What future for environmental and climate litigation?

Exploring the added value of a multidisciplinary approach from international, private and criminal law perspectives

Edited by
Stefano Zirulia, Lidia Sandrini
and Cesare Pitea

Milano University Press

WHAT FUTURE FOR ENVIRONMENTAL AND CLIMATE LITIGATION?

Exploring the added value of a multidisciplinary approach from international, private and criminal law perspectives

Edited by
Stefano Zirulia, Lidia Sandrini and Cesare Pitea

Milano University Press

What future for environmental and climate litigation? Exploring the added value of a multidisciplinary approach from international, private and criminal law perspectives / Stefano Zirulia, Lidia Sandrini and Cesare Pitea (eds.), Milano: Milano University Press, 2024.

ISBN 979-125-510-112-3 (print)
ISBN 979-125-510-116-1 (PDF)
ISBN 979-125-510-118-5 (EPUB)
DOI 10.54103/milanoup.151

Published by Milano University Press
Via Festa del Perdono 7 – 20122 Milano
Web Site: https://milanoup.unimi.it
e-mail: redazione.milanoup@unimi.it

The print edition of this volume can be ordered from all physical and online bookstores, and is distributed by Ledizioni (www.ledizioni.it)

General note on figures and tables

Unless otherwise indicated, figures and tables have been prepared by the author(s) of the chapter in question. The Editor is committed to striving to satisfy all copyright requirements concerning graphics, images and tables for which it has not been possible to identify the type of licence used.

Contents

Section III
International and domestic Criminal Law

Editors' introduction

The book provides in-depth analysis and innovative insights on the prospects of climate and environmental litigation, namely by exploring the ability of judicial remedies and sanctions to affect public and private decision-making in every context where natural resources, climate as well as human health are threatened as a result of polluting and climate-altering activities.

The volume contains the proceedings, updated and subjected to peer review, of the workshop held with the same title on September 16, 2022, at the University of Milan, thanks to the funding obtained by the organizers within the framework of the SEED 2019 Call for Proposals.

The question underlying this volume is whether and to what extent, in the face of often unsatisfactory and unreasonable political choices characterizing the Anthropocene, resorting to national and supernational courts represents a valid alternative in order to achieve a better balance between the different interests at stake and eventually pursue a more sustainable future for the whole human kind, including future generations. The relevant contexts covered by the book include, for instance, industrial development, exploitation of natural resources, agricultural production, manufacturing techniques, as well as policies on energy, public and private transport, and urban development. The book is composed of three parts, each one addressing, from multiple perspectives, a specific category of judicial remedies in a certain area of legal studies: I) international human rights law; II) international trade law and conflicts of private laws; II) domestic and international criminal law.

Among the features that make this volume innovative is undoubtedly its interdisciplinary nature. The editors' aim, in fact, has been to focus on judicial remedies to environmental and climate degradation generally understood, in order to offer an all-round view without the often-artificial limitations generated by the division of branches of law. The need for clarity and organicity, however, suggested dividing the work into three parts, each dedicated to a specific area of litigation; at the same time, efforts were made to set up the analysis of the problems at stake, before addressing their legal discipline, as well as to make use of a language as transversal as possible.

The first part of the volume focuses on international human rights law and the protection prospects it offers to environmental resources. In the face of an increasingly copious jurisprudence – delivered by the European Court of Human Rights, the Inter-American Court of Human Rights as well as a growing number of national instances – a series of questions emerge, some classic and some entirely new. The question arises, then, as to who is entitled to act in defence of nature before a court of law; whether the very concept

of the environment should be declined in an anthropocentric or ecocentric perspective; whether existing human rights are sufficient to provide satisfactory answers or whether new ones need to be drawn up, tailored to the specific nature of the sector, also with a view to taking into account the rights of future generations; whether and to what extent forms of collective protection can be tried out; what are the pros and cons of litigation aimed at "mitigation" of climate change compared to those intrinsic to less ambitious "adaptation". In the background, there is an even broader question, concerning the limits imposed by the principle of separation of powers, and especially the merits of political decisions in environmental matters, in the face of increasingly pervasive judicial interventionism.

The second part of the volume addresses the prospects of protection offered by civil law remedies, in particular the law of torts in its multiple national declinations. The transnational dimension of conduct causing environmental damage, and more generally the peculiar and ubiquitous nature of climate change, place at the centre the issue of conflicts between jurisdictions and laws, and thus private international law, in order to prevent the creation of safe havens for polluters, in particular by preventing corporations from hiding behind local permits and licenses to escape liability (so-called "permit defence"). Moreover, the attribution of civil liability to natural and legal persons encounters a series of obstacles that may jeopardise the success of actions for damages or injunctions: for instance, the proof of the causal link between a productive activity and its harmful effect on the environment; or the proof of the illegitimacy of individual conduct carried out in the context of authorised activities; or even of the possibility of challenging industries located in the Global North for harmful effects produced in the Global South. Thus, in the background, environmental and climate litigation aimed at civil protection makes it necessary to assess what evidence can be brought to the attention of the civil courts according to different domestic procedural law and how the concrete case and the type of legal action taken condition the selection of the relevant evidentiary material. On the opposite front, in some respects, one cannot overlook how the ambitious sustainability goals set by western countries can in some ways prove discriminatory for developing countries, generating litigation before the WTO Dispute Settlement Body, with inevitable consequences on the conduct of private business activities and on the regulations governing them.

The third and final part of the book focuses on the criminal side of environmental protection, an area that is increasingly growing due to the awareness – manifested at the European level since the 2008 directive on environmental crimes – that the deterrent effect of criminal sanctions and their severity represent proportionate remedies against the most serious forms of polluting and climate-altering illegal conduct. However, despite the fact that no one seriously doubts any longer the need for criminal law in this area, the debate on how to

define environmental offences and related sanctions, as well as how to ensure their enforcement in a way that respects the defence rights of the accused, is still open. One of the most problematic issues is certainly that of the model of criminal protection that can best guarantee the correct balance between protection of victims and guarantees of defendants: in fact, it is a question of assessing whether criminal law should always be based onto a previous formal violation of administrative environmental law, thus guaranteeing the predictability of the sanction; or whether at least the most serious forms of environmental offence (a concept that also needs to be defined) can also apply to activities that are formally lawful but actually harmful. The growing phenomenon of outsourcing production to other countries, moreover, raises delicate questions of reconstructing the chains of responsibility within corporate groups, in order to avoid the impunity of the parent company for the damage caused by illicit production policies on an international scale. Again, against the backdrop of the opposition between anthropocentric and ecocentric approaches, the question arises as to whether and how the same natural resources affected by man, such as trees, rivers, ecosystems, and so on, can be given access in criminal justice courts. Finally, looking beyond the borders of national legal systems, one wonders about the possibility of configuring, within the framework of international criminal law, a new figure of "ecocide"' which would stand alongside existing international crimes (such as genocide) to give body and substance to a specific form of aggression against interests that concern the whole of humanity.

