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Environmental Justice: The Indispensable Role Of the Judiciary

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In the name of God, Most Gracious, Most Merciful

Praise be to God, Creator of all; the Cherisher and Sustainer of the Worlds. Blessing and Peace be upon Muhammad, God's Prophet and Apostle

It is my distinct honor, on behalf of the International Union for the Conservation of Nature and Natural Resources (IUCN) to welcome all participants to this singularly important symposium. IUCN is honored to be here in Kuwait for this uniquely important meeting. IUCN is grateful to the State of Kuwait, and to this meeting's cosponsors, the UN Environment Programme. IUCN is grateful to each of you for dedicating your valuable time to participate here these two days.

This is the sixth such judicial gathering that I have been privileged to address in the past several years. Earlier this month, UNEP and IUCN meet in London with the Lord Chief Justice of England and Wales and some thirty judges from across western Europe, to discuss the same topics we shall explore here. At the invitation of UNEP,

through my good friend Donald Kaniaru, I spoke in Colombo, Sri Lanka, in 1998 at the first meeting of all the Supreme and High Courts of South Asia to examine the role of the judiciary in environmental law. UNEP convened that meeting with Justice Weeramantry of the International Court of Justice. We met again under the auspices of UNEP and Chief Justice Hilario G. Davide, Jr., in Manila with the judges of the States comprising the Association of South East Asian Nations (ASEAN) in March of 1999. Several Judges from the Arab World joined over 160 other judges at the "Global Judges Symposium" held on the eve of the United Nations' World Summit on Sustainable Development in Johannesburg, South Africa, 18-20 August. UNEP ably assembled the Johannesburg Symposium, at the invitation of the Chief Justice of the Constitutional Court of South Africa, Justice Arthur Chaskalson, and I was privileged to address this historic meeting. Thereafter, at the World Jurist Association's international conference in Stuttgart, Germany, I was privileged to confer with judges from north and south, including Prof. Dr. Hans-Jűrgen Papier, President of the Federal Constitutional Court of Germany and Dr. Pekka Hallberg, President of the Supreme Administrative Court of Finland, met to explore the role of constitutional courts and the environment. Next year, IUCN has similar meetings being planned for East Europe, Brazil, Canada, the U.S.A., and elsewhere. UNEP has previously held such symposia in Africa and in the South Pacific. We are all indebted to Lal Kurukulasuriya of UNEP for his diligent leadership in organizing many of these judicial symposia.

There is a common thread through each of these regional and international judicial symposia: How can the courts of each nation or region best advance the principle and remedial objectives of environmental law? UNEP and IUCN seek to gather the views of judges from each area of the world, from each legal tradition. Our common purpose is to explore how intergovernmental, international organizations expert in environmental law can assist the judiciary.

IUCN's undertakings are part of the recommendations adopted by consensus last September at the United Nations' World Summit on Sustainable Development. IUCN participated actively in the WSSD with is UN Observer Delegation. In the ***Johannesburg Plan of Action***, adopted 4 September 2002, the nations in Johannesburg urged measures to advance the rule of law (Para. 121), as essential to sustainable development. Through working with the courts around the world, IUCN endeavors to strengthen courts as "necessary for policy-making, coordination and implementation and enforcement of laws" (Para. 145). The importance of the courts was expressly emphasized in the WWSD Plan of Implementation, and the States recommended "providing necessary infrastructure and by promoting transparency, accountability and fair judicial institutions." (Para. 146).

