesville WDC. The work was published in a volume financed by the University of the United Nations. This publication is still under editing process.

b) Report on Environmental Refugees:

Following the recent catastrophic floods occurring in Santa Fe, CEDHA initiative work on environmental refugees as victims of water mismanagement and crisis. This first report on the state of environmental refugees in Santa Fe comments on the social situation of the victims of one of the most important floods in the history of the Province of Santa Fe. Research for this project was conducted and this report prepared by an Interdisciplinary Team of Professionals from CEDHA and PROTEGER. The social situation of the city after the flood is commented. Data shows that this meteorological phenomenon left at least 23 confirmed casualties<sup>24</sup>, but a much more initial listing of several hundred missing persons, economic losses estimated in the hundreds of millions of dollars, as well as the consequences faced by a destroyed city and region. Currently, the victims of the flood catastrophe in Santa Fe are not only suffering enormous impacts in terms of their property loss, but they are also suffering high risks in their health due to unhealthy conditions generated by the evacuation of their houses and the propensity to innumerable contagious diseases that the flood has produced.

The federal prosecutors with competence in the city of Santa Fe acted to establish the responsibility the public authorities had in the tragedy since according to water engineers and biologists this flood could have been avoided.

c) Right to Water in the Americas Report

This report follows a three month fellowship and research project carried out by CEDHA's Right to Water Initiative Coordinator in Washington, DC while working at the Inter-American Commission on Human Rights. The final report, still in draft form, focuses on the legal and social state of water resources in the American continent, aims to shed light on the progress towards the full realization of the right to water in the context of the hemisphere's human rights tribunals and body of international human rights law.

## **5.: General Points:**

### Right to Water in India: Successes and Weaknesses

Global meetings such as the World Social Forum, the Summit on Sustainable Development (where water was a principal focus), or water management meetings of major financial stakeholders and private sector interests, such as the event held at the Third World Water Forum in March 2003 in Japan, provide advantages and disadvantages to global advocacy and promotion of water rights issues. Clearly such

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<sup>24</sup> (the number of casualties is estimated to be higher)

events draw many interested stakeholders, and exclude others. At each event, specific interests are represented, not always allowing for diversity of opinion and position.

The drive on water issues in the context of the World Social Forum to be held in India this year, which will likely hold several sessions on water rights issues (as did the last Forum in Porto Alegre Brazil), along with the idea of a global civil society event on water in India prior to the World Social Forum, clearly manifests how the concern over water rights is growing among civil society groups devoted to promoting sustainable development and concerned with the trends of global water consumption patterns and misuse of these resources.

The flocking of civil society organizations to events such as the WSF in part is due to the openness of the venue to alternative development ideas, and conversely to the difficulties of participation and exclusion from events such as the World Water Forum held in Japan earlier this year.

Undoubtedly, as was the former WSF, this will be an opportunity for NGOs from around the world to convene in a common and open format, exchange ideas and experiences on right to water advocacy and discuss potential future strategies to continue to promote the right to water at a global level. The harnessing of this unique opportunity to have so many organizations from so many countries and sectors together is fundamental, and must be utilized.

Perhaps the greatest barrier and limitation to holding such an event is the difficulty of many organizations to participate due to high costs of travel. Organizations supporting this event would do well to diversify support and seek as wide a regional representation as possible in the profile and origins of the attendees that they support and the regional subject matter they include in their agendas.

CEDHA is organizing an event on Right to Water at the upcoming WSF in India and is already utilizing its various networks, such as the Rios Vivos Coalition and the International Economic, Cultural and Social Rights network to foster collaboration, participation and a wide base of viewpoints on this critical advocacy platform.

Events such as those organized by economic interests, such as the World Water Forum, should, however, not be overlooked in terms of their importance and impact on global water policy, and as scenarios in which NGOs can and *do* have an opportunity to voice their concerns over the development of global water management policy.

### Strengthening Right-Based Advocacy

Regarding the work CEDHA has carried out from its Right to Water Initiative, we sense improvement in the awareness and advocacy agenda of our peers with respect to a rights based water advocacy agenda. In many of our partnerships, CEDHA is providing other institutions with legal advisory services and instruction, and we are beginning to see more demand for such an approach from our peers following our intervention. The co-authorship of the Report on Environmental Refugees with Proteoeger is an example of how an environmental organization has begun to turn to

social impact and rights based assessment of environmental problems, with encouragement from CEDHA.