At a time when, no later than 28 July 2022, the UN General Assembly recognised the right to a clean, healthy and sustainable environment as a human right and has called upon States, international organizations, business enterprises and other relevant stakeholders to scale up efforts to ensure such a right for the whole humanity, this book represents an original, up-to-date and ambitious attempt to make available to scholars and students, practitioners, and civil society legal tools to effectively counter unsatisfactory environmental policies, thus contributing to the construction of remedies capable of offering the enforcement of a human right that none of us can truly renounce.

Section I
International human rights law

Minimum ecological standards for the evolution of the Strasbourg system towards ecological human rights

Natalia Kobylarz*
Registry of the European Court of Human Rights
DOI: 10.54103/milanoup.151.c190

This chapter provides some answers to the questions: Is the protection offered by the European Court of Human Rights sufficient in the new ecological reality that poses complex challenges not only to the modern way of life, but also to the established systems of governance and law? In what direction could the current system evolve? The author argues that the Strasbourg system of environmental human rights can and ought to transition to the regime of ecological human rights. She proposes that, independently of the possible recognition of the autonomous right to a healthy environment, such transition can be achieved by integrating ecological minimum standards into the ECHR's 'fair balance' review. These ecological minimum standards are a set of notions that express the legal paradigms of immersive anthropocentrism and ecocentrism; that give due consideration to climate and biodiversity crises; that include the concepts of sustainable development and sustainable use of natural resources; as well as the principles of intergenerational equity, precaution, and in dubio pro natura.

Keywords: human rights, environment, climate change, right to a healthy environment, anthropocentrism, ecocentrism, sustainable development, intergenerational equity, precautionary principle, *in dubio pro natura*, courts, environmental litigation, climate litigation

* The author works as a Senior Lawyer at the Registry of the ECtHR in Strasbourg. The views expressed in this paper are those of the author and do not represent the official position of the ECtHR or the CoE. The Registry gives support to the Court and cannot in any way influence the Court's decisions on the admissibility and/or the merits of any case.

1. Introduction

The European Convention on Human Rights (hereinafter the "Convention" or "ECHR") has been called to operate at a time of climate and environmental crises, which have significant impacts on human rights, on society and the world order. The ECHR or its Protocols are not specifically designed to provide general protection for the Earth systems.[1] They do not guarantee the right to a healthy environment. But because human rights and the environment are intrinsically linked, the Convention organs have repeatedly ruled on cases with an environmental component, thus developing, in effect, a system of indirect environmental protection by proxy of civil and political rights.

This article provides some answers to the questions posed by academia, judiciary and citizens: Is the protection of the environment offered by the European Court of Human Rights (hereinafter the "ECtHR" or "Court") sufficient in the new ecological reality that poses complex challenges not only to the modern way of life, but also to the established systems of governance and law? (2) In what direction could the current system evolve? (3)

2. Is the protection of the environment offered by the current Strasbourg system sufficient?

Various environmental claims can and have been made in terms of traditional civil and political rights. The environmental jurisprudence of the ECtHR has already been extensively described and commented upon.[2] It can be

1 For example, ECHR, Cases: *X. v. Federal Republic of Germany* (dec.), 13 May 1976, (7407/76); *Kyrtatos v. Greece*, 22 May 2003, (41666/98), § 52; *Dubetska and Others v. Ukraine*, 10 February 2011, (30499/03), § 105.

2 P. Baumann, "The right to a healthy environment and the ECHR" (2021) LDGJ; O. Pedersen, "ECtHR and environmental rights", in *Human rights and the environment: legality, indivisibility, dignity and geography,* J.R. May, E. Daly, eds, Elgar, 2019, pp. 463-471; K. Morrow, "The ECHR, Environment-Based Human Rights Claims and the Search for Standards", in *Environmental Rights. The Development of Standards* S.J. Turner, D. Shelton, eds, Cambridge, 2019, pp. 41-59; D. Shelton, "Tătar v. Romania", in *American Journal of International Law*, Vol. 104, 2010, p. 247; Y. Winisdoerffer, "La jurisprudence de la CrEDH et l'environnement", in *Revue juridique de l'Environnement* (2003); N. Kobylarz, "The ECtHR, an Underrated Forum for Environmental Litigation", in *Sustainable Management of Natural Resources, Legal Instruments and Approaches,* H. Tegner anker and B. Egelund Olsen, eds, Intersentia, 2018; N. Kobylarz, "Balancing its way out of strong anthropocentrism: Integration of 'ecological minimum standards' in the ECtHR 'fair balance' review", *Journal of Human Rights and the Environment, Special Issue Human Rights and the Planet,* Elgar, 2022; J.-P. Costa and P. Titiun, "La Cour EDH et l'environnement", in *Terres du droit: mélanges en l'honneur d'Yves Jégouzo*, Dalloz, 2009, pp. 31-41; L. López guerra, "Privacy and environment: the case of noise", in *Essays in honour of Dean Spielmann,* J. Casadevall, coll, Wolf Legal Publishers, 2015; L.-A. Sicilianos and P. Titiun, "Regards sur la jurisprudence environnementale de la Cour EDH", *Europe des Droits & Libertés*, Sept. 2020/2, pp. 252-260; and H. Keller, et al, "Something ventured, nothing

concluded that many of the Court's landmark judgments – such as *López Ostra*,[3] *Guerra*,[4] *Öneryıldız*,[5] *Tătar*,[6] *Gorraiz Lizarraga*,[7] *Collectif Stop Melox*[8] , *Chassagnou*[9] or *O'Sullivan*[10] – were ahead of their time and, as such, have made important advances in the environmental human rights system, in Europe and beyond.[11] On the other hand, other rulings – such as *Kyrtatos*,[12] *Balmer-Schafroth*,[13] *Hatton*,[14] *Hudorovič*[15] or the recent *Yusufeli* or *Cangi* [16] – demonstrate important limitations of the system.

For example, in accordance with the doctrine of "direct and personal harmful effect",[17] the Court will not consider the merits of any case seeking to defend the environment in general without specifying that it is an individual civil right guaranteed by the ECHR or its Protocols.[18] In several public interest applications concerning urban development or deforestation, the Court has found that there is no right to the peaceful enjoyment of property in pleasant surroundings or to private life in an environment of scenic beauty or wilderness habitats.[19] Applicants are required to prove a personal impact on their property, life, health or well-being.[20] In this context, the ECtHR is not spared from what Katalin Sulyok calls "epistemic arbitrariness" as facts established in the

---

gained? Remedies before the ECtHR and Their Potential for Climate Change Cases", *Human Rights Law Review*, Volume 22, Issue 1 March 2022.

3 ECHR, Case of *López Ostra v. Spain*, 9 December 1994 (16798/90).

4 ECHR, Case of *Guerra and Others v. Italy*, 19 February 1998 (14967/89).

5 ECHR, Case of Öneryıldız v. Turkey [GC], 30 November 2004, (48939/99).

6 ECHR, Case of *Tătar v. Romania*, 27 January 2009, (67021/01).

7 ECHR, Case of *Gorraiz Lizarraga and others v. Spain*, 27 April 2004 (62543/00).

8 ECHR, Case of *Collectif national d'information et d'opposition à l'usine Melox – Collectif Stop Melox et Mox v. France (dec.)*, 28 March 2006, (75218/01).