To further this mission, IUCN's Commission on Environmental Law has established a Judiciary Specialists Group, chaired by Justice Paul Stein of the Supreme Court of New South Wales in Australia. We invite the participation of any of you who would like to serve on this Specialist Group. IUCN, with UNEP, is launching on the Internet a Judicial Portal for Environmental Law Decision. You can enroll for access to this Portal, which is available only to Judges, through IUCN's Environmental Law Centre in Bonn, Germany {you may contact ALukacs@elc.iucn.org or the telephone numbers

listed above}. Since having been founded in 1948, IUCN has been working to build the legal stewardship for nature, and its recent work with the judiciary is a natural progression for IUCN. IUCN's Environmental Law Commission began its work in 1965, and has been pleased to support the establishment of UNEP after the 1972 UN Stockholm Conference on the Human Environment. IUCN, and its 820 Law Commission Members in 130 nations, have been active supporters of UNEP's environmental law work for the past three decades. IUCN's Commission on Environmental Law is honored to be associated with the Arab Regional Centre for Environmental Law (ARCEL) hosted at the Kuwait University. We are all indebted to ARCEL's Director, Dr. Badria Al-Awadhi, for her international leadership in environmental law for more than three decades.

What have we been finding as we meet judges around the world?

First, notwithstanding different legal traditions and socio-economic settings, the courts share common challenges. The same treaties and comparable legislation for environmental protection now exist in every region.

Courts are confronted with similar issues and new problems peculiar to the subject matter of the natural environment. For instance, how best may sophisticated questions of ecology and the environmental sciences be determined? What sort of proof of environmental effects should be required? What remedies are most effective in judicial orders to restore the environment after it is injured? What are appropriate levels of fines or prison terms for environmental crimes? When should companies and their principals equally be held liable or responsible for environmental injuries? What provisions should courts make for access to justice by public interest organizations of citizens, as in the definitions of *locus standi,* to ensure that public interest litigants could secure judicial oversight of conduct that violates environmental norms? What role has the court to ensure that the poor and under-represented have redress for injuries or threats of injuries to their health? How can procedural rules for environmental impact assessment (EIA) most effectively be enforced by courts?

These are but a few of the important and difficult questions that judges must grapple with as environmental claims come before them. In light of the scientific complexity of environmental disputes, some jurisdictions have responded by establishing specialized courts or chambers for hearing environmental matters. One example is the establishment of the Vth Chamber of the Council of State in Greece, established on the recommendation of the Vice President of the Hellenic Council of State, Justice Michael Decleris. New Zealand and New South Wales, Australia, have had environmental courtrs for many years, to great effect. The States of Vermont and New York have also established courts or dedicated chambers of courts to handle environmental cases. However, some other States have declined to establish such tribunal, preferring to maintain environmental issues within the traditional judicial framework. Some States have established administrative tribunals, to relieve the judiciary of the volume of environmental law matters that would otherwise fall to it. Some once mooted proposals, such as establishment of a "science court," have been rejected. There is a need to

compare and understand the competing considerations that have gone into revising the governmental framework for judicial decision-making.

Regardless of the varying judicial *fora* for hearing environmental matters, courts can benefit from understanding how comparable issues have been resolved in different contexts. How have courts defined and applied the "polluter pays principle" or the "precautionary principle"? Both are contained in the ***Rio de Janeiro Declaration on Environment and Development*** of 1992. Such UN Declarations, already published in Arabic. Should be made available to judges in courts throughout the Arab World. Indeed, judges throughout the Arab World should have the Arabic edition of ***Agenda 21*** in their libraries as references. ***Agenda 21***, adopted at the 1992 Earth Summit with the support of the Arab States, is not just a "soft law" instrument for the executive authorities such as environment ministries., It is equally a reference that courts may use as they define environmental liability or design orders to repair environmental damage..

What measures have courts taken – such as the appointment of special referees or even committees or trust funds – to ensure that funds allocated for environmental protection are in fact spent effectively for those purposes? Should laws for environmental impact assessment actually require administrative decisions to select the alternative that may be least harmful to the environment, or merely provide a transparent evaluation of all impacts, leaving decision-makers the option of disregarding the assessments? When courts assess, on the basis of the "subsidiarity principle" which level of government should be responsible for undertaking environmental protection, how can it ensure that different governmental authorities will not continue to shirk the duties?
How should regional courts, such as the new African Union Court of Justice or the European Court of Justice, interact with national courts, in construing environmental law that exists at once in local, national, regional and international law?