In our efforts to promote a greater understanding and consideration for human rights affected by problems of access to fresh water, rights such as the right to life, to health, to personal freedom (which are all basic and fundamental); is present in much of our international advocacy work to incorporate the right to water into international legislation. Our contributions to the UN General Comments on the Right to Water, and subsequent work to raise this awareness, including holding one of the few NGO panels at the World Water Forum in Japan on the Right to Water, and our recent publication of "Linking Human Rights and Environment" (Arizona Press, 2003) in which we devote a section to the right to water, and our promotion of the right to water at the Inter-American Commission on Human Rights is bearing fruit in many aspects of how these international forums address and understand the importance of the right to water.

Our aim is to achieve international agreements to declare this right, to be legislated afterwards at regional and local level and simultaneously work in the capacity building of judges and prosecutors to get them to force everyone to respect this human right.

Much work has already been done or is underway in terms of the technical, social and natural resource implications of poor water management practice. Less work is underway in the legal realm, where CEDHA is attempting to make an impact, bringing existing advocacy groups into the right to water debate, discussion and action.

From CEDHA's standpoint we firmly believe that the law, and access to justice mechanisms are an important and effective tool to realize our human rights and we are working to ensure that human rights law, including the right to water is fully enforced.

#### Lessons Learnt

Working in an area having to do with the complexities of natural resource management, the effort to link this vital natural element (water) with the Law and human rights is no easy task. However, global tendencies and the collapse of water resources everywhere place us in an urgent context, which help transform opinions and perspectives.

In this process a collaborative, cross sectoral and interdisciplinary approach is fundamental, especially bridging the scientific, environmental, private, social and public sectors together into some degree of consensual understanding of social needs and demands.

Our first and foremost lesson is that all interests, despite their diversity, have common grounds upon which to construct dialogue and develop feasible solutions.

Another important lesson is that many individuals and communities are unaware that they have rights which they can exercise and demand. Access to water is one of those

rights that remains elusive to most poor communities, which assume that non-access is simply another inevitable condition of poverty, not realizing that it is a right that can be demanded in court and before public authorities and that there are effective channels of access to justice to exercise the right. Also that the State must ensure the protection of this right as it does education and health, for example.

Another important lesson learned in our work is the perhaps small but important nuance that water is not only a necessity but also a human right. Thinking of water as a right is not always clearly understood or conceptualized by even the most savvy legal actors, especially given the diverse interests at stake and the juxtaposed understanding that the right generates rights of exploitation of the resource, in an economic sense, perhaps in detriment to someone else's right to access it for needs relative to their own survival.

Finally we can mention the importance and opportunity which appears on the horizon due to this work, of utilizing international human rights legislation and tribunals to defend natural resources and those affected by the mismanagement of such resources.

## Recommendations

As a final observation we posit a series of recommendations or observations that might be useful to the reader in his/her quest in the promotion and protection of the right to water:

- Awareness is critical. This is so in all levels and at all institutions, including government, private sector civil society organizations, communities and individuals. Our work should always focus on awareness building so that the right to water be part of the agenda in every event related to environment and human rights.
- International Human Rights Recognition of the Right to Water. We should work to develop local and international legal principles and legislation that clearly establish the right to water, so that such doctrine inspires local norms and regulations and so that we can aspire to access justice in cases of water misuse at the very highest levels of our social codes. We must in this context, promote the links between human rights and the environment, and particularly this subset of environmental issues relative to water.
- Access to information. Much of our work and lives occur in a complete vacuum of information about the ongoings in the world around us. Once we have identified a problem, accessing reliable and good information is generally very difficult, and rights to such information are generally difficult to realize. In the area of water, and water resources, information about quality, changing patterns, contamination, and others, which is regularly (or can be) collected by official sources is critical to access. Such access is fundamental to prevent future health problems and even armed conflicts. We must work to establish such rights of information and ensure effective mechanisms to realize this right.
- Participation in decision-making. The participation of the population in decision making about water resources is also fundamental since stakeholders are the most affected parties and most likely to suffer the impacts of water misuse. As in the case of access to information, right of participation in decision-making, especially

for key stakeholders, is key to achieving sustainable development and anticipating eventual problems of failure to consult stakeholders on risky environmental policy decisions.

- Finally regarding access to justice we must work to improve process, assuring its effectiveness, expediency and efficiency to get complaints through bureaucracy of the public policy and legal systems in order to obtain concrete results, real access to justice and to prevent future damages to this resource and above all to obtain a judicial resolution where access to fresh water is guaranteed as a human right.

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