9 ECHR, Case of *Chassagnou and Others v. France* [GC], 29 April 1999, (25088/94).

10 ECHR, Case of *O'Sullivan McCarthy Mussel Development Ltd v Ireland*, 7 June 2018, (44460/16).

11 N. Mileva and M. Fortuna, "Environmental Protection as an Object of and Tool for Evolutionary Interpretation", in *Evolutionary Interpretation and International Law,* G. ABI-SAABl, coll., Hart Publishing, 2019, pp. 8-9. The IAHR Court made numerous references to the case law of the ECtHR in its Advisory Opinion OC-23/17 of 15 November 2017.

12 *Kyrtatos* (n 1).

13 ECHR, Case of *Balmer-Schafroth and others v. Switzerland*, 26 August 1997, (22110/93).

14 ECHR, Case of *Hatton and others v. United Kingdom* [GC], 8 July 2003, (36022/97).

15 ECHR, Case of *Hudorovič and others v. Slovenia*, 10 March 2020, (24816/14).

16 ECHR, Case of *Yusufeli Ilcesini Guzellestirme Yasatma Kultur Varliklarini Koruma Dernegi v. Turkey* (dec.), 7 December 2021, (37857/14). Cangı and Others v. Türkiye, 14 November 2023 (48173/18).

17 ECHR, Case of *Fadeyeva v. Russia*, 9 June 2005, (55723/00), § 68.

18 ECHR, Case of *Klass and Others v. Germany*, 6 September 1978, (5029/71), § 33; ECHR, Case of *Crash 2000 Ood and Others v. Bulgaria* (dec.), 17 December 2013, (49893/07), § 84.

19 *Kyrtatos* (n 1) §§ 46 and 53; ECHR, Cases: Ünver *v. Turkey* (dec.), 26 September 2000, (36209/97); *Valentina Viktorovna Ogloblina v. Russia* (dec.), 26 November 2013, (28852/05), §§ 20-22 and 28.

20 For example, *Ogloblina* (n 19), §§ 20-22; *Kyrtatos* (n 1) §§ 46, 52 and 53; and *Dubetska* (n 1) § 105.

science of ecology are assessed with a non-scientific method, namely common sense.[21] The Court has so far never attached importance to the collective benefits derived by humans from the environment (ecosystem services). Therefore, a significant impairment of ecosystem elements or functions that disrupts or extinguishes these services (ecological damage[22]) to the detriment of nature, but also of local residents, does not confer standing or guarantee the applicability of the ECHR,[23] unless – possibly – the claimants succeed in providing evidence of their significant impairment, i.e. the loss of obvious, direct and immediate benefits.[24]

Strasbourg jurisprudence on environmental human rights is based on the legal paradigm of strong anthropocentrism or extractivism[25]. Only humans are carriers of intrinsic value[26] and endowed with "rights".[27] The conditions of existence of non-humans are generally outside the scope of the ECHR, with the exception of situations where the protection of certain categories of wild animals has, on occasion, been considered a valid "legitimate aim" or "general interest" for member States.[28] For example, the ECtHR has accepted that the reclassification of land into protected nature areas, with the consequent prohibition of building, fishing or tourism, would not violate property rights,

21 K. Sulyok, "Science and Judicial Reasoning: The Legitimacy of International Environmental Adjudication", Cambridge, 2021, pp. 40, 65 et seq; *Kyrtatos* (n 1) §§ 46 and 53, partly dissenting opinion of Judge Zagrebelsky.

22 Article 1247 French Civil Code.

23 *Kyrtatos* (n 1) § 53*; and Ogloblina* (n 19) §§ 21 and 28.

24 *Kyrtatos* (n 1) § 53 *in fine*.

25 Resolution 2396 (2021) of the CoE Parliamentary Assembly, § 6; E. Lambert, Environment and Human Rights. Introductory Report to the High Level Conference on Environmental Protection and Human Rights, Strasbourg, 27 February 2020, pp. 12-15; and Numann (n 2).

26 Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, Part I, Article 5); "Atrato River Case", Centro de Estudios para la Justicia Social 'Tierra Digna' and others v. President of the Republic and others, No.º T-622, Constitutional Court [Colombia] 10 November 2016, para 5.7.; C. Redgwell, 'Life, the Universe and Everything: A Critique of Anthropocentric Rights', in *Human Rights Approaches to Environmental Protection,* A. Boyle, al., Oxford, 1998, pp. 71-72; J. Shestack, 'The Philosophical Foundations of Human Rights', 2000, in *Environmental Protection and Human Rights*, D. Anton and D. Shelton, Cambridge, 2011, p. 189; and C. Sunstein, "Rights and Their Critics", 1995, in Anton and Shelton (ibid), p. 196.

27 ECHR, Cases: *Balluch v. Austria,* (26180/08), *Stibbe v. Austria*, (26188/08), applications by animal protection activists on behalf of a chimpanzee, rejected by a First Chamber Committee for incompatibility *ratione materiae*; *Herrmann v. Germany* [GC], 26 June 2012, (9300/07). Pets have been considered as property, see ECHR, Cases: *Akkum and Others v. Turkey*, 24 March 2005, (21894/93), § 276; and *Chagnon and Fournier v. France*, 15 July 2010, (44174/06), § 36.

28 ECHR, Cases: *Bahia Nova S.A. v. Spain* (dec.), 12 December 2000, (50924/99); *Friend and Others v. the United Kingdom* (dec.), 24 November 2009, (16072/06), § 50 *in fine*; *Matczyński v. Poland*, 15 December 2015, (32794/07), §§ 100-102, *and O'Sullivan* (n 10) § 109; compare with ECHR, Cases: *Matos e Silva, Lda., and Others v. Portugal*, 16 September 1996, (15777/89), § 89; and Z.*A.N.T.E. – Marathonisi A.E. v. Greece*, 6 December 2007, (14216/03), § 54.

essentially, as long as the change was foreseeable and the applicant could claim compensation for pecuniary loss from the State.[29] An obligation may indeed be imposed insofar as natural resources may have to be left unused to ensure their renewal.[30] But the Court has so far implicitly considered humans as having privileged access to natural resources and as being superior to other members of the natural community.[31] The natural environment has thus been protected primarily for its utilitarian value, insofar as it secures conditions or resources immediately and obviously necessary for human life and well-being.[32]

Finally, the fact that some of the judgments of the ECtHR relating to the environment have had a generally positive effect on nature does not call into question their strongly anthropocentric character insofar as such an effect is only incidental. Having found a violation of the ECHR in the context of an environmental issue, the Court usually orders individual *restitutio in integrum* measures for the benefit of the injured party.[33] General measures, which in turn aim to prevent similar violations in the future, may indeed result in an improvement of environmental conditions.[34] However, this is only a ripple effect, as the central object of protection is a human entity.[35]

Another consequence of the "direct and personal harmful effect" doctrine is the requirement that, in order to engage Articles 2, 6 and 8 of the ECHR, there must be a direct and immediate link between the situation at issue and the individual right of a person.[36] Specifically, in the context of Article 2, the Court has held that States must mitigate environmental risks that are imminent and clearly identifiable.[37] Similarly, in the context of Article 6, protection will only be triggered if applicants demonstrate that they are personally exposed to

29 *Bahia Nova* (n 28); *Matczyński* (n 28) §§ 100-102; *O'Sullivan* (n 10) § 109; *Matos e Silva* (n 28) § 89; and *Z.A.N.T.E.* (n 28) § 54.