Beyond these types of issues, which are quintessentially juridical, there are the emerging issues of environmental law that many, if not most, courts have yet to encounter. Some questions are now expected. Courts are essential to conserving Earth's biodiversity. For instance, on 9 October 2002, IUCN's Species Survival Commission released revisions to the IUCN Red List of Threatened Species, reporting that 121 more species are in danger of extinction than was the case in 2000, a total of 11,176 animals and plants. Courts are essential links in society's efforts to prevent these threatened extinctions, since courts can save their habitat and deter or prevent unlawful killing of such species, or trade in them or their parts. Every year, game wardens and park rangers are murdered by poachers and others. Enforcing an international ban (adopted under the Convention on the International Trade in Endangered Species) in Europe, North African and West Asia, on the trade in caviar in order to protect the sturgeon as a species threatened with extinction, will help to save the fish species, and to protect the wildlife wardens in Russia, for instance. Halting pollution of the Gulf will safeguard fish and coral in the Gulf. Here the judicial role here is, of course, rather traditional, it is nonetheless essential.

Yet courts also face novel environmental legal challenges. Can a genetically engineered life form be granted a patent? If it is owned, and "escapes" from its intended use to breed with other life forms, is the patent owner liable for these consequences? Do manufacturers of hazardous chemicals, not used in an area such as the Artic, responsible as a class when these chemicals contaminate distance places and poison the people or flora and fauna living there? What are the "common but differentiated responsibilities" within nations for sustaining the habitats for migratory species, or for curbing green house gas emissions to help reduce climate change, or to apply criminal law sanctions to curb the black market trade in chlorofluorocarbons (CFCs), which endanger the stratospheric ozone layer, or to deter the illegal trade in endangered species? What duties does an owner of land have to maintain soil fertility and soil productivity as part of the present web of life, and not just own land as "dirt" or space to be paved over? In light of the rules on environmental impact assessment under Article 206 of the UN Convention on the Law of the Sea, and related regional conventions such as the Kuwait Convention, what judicially cognizable duties does one nation have to minimize the adverse environmental impacts, such as traffic congestion in one State caused by road infrastructure decisions in another State?

Courts increasingly encounter such questions. Courts need to be equipped with access to knowledge about how judges are addressing such environmental disputes. This is not just because its serves society well to have a well-educated and capable judiciary. In the cased of environmental decisions, judges are not purely national or local when it comes to the environment. Each court's jurisdiction exists within the biosphere. Common natural systems link all parts of Earth. Judges cannot ignore international environmental law norms without undermining or jeopardizing different elements of the natural systems that sustain life on Earth. A local magistrate, hearing a criminal case about of poacher of endangered species or concerning an illegal sale of CFCs, serves both her or his national legal system and – in the capacity of *dédoublement functionnel* – also serves the international law regime. Indeed, this judge serves a triple function, since she or her is serving to safeguard the evolved laws of nature.

It is accepted that the rapid worldwide emergence of the field of environmental law in just one generation – the 30 years since 1972 – is unprecedented in the history of law. In this span of years, nations have negotiated and ratified, and now apply over 300 specialized international agreements. The nations have adopted a vast range of environmental statutes, embracing the polluter pays principle and radically altering once common industrial and land use practices. States have pioneered new legal procedures such as environmental impact assessment. New ministries and agencies for environmental protection now exist in every nation. Public companies have entire divisions devoted to compliance with environment, health and safety requirements.

It is no wonder, then, that as environmental matters enter the courts, the judges around the world may be hard pressed. Most judges never studied environmental law in their legal studies, because the courses did not yet exist. IUCN is working with universities in developing nations to design and introduce the first courses in environmental law in many regions. The bar and bench are only now coming to

understand how pervasive environmental laws are. They touch on practically every other field of law, as is demonstrated in the chapters of ***Agenda 21***, the action plan adopted at the 1992 Earth Summit in Rio de Janeiro.