30 ECHR, Case of *Posti and Rahko v. Finland*, 24 September 2002, (27824/95), §§ 72 and 77.

31 With the sole exception of *O'Sullivan* (n 10) §§ 116-131.

32 P. Taylor, "Ecological Integrity and Human Rights", in *Reconciling Human Existence with Ecological Integrity*, L. Westra, K. Bosselmann, eds, Routledge, 2008, p. 99.

33 The most common individual measure ordered by the ECtHR is the payment of compensation for non-pecuniary damage to individual victims, see, for example, *López Ostra* (n 3) § 65; ECHR, Cases: *Taşkın and Others v. Turkey*, 10 November 2004, (46117/99), § 144; and *Giacomelli v. Italy*, 2 November 2006, (59909/00), § 104. On a few occasions, the ECtHR has also indicated the relocation of the applicant to an environmentally safe area, see *Fadeyeva* (n 17) § 142; and *Dubetska* (n 1) § 162.

34 For a summary of the general measures in the context of the environment, see Kobylarz 2018 (n 2), p. 114.

35 H. M. Osofsky, "Learning from Environmental Justice: A New Model for International Environmental Rights", in Anton and Shelton (n 28), p. 145.

36 With regard to the harm already produced: *Guerra* (n 4), § 57; *Fadeyeva* (n 17) § 68; ECHR, Case of *Băcilă v. Romania*, 30 March 2010, (19234/04), § 64. On risk of harm: *Balmer-Schafroth* (n 13) § 40; ECHR, Cases: *Athanassoglou and Others v. Switzerland* [GC], 6 April 2000, (27644/95), § 51; and *Folkman and Others v. Czech Republic* (dec.), 10 July 2006, (23673/03).

37 ECHR, Case of *Budayeva and Others v. Russia*, 20 March 2008, (15339/02), § 137.

a serious, specific and imminent danger.[38] Only in exceptional cases may the risk of a future violation confer on an applicant the status of a potential victim, based on reasonable and convincing evidence of the likelihood of harm.[39] This is an important limitation since the main purpose of legal environmental protection is to prevent environmental damage. The central concept is therefore the assessment of risks which operate with the inherent element of uncertainty.

The impacts of climate change or environmental degradation constitute a new ecological reality which, insofar as it affects society, governance and law, shows that current protection is not sufficient. It is incompatible with the general objectives of environmental protection[40] and with the requirements of the environmental rule of law. Citizens are increasingly concerned not only about their own short-term security and prosperity, but also about the long-term well-being of future generations and the living conditions of non-human animals and ecosystems.[41] They want to participate in the decision-making process concerning policies, laws or projects that impact on the environment in the broadest sense of the term. They introduce new human rights-based grievances that explore the limits of the traditional normative parameters of the system. New social understanding and legal circumstances call for a shift away from a strongly anthropocentric legal paradigm, as well as a re-evaluation of legal concepts and terms such as "necessary in a democratic society", "compelling social need", "jurisdiction", "victim", "civil right" or "private life". Civil society is also pushing for broader substantive and procedural guarantees, particularly in the area of positive State obligations.

38 *Balmer-Schafroth* (n 13) § 40; ECHR, Cases: *Tauria and 18 Others v. France* (dec.), 4 December 1995, (28204/95); *Asselbourg and Others v. Luxembourg* (dec.), 29 June 1999, (29121/95) and *Athanassoglou* (n 36) § 51.

39 *Tauria* (n 38); *Asselbourg* (n 38); ECHR, Case of *Legal Resource Centre on behalf of Valentin Câmpeanu v Romania* [GC], 17 July 2014, (47848/08), § 101. The Court has indeed rejected applications on the grounds that the risks invoked were too vague or remote, see ECHR, Cases: *Aly Bernard and 47 Others and Greenpeace – Luxembourg v. Luxembourg* (dec.), 29 June 1999, (29197/95); and *Luginbuhl v. Switzerland* (dec.), 17 January 2006, (42756/02).

40 *Kyrtatos* (n 1) § 52; Baumann (n 2) pp. 441-485; Lambert (n 25); G. Handl, "The Human Rights to a Clean Environment and Rights of Nature. Between Advocacy and Reality", in *The Cambridge Handbook of New Human Rights. Recognition, Novelty, Rhetoric,* A. vos Arnauld, Cambridge, 2020, p. 138.

41 This is evidenced by applications to the ECtHR, for example *Balluch* and *Stibbe* (no. 27); *Ogloblina* (no. 19); *Duarte Agostinho and others v. Portugal and 32 other Member States,* (39371/20); or *Verein KlimaSeniorinnen Schweiz v. Switzerland*, (53600/20); as well as by actions taken by civil society or local authorities for the recognition of the legal personality of various European rivers, e.g., the Rhone River in Switzerland and France or the Meuse in the Netherlands.

3. Could the current system evolve and in what direction?

In order to address new human rights-based claims and normative expectations of European society that take into account the current state of the environment, the Strasbourg system could gradually evolve towards the regime of ecological human rights.[42]

3.1. Developments in the field of environmental human rights

The origins of the term "ecological human rights" can be traced back to Prudence Taylor and Klaus Bosselmann,[43] who, in the late 1990s, argued in favour of subjecting the exercise of human rights to "ecological limitations" that would legally implement "moral responsibilities due to all life on Earth", without recourse to new rights such as those of nature.[44] More recently, Mario Peña Chacón has recorded the process of consolidation of ecological human rights – which may include the rights of nature – in the jurisprudence of some Latin American constitutional courts.[45]

Ecological human rights nowadays operate both in the regime of indirect environmental protection through first and second generation rights, as well as in the regime of direct protection, primarily through the right to a healthy environment, and sometimes also through the rights of nature. With regard to the right to a healthy environment, ecological rights operate independently of whether this right is derived from other human rights – as happened in the case of the Inter-American Court of Human Rights (hereinafter the "IACtHR")[46] – or whether it is enacted into law as an explicit and autonomous third generation right – as has been the case, for example, in several national jurisdictions around the world.

As for the philosophical underpinnings, for Prudence Taylor, ecological rights recognise both "the human interest" and "the intrinsic value of all life".[47] For Elisabeth Lambert, the doctrine combines traditional environmental human

42 Lambert (n 25), pp. 4, 10 *in fine*, 13 and 15 *in fine*; Resolution 2396 (n 25) §§ 4, 6 and 12. See also the separate opinion of Judge Pinto Albuquerque in *Herrmann* (n 27) p. 39.

43 P. Taylor "From Environmental to Ecological Human Rights: A New Dynamic in International Law", HeinOnline, 1998, 10 (2) *Georgetown International Environmental Law Review,* p. 314; K. Bosselmann (ed) Ökologische Grundrechte, Nomos, 1998; K. Bosselmann, "Human Rights and the Environment: Redefining Fundamental Principles?", *Environmental Justice and Legal Process* (online), 2001 and in *Governance for the Environment*, B. Gleeson, ed., Palgrave London, 2001; and taylor (n 32), pp. 89-108.

44 Taylor (n 32), p. 91.

45 M. Peña Chacón, "Enverdecimiento de las Cortes Latinoamericanas, últimos avances jurisprudenciales", 2020, p. 272 Diario Ambiental (online); M. Peña Chacón, "Del derecho ambiental al derecho ecológico, El caso de Costa Rica" (online); and M. Peña Chacón, "Derechos Humanos y Medio Ambiente", Universidad de Costa Rica, 2021, p. 291.

46 OC-23/17 (n 11) § 57.

47 taylor (n 32), p. 92.

rights with the recognition of a profound interdependence of humans and nature (immersive anthropocentrism) and a duty to respect all forms of life as a fundamental ethical principle (ecocentrism).[48]

Overall, ecological human rights give rise to considerations about a wide range of ecosystem services and the entities that receive those services, from the need to prevent and repair ecological damage beyond the locality, to the long-term benefits of humans and non-human entities.[49]

The evolution of the Strasbourg system towards this regime is possible since it does not contradict the historical human-centred foundations of the ECHR, taking into account the undisputed interconnections between the human being and the natural environment,[50] and the indivisibility and interdependence of all human rights.[51]

3.2. Ways forward for the ECHR system

One way to ensure a transition to ecological human rights would be for member States to enact an autonomous right to a healthy environment, understood as having a subjective (anthropocentric) and an objective (ecocentric) dimension. A political process to this end is underway within the Council of Europe.[52] But there is a risk that, even if the law is successfully adopted (at the end of the process which would necessarily take many years[53]), it will remain effectively inoperative[54] until the ECtHR is conceptually ready and willing to move away from the current legal paradigm.

So, irrespective of the eventual recognition of the right to a healthy environment, the evolution could be triggered by the gradual integration of "minimum ecological standards" into the "fair balance" (proportionality) review of human

48 Lambert (n 25), pp. 3-5, 19 and 22.

49 Kobylarz 2022 (n 2).

50 Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, D. R. Boyd, Human rights depend on a healthy biosphere, 15 July 2020, A/75/161.

51 Vienna Declaration (No. 26) Part I Article 5; and Resolution adopted by the United Nations General Assembly, The Human Right to a Clean, Healthy and Sustainable Environment, A/RES/76/300, 28 July 2022, Preamble.

52 Resolution 2396 (n 25) § 14.3; and Recommendation 2211 of the CoE Parliamentary Assembly, 29 September 2021.

53 For example, in the case of Protocol No. 12, which extended the limited scope of Article 14 of the ECHR by providing for a general prohibition of discrimination, four years elapsed between the date on which the Committee of Ministers first instructed the Steering Committee for Human Rights to examine the desirability and feasibility of the new legal instrument and the date of adoption of the Protocol. It took another five years before the Protocol entered into force. See Explanatory Report on Protocol No. 12 to the ECHR, Rome, 4.XI.2000 and Treaty Details No. 177.

54 K. Morrow, "The ECHR, Environment-Based Human Rights Claims and the Search for Standards", in Turner (n 2), p. 58.

rights interference and victim status. These minimum ecological standards are defined here by reference to a set of notions that emanate from the legal paradigms of immersive anthropocentrism and ecocentrism (3.2.1.);[55] that take due account of the climate and biodiversity emergencies (3.2.2.); and that include the concepts of sustainable development and sustainable use of natural resources; the principles of intergenerational equity (3.2.3.), precaution and *in dubio pro natura* (3.2.4.).[56]

The judicial integration of minimum ecological standards is illustrated by decisions of the IACtHR, the Human Rights Committee (hereafter the "HRC") and constitutional courts in Latin America, known as ecologically progressive.[57] For reasons of space, this article does not describe how minimum ecological standards could concretely be implemented in the ECHR system. This topic is extensively covered by the author in her article: "*Balancing its way out of strong anthropocentrism: Integration of 'ecological minimum standards' in the European Court of Human Rights' 'fair balance' review.*"[58]

3.2.1. The new legal paradigms

Immersive anthropocentrism recognises that, in order to thrive, humans need and have the right to live in harmony with nature (the object of law).[59] The IACtHR has recognised that for indigenous peoples there is a special relationship between the territory and natural resources that are necessary for their physical and cultural survival, and for the development and continuity of their worldview.[60] This special relationship has been protected from the adverse effects of environmentally damaging activities by he right to property.[61] The IACtHR has also incorporated the immersive vision into the right to a dignified life, which encompasses the obligation to "provide the conditions for a full and possible existence" of a community, as a whole, and its individual members.[62] The UNHRC, in turn, has recognised that not only indigenous groups, but also small-scale farmers, have a particular attachment to and dependence on land

55 Resolution 2396 (n 25) § 6 *in fine*.

56 Compare Taylor (n 32), p. 100.

57 Kobylarz 2022 (n 2).

58 Ibid.

59 1982 World Charter for Nature, Annex, *Whereas*: (b).

60 IACtHR, Case of *Yakye Axa Indigenous Community v. Paraguay*, 17 June 2005, § 135.

61 For example, IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 31 August 2001; Yakye Axa (n 60); IACtHR, *Sawhoyamaxa Indigenous Community v. Paraguay*, 29 March 2006; IACtHR, *Saramaka People v. Suriname*, 28 November 2007; *Xákmok Kásek Indigenous Community v. Paraguay*, 24 August 2010; IACtHR, Case of the *Kichwa Indigenous People of Sarayaku v. Ecuador*, 27 June 2012; and IACtHR, Case of the *Kaliña and Lokono Peoples v. Suriname*, 25 November 2015. See also E. Grant, "American Convention on Human Rights and Environmental Rights Standards", in Turner (n 2), pp. 67-80.

62 *Yakye Axa* (n 60) § 162; and *Sawhoyamaxa* (n 61), §§ 150-178; see also concurring opinion of Judge García Ramírez, §§ 18-23. See also Grant (n 61), pp. 80-91.

that is not contaminated by agrochemicals. Their crops and the natural resources necessary for their livelihoods are elements of their "way of life" which is protected by the right to privacy, family and home.[63] Moreover, for indigenous peoples, pollution can also have serious intangible impacts, in violation of the right to culture.[64]