The rapid progression of environmental law has been uneven, geographically and substantively. This is to be expected. Yet because the promulgation of environmental laws tend to follow similar patterns in all jurisdictions, one can anticipate how the law is emerging and thus the types of legal questions that come to courts at each phase of its development. Five phases have been identified: (1) the period when traditional rules, such as the law of torts or delicts, or the Roman law's public trust doctrine, are employed to decide environmental matters; (2) as natural resource depletion becomes extreme, the conservation laws are adopted, to restore and ensure the sustained yield of renewable resources; (3) as agricultural, chemical and industrial pollution become acute, environmental laws are enacted to abate pollution; (4) as this body of statutes, and treaties, and legal practices grow, the complexity of the field confounds governments, courts and the public, and efforts are made to recodify and streamline the field of environmental law, for instance many States have enacted framework legislation or procedures that cut across all sectors such as environmental impact assessment rules; (5) finally, in an effort perhaps to refine the field and emphasize the underlying principles of justice, States are amending their constitutions to provide their citizens with a basic environmental right, and to include environmental rights in charters of human rights.

Environmental laws in each of these phases co-exist together in all nations; few have attempted a comprehensive recodification, as was attempted in New Zealand. Therefore, courts are called upon to address environmental legal problems with an often unsettled and somewhat inchoate body of law. Let us be frank: environmental law is difficult to apply, and courts face uncommon challenges in doing so. IUCN, and other international organizations, need to rally national support for strengthening the courts as they endeavor to meet these tasks. CEL members have been engaged in judicial capacity building in Indonesia and elsewhere; we have supported adequate salaries for judges and adequate administrative support services. Without strong and capable courts, environmental law cannot succeed.

Even where resources are lacking, however, the courts can and should advance environmental law. Many courts have invoked basic principles to reaffirm environmental stewardship. These are set forth in ***The Holy Qur'an.*** It is well known that The Prophet, upon him be blessings and peace, forbade that a person relieve himself in a water resource or on a path, or in a place of shade, or in the burrow of a living creature.[1] How shall this rule be applied when companies place their pollution into such places, even though the statutes also prohibit it?

[1] Ahadith related by Abu-Dawud and others, on the authority of Mu'adh, Abu-Huaryrah, and 'Abu-Allah ibn Sarjis. See discussion in Section Three of the IUCN Environmental Policy Law Paper No. 20 (rev.), ENVIRONMENTAL PROTECTION IN ISLAM by Dr. Abubakr Ahmed Bagader, Dr. Abdullatif Tawfik El-Chirazi El-Sabbagh, Dr. Mohammad As-Sayyid Al-Glayand, and Dr. Mawil Yousuf Izzi-Deen Samarrai, in cooperation with 0thman Abd-ar-Rahman Llewellyn, (2d ed., 1994).

IUCN has published a study in Arabic, French and English, on ***ENVIRONMENTAL PROTECTION IN ISLAM*** (Second Edition, 1994). It is clear that Courts in the Arab World will find strong support in moral and religious guidance for the application of modern environmental legislation. Even when the statutes are not fully as up to date as might be possible, by careful considering of such fundamental principles, a court can bring consistency and integrity to its judicial decisions. Our human stewardship of the natural environment requires that courts serve nature's laws in this way. IUCN would be honored to make this study available in Arabic to the Courts of the Arab world.

It is the purpose of this Symposium to afford the judges attending an opportunity to reflect on these issues. In the future, IUCN and UNEP hope to organize further opportunities for judges from many regions of the Earth to confer together, request studies, share common experiences and learn from the deliberations of different courts. Future such symposia may be on specific issues which the courts have identified are of priority importance. Your guidance to us at this meeting will be a critical step in determining our further cooperative. Insha'Allah, we shall all meet again many times as we examine how the courts may most effectively apply environmental law in our stewardship of the Earth.

This Symposium tangibly demonstrates the serious commitment that courts have to ensure that the environmental laws will be taken seriously. The indispensable role of the judiciary is to maintain a just society. The courts, here and around the world, are recognizing environmental justice as a fundamental dimension of their work. I thank you again for your time and wish you well in these deliberations.

May Allah guide us to the right aim.