The key to immersive anthropocentrism is to "[realise] that human beings are immersed in a set of ecosystems."[65] Ecosystem services can serve as part of a formal legal test for the victim status or legal standing in environmental cases.[66] In a Mexican case concerning the destruction of mangroves during works to convert a wilderness area into a recreational park, the constitutional action (*amparo*) was brought by residents of a ten-kilometre radius who claimed to be personally affected by the loss of services provided directly and indirectly by this ecosystem.[67] The Supreme Court granted standing to a resident of the nearest town under the new principle that the diffuse interest in protecting the environment had to be related to the personal and particular situation that the claimant had with specific ecosystem services in his or her "adjacent environment."[68] Causality does not correspond to the classical legal causality scheme because the elements that produce the environmental impact are diffuse and add up to each other.[69] Moreover, the impacts are not always immediately perceptible to humans.[70] This implies that "the existence of physical evidence cannot be a necessary condition for demonstrating an alteration or damage to an environmental service."[71] But the concept of ecosystem services is not a legal obstacle for judges, as demonstrated by the Costa Rican Supreme Court's ruling on bee contamination. This case arose from a constitutional action brought by individuals who claimed that the rights to a healthy environment and food security were violated by the State's policy of promoting the use of agrochemicals. Based on science, the court recognised that the use of neonicotinoids in agriculture could pose a risk to honey bees and that "the reduction of the pollinator population [was] a threat to food security, the export of agricultural products

63 HRC, *Portillo Cáceres et al. v. Paraguay* (CCPR/C/126/D/2751/2016), §§ 7.2.-7.53, 20 September 2019; and *Oliveira Pereira and Sosa Benega, indigenous community of the Agua'ẽ camp of the Ava Guaraní people v. Paraguay*, no. 2552/2015, 14 July 2021 (CCPR/C/132/D/2552/2015), §§ 8.2.-8.4.

64 Ava Guaraní (n 63) § 8.6.

65 "Carpintero Lagoon Case", Liliana Cristina Cruz Piña et aure v. Mayor de Tampico, estado de Tamaulipas, and others, Supreme Court [Mexico] no. 307/2016, 14 November 2018, § 125.

66 Ibid, §§ 147-173; and "Aquifers Case", Supreme Court [Mexico] no. 649/2019, 11 March 2020, § 32 (p. 20).

67 "Carpintero Lagoon Case" (n 65), §§ 31 and 32.

68 Ibid, §§ 147-173.

69 Ibid, § 98.

70 Ibid, § 131.

71 Ibid, § 131.

and biodiversity."[72] Lastly, the Colombian Supreme Court granted a guardianship action to young non-indigenous urban dwellers who felt affected by massive logging in the Amazon forest as it contributed to global warming. The court, relying on science, concluded that the country faced imminent and serious harm because of the chain of physical effects beyond the region: increased deforestation produced CO2 emissions that caused the greenhouse effect and global warming that destroyed biodiversity and disrupted water cycles.[73] This led to the interdependence between the collective right to a healthy ecosystem and the claimants' individual rights to life, health and human dignity.[74]

Ecocentrism,[75] in turn, promotes the direct protection of nature, based on the intrinsic value of all natural entities, irrespective of their usefulness to humans.[76] In international law, ecocentrism was first introduced by the Council of Europe's 1979 Bern Convention on the Conservation of Wildlife and Natural Habitats in Europe.[77] It was subsequently included in a series of international documents[78] and, importantly for the ECHR system, the 2021 Council of Europe Parliamentary Assembly Resolution No. 2396 on the right to a healthy environment.[79]

Humanity is seen as an integral, but not privileged, part of nature.[80] The relationship between human and non-human beings is based on symbiosis, respect and interspecies solidarity.[81] For the Supreme Court of Argentina, addressing

72 "Honeybees Case", Supreme Court, Constitutional Chamber [Costa Rica] no. 24513 – 2019, 6 December 2019, Considerando VIII.

73 "Amazon Forest Case", Andrea Lozano Barragán, Victoria Alexandra Arenas Sánchez, Jose Daniel and Felix Jeffry Rodríguez Peña and others v. President of the Republic and others, STC4360-2018, Supreme Court [Colombia] 5 April 2018; Consideraciones 4 (p. 15), 5 (p. 16) and 11 (pp. 33-36).

74 Ibid, Consideraciones 2 (p.13).

75 Ecocentrism (derived from the Greek word for 'home') attaches equal importance to the living and non-living elements of the environment.

76 A. Naess, "The Shallow and the Deep, Long Range Ecology Movement", 1972 and J. Nash, "Wilderness and the American Mind", 1967, both in Redgwell (n 26), p. 80; A. Naess, "There is No Point of No Return", *Penguin Books – Green Ideas*, 2021; A. Leopold, "A Sand County Almanac: With Other Essays on Conservation from Round River", Oxford University Press, New York, 1949.

77 Preamble, 1979 Bern Convention Convention on the Conservation of European Wildlife and Natural Habitats.

78 1982 World Charter for Nature, Annex, *Convinced that*: (a)); 1992 Convention on Biological Diversity (Preamble); 2000 International Covenant on Environment and Development of the International Union for Conservation of Nature (Article 2); and 2000 Earth Charter (Article 1).

79 Resolution 2396 (n 25) § 6 *in fine*.

80 1982 World Charter for Nature, Annex, *Convinced that*: (a); "Man Belongs to the Earth: international co-operation in environmental research", *Man and the Biosphere Programme*, UNESCO (1988); See also "Atrato Case" (n 26) §§ 5.9 and 5.10.

81 E. Macpherson and F. Clavijo Ospina, 'The pluralism of river rights in Aotearoa, New Zealand and Colombia', (2018) 25 *Water Law*, 283, 285.

the issue of the exploitation of glacier water reserves, the concept of 'climate justice' invites judges to integrate multiple actors in order to achieve a more systemic protection of ecosystems and biodiversity.[82] The ecocentric approach has also been confirmed in the most recent jurisprudence of the IACtHR, notably in the advisory opinion OC-23/17 and the judgment in the *Lhaka Honhat* case. It was explicitly stated that the right to a healthy environment protects the elements of nature:

> "as legal interests in their own right [...], not only because of the benefits they provide to humanity or the effects their degradation may have on other human rights [...], but because of their importance to the other living organisms with which we share the planet which also deserve full protection." [83]

The most extreme expression of ecocentrism in law has been the attribution of legal personality to nature or its elements.[84] For example, Colombian constitutional judges have recognised that, as legal persons, the Atrato River and the Amazon forest have rights distinct from the rights of the communities living in these ecosystems. These are the rights to protection, conservation, maintenance and restoration of these entities by the State and by ethnic communities.[85]

But ecocentrism can also function without nature being the subject of law, for example through the principle *in dubio pro natura*. What is essential is that nature "has a legally recognised value and dignity".[86] For example, the Colombian Constitutional Court prohibited recreational hunting as contrary to the duty to protect animals from suffering which arose, not from human morality, but from the "higher interest" of protecting wildlife as part of the environment.[87]

The ecocentric approach also implies that citizens or associations, as defenders of the collective interest, can fulfill their ethical and legal duties towards nature.[88] While a law is not required to grant *actio popularis* in its broadest form

82 "Glaciers Case", Barrick Exploraciones Argentina S.A. y v. Estado Nacional, Supreme Court [Argentina], no. CSJ 140/2011 (47-B)/CS1, 4 June 2019, Considerando 21.

83 OC-23/17 (n 11) § 62; and IACtHR, Case of *Indigenous Communities Members of the Lhaka Honhat (Our Land) Association v. Argentina*, 6 February 2020, § 203.

84 C.D. Stone, "Should Trees Have Standing? – Towards Legal Rights for Natural Objects", 1971, 45 *Southern California Law Review*; Redgwell (n 28), p. 83; Taylor (n 32), p. 92; D. Bonilla Maldonado, "The Rights of nature and a new constitutional environmental law", in *Human Rights and the Environment, Legality, Indivisibility, Dignity and Geography*, E. Daly and J. R. May, eds., Elgar, 2019, VII, pp. 310- 322.

85 "Atrato River Case" (n 26) §§ 9.27, 9.32 and 10.2.(1); Amazon case (n 73) Consideraciones 5.1. and 5.2. (pp 18 and 19), 13 (pp 41-45) and 14 (p 45).

86 Stone (n 84), p. 458.

87 "Sport Hunting Case" Constitutional Court [Colombia], Judgment C-045-19, 6 February 2019, § 6.4, p. 60.

88 F. Ost, "La nature hors la loi : l'écologie à l'épreuve du droit", La Découverte, Paris 2003; and Lambert (n 25) pp. 3 and 21; OC-23/17 (n 11) § 62.

(allowing anyone to challenge an environmental decision, act or omission),[89] it cannot effectively exclude all or almost all members of the public from challenging such acts or omissions contrary to national law.[90]

In the event of a favourable ruling, a court orders reparations to nature[91] in order to ensure "the recovery or rehabilitation of the environmental functionality, life cycles [of nature], its structure and evolutionary processes."[92] In the Amazon case, the Colombian court ordered the State and local communities to reduce logging and to enter into an "intergenerational pact for the life of the Amazon."[93] The IACtHR Court, in turn, attempted to give real ecological consequences to the *Lhaka Honhat* case. It ordered – beyond measures aimed at the restitution of ancestral property and the improvement of the quality of life of the claimant communities – the fight against illegal logging in general.[94] This is an important step even if the practical effectiveness of this general measure was inevitably undermined by the fact that the IACtHR excluded it from its judicial review.[95]

3.2.2. Climate and biodiversity emergencies

With regard to the social and economic effects of the climate and biodiversity crises, science will be of unprecedented importance in deciding complex and often novel legal issues concerning, for example, the legal status of actual and potential victims; extraterritoriality; shared State responsibility; or causality. The seriousness and urgency of climate and biodiversity problems are also expected to weigh heavily in the balancing of ecological interests against general economic interests or individual fundamental rights or freedoms.

As for the latter, the Supreme Court of Costa Rica has explicitly held – in the context of water management – that the guarantee of economic gains or freedom of enterprise are secondary to "a favourable evolution of the environment and natural resources."[96] In the same vein, the Mexican Supreme Court declared

89 Article 437 of the Constitution of Ecuador, Article 59 of the Organic Law on Jurisdictional Guarantees and Constitutional Control, and Constitutional Court, no. 166-15-SEP-CC, 20/05/2015; or PIL in India, see Sub hash Kumar v. State of Bihar, (1991) 1 SCR 5 and M.C. Mehta v. Union of India, SCR 86 1991 SCC (2) 353 (1991), Supreme Court of India.

90 Aarhus Implementation Guide, pp. 197-198; and Access to Justice in EU Law. A Legal guide on Access to Justice in environmental matters (Client Earth 2021), p. 38.

91 Stone (n 84), p. 458.

92 "Mangroves Case" Constitutional Court [Ecuador] no. 166-15-SEP-CC, 20 May 2015, pp. 11 and 12; See also the report of the Association des Professionnels du Contentieux Économique et Financier Commission "Préjudice écologique", La réparation du préjudice écologique en pratique, APCEF, 2016, p.27.

93 "Amazon Forest Case" (n 73), p. 48.

94 *Lhaka Honhat* (n 83) § 333.

95 Ibid, § 336.

96 "Natural Heritage Sites Case" Supreme Court, Constitutional Chamber [Costa Rica], no. 2019-17397, 11 September 2019, Considerando VIII (5).

unconstitutional a regulation leading to the authorisation of an increase in the ethanol content of gasoline, noting that the purely economic benefits that could possibly be generated by its use had to be weighed against the risks that this practice could pose to the environment, as well as the obligations of States to reduce greenhouse gas emissions and thus combat climate change.[97] For the same reasons, in the case concerning the destruction of a coastal mangrove forest, the Mexican judges extended legal protection to an urban area previously degraded by human activity.[98] Based on scientific evidence, the court concluded that protecting and conserving mangrove ecosystems was a national and international priority.[99]

In the doctrine of ecological human rights, the balance of economic and ecological interests could be based, first, on the political consensus around ambitious global and national environmental action; second, on the obligations of States arising from international climate and biodiversity protection mechanisms, and/or national laws derived from them; and third, on the scientific recognition of the climate and biodiversity crises, both as a "reality of the situation complained of" and as a European (and international) consensus. Overall, the crisis situation could justify the expansion of the State's positive obligations – substantive and procedural.

3.2.3. Sustainable development, sustainable use of natural resources and intergenerational equity

The interconnected concepts of sustainable development and the sustainable use of natural resources, as well as the principle of intergenerational equity, imply limits to the exploitation of natural resources, either to allow them to regenerate or to preserve them for future use. These restrictions may be motivated by solidarity with other people (current and/or future generations), or with non-human living elements of nature. Sustainability can also be seen in terms of responsibility towards the environment and the moral duty to preserve it.

In the case concerning the extraction of water for human consumption within natural heritage sites,[100] the constitutional judges of Costa Rica recognised that the environment provides "potential for development", but not to jeopardize the heritage of present and future generations, development must be "rational", "reasonable" and "intelligent."[101] The regenerative capacity of the environment must not be disrupted in order to be available to humans in the long term.[102] Furthermore, the State and citizens have an obligation to

97 "Ethanol Case" Supreme Court [Mexico] no. 610/2019, 15 January 2020, pp. 75-80 (draft).
98 "Carpintero Lagoon Case" (n 65), §§ 217 and 218.
99 "Carpintero Lagoon Case" (n 65) §§ 143 and 146.
100 "Natural Heritage Sites Case" (n 96) Considerando VI.
101 ibid.
102 "Natural Heritage Sites Case" (n 96) Considerando VIII (5).

protect and preserve natural resources.[103] In another case, the same court held that it had a mandate to protect the environment itself, namely animals and their habitat, from "manifestly harmful situations" in particular where the environmental sustainability of a project (here, taking water from a river that was a natural habitat of an endangered species for intensive crop irrigation) had not been determined by means of a comprehensive and rigorous environmental impact assessment.[104] So, while farmers must have access to water, a "perfect balance" must be found between agriculture, food and the environment.[105] The Argentine Supreme Court which does not recognise the rights of nature, perceives the environment as "a collective good, of common and indivisible use." The environment is not "an object intended for the exclusive service of a man, subject to appropriation according to his needs."[106] Natural resources, such as water, must be protected in order for nature to maintain its capacity for regeneration and resilience, as well as its functions as a system that serves humans and biodiversity.[107] Therefore, individual rights to explore and exploit natural resources must go hand in hand with collective rights to ensure the sustainability of the resource.[108] Finally, in the case concerning the contamination of a river and its basin, the Colombian Constitutional Court relied on the concepts of sustainable development and "global solidarity", in order to hold that "the environmental heritage of a country does not belong exclusively to the people who inhabit it, but also to future generations and to humanity in general."[109]

In the doctrine of ecological human rights, environmental sustainability is treated as a legitimate general objective that limits the exercise of individual rights. Furthermore, the use of natural resources is no longer approached through an extractive prism, but rather, with reference to the legal paradigms of immersive anthropocentrism and ecocentrism. The assessment of the proportionality of human rights interference is polycentric in the sense that it takes into account the socio-cultural and natural interests of stakeholders beyond the bilateral legal dispute under litigation.[110]

---

103 Ibid, Considerando VIII (5).

104 "Otter Case" Supreme Court, Constitutional Chamber [Costa Rica], no. 08486-2014, 13 June 2014, Considerando VI and X.

105 Ibid, Considerando VIII.

106 ibid.

107 "Atuel Case" La Pampa, Provincia de v/ Mendoza, Provincia de s/uso de aguas, Supreme Court [Argentina], no. CSJ 243/2014 (50-L) ICS1, 1 December 2017, Considerando 11; and "Glaciers Case" (n 82) Considerando 17 and 18.

108 "Glaciers Case" (n 82) Considerando 21.

109 "Atrato River Case" (n 26) § 5.8.

110 "Graciers Case" (n 82) Considerando 17.

3.2.4. Precautionary principle and in dubio pro natura

The precautionary principle and the *in dubio pro natura* principle set minimum ecological standards in the context of precautionary decisions and scientific uncertainty. The precautionary principle is a fundamental principle of environmental law.[111] It generally states that public authorities may be required to anticipate and prevent environmental damage even when the threat is not fully confirmed by science.[112]

Related to the precautionary principle is the *in dubio pro natura* principle, which is considered to be "a general interpretative mandate of environmental justice."[113] According to this principle, in the event of a conflict between environmental and other interests, where environmental damage or risk cannot be established with certainty, all necessary measures must be taken in favour of the environment.[114] Thus, the *in dubio pro natura* principle operates not only in scientific uncertainty but also in legal uncertainty.

According to Mexican jurisprudence, the absence of knowledge or scientific consensus is not synonymous with the absence of risk or the existence of an acceptable risk. Risk analysis must be supported by studies reflecting reliable data.[115] The precautionary principle imposes a duty on the public administration to warn, regulate, control, monitor or restrict certain activities that pose a risk to the environment. In this sense, this principle justifies decisions that would otherwise be contrary to the principle of legal certainty.[116] The absence of prior environmental assessment may in itself endanger the ecosystem, in direct violation of the precautionary principle and the principle *in dubio pro natura*. It is therefore irrelevant whether or not ecological damage has actually occurred.[117] Precautionary measures may not be delayed or superficial either.[118]

---

111 1992 Rio Declaration on Environment and Development, Principle 15; International Court of Justice, Gabčíkovo-Nagymaros (Slovakia v. Hungary), 25 September 1997; and Pulp Mills on the River Uruguay (Argentina v. Uruguay), 20 April 2010; 1992 Framework Convention on Climate Change, Article 3(3); Treaty on the Functioning of the European Union, Article 191(2).

112 Rio Declaration (n 111).

113 "Carpintero Lagoon Case" (n 65) § 107.

114 2016 IUCN World Declaration on the Environmental Rule of Law, Principle 5; see also Majul, Julio Jesús v/ Municipalidad de Pueblo General Belgrano y otros s/ acción de amparo ambiental, Supreme Court [Argentina], 19 July 2019, §§ 11-13; "Carpintero Lagoon Case" (n 65) § 105; and "Atrato Case" (n 26) §§ 7.39-7.41.

115 A. Rabasa et al, "Contenido y alcance del derecho humano a un medio ambiente sano", *Cuaderno de jurisprudencia no. 3*, Centro de Estudios Constitucionales de SCJN, July 2020, pp. 14-19, cases n^{os} 921/2016 and 923/2016.

116 "Carpintero Lagoon Case" (n 65) § 93.

117 Ibid, §§ 257-262.

118 "Los Cedros Forest Case", Constitutional Court [Ecuador] no. 1149-19-JP/21, 10 November 2021, §§ 66, 132-137 and 146.

In its procedural aspect, the precautionary principle requires that, when the cause of the alleged harm is an activity under the responsibility of a public authority, it is incumbent upon the State to produce convincing evidence that there is no harm to the rights of the alleged victim.[119] As expressed by the Constitutional Court of Ecuador in the Los Cedros Forest decision, the claimant's allegation of environmental risk must be presumed true when the defendant public entity has failed to refute the allegation of environmental risk or provide relevant information in response.[120] In the same context, the Mexican Supreme Court has affirmed that the reversal of the burden of proof is a tool by which the judge can obtain all the evidence necessary to identify the risk or reality of environmental harm,[121] and to examine the case on the basis of evidentiary standards such as "best available information" and "serious, precise and concordant facts."[122] The Mexican judges considered, for example, that the authorities had not properly assessed the risks of ethanol-enriched gasoline on the basis of a pluralistic, detailed and participatory scientific and social assessment.[123] Above all, the judges adopted a fully ecocentric perspective, considering that "in view of the need to protect both the population and various animal and plant species," it would have been essential to ensure adequate consultation of all relevant stakeholders.[124]

In their substantive part, the precautionary principle and the *in dubio pro natura* principle require that public authorities and individuals refrain from taking, or actively mitigate, the risk of serious and irreversible environmental damage, even when this risk is not fully proven by currently available scientific data. While these cannot be hypothetical effects or imaginary risks, the environmental damage need not be immediately and materially perceptible to humans.[125]

In accordance with the doctrine of ecological human rights, where there is uncertainty, the environmental dispute must be regulated by law and resolved in court in a manner most conducive to the protection and preservation of natural resources and related ecosystems.[126] In order to properly understand the risks, judges are required to "seek, on a case-by-case basis, the tools or methods necessary to understand the functioning of an ecosystem, as well

119 1998 Wingspread Declaration.

120 "Los Cedros Forest Case" (n 118) § 129.

121 "Carpintero Lagoon Case" (n 65) §§ 102, 242 and 243.

122 Ibid, § 244. See also, Rabasa (n 115) and Communication from the European Union Commission on the precautionary principle, COM/2000/0001, 2 February 2000.

123 "Ethanol Case" (n 97) § 73.

124 Ibid, § 74.

125 "Carpintero Lagoon Case" (n 65) § 131; The Future Brief, "Science for Environment Policy. The precautionary principle: decision-making under uncertainty", European Commission, September 2017, page 5; Pfizer Animal Health SA v. Council of the European Union, Court of First Instance, T-13/99, 11 September 2002, ECR II-03305.

126 "Carpintero Lagoon Case" (n 65) §§ 132 and 133; Majul (n 114), § 13.

as the environmental services it provides, always with a view to ensuring its conservation."[127]

4. Conclusion

It is not suggested that international human rights law alone can solve environmental problems, nor is it submitted that in the absence of more appropriate mechanisms, the ECtHR should act as a "European environmental court." Instead, it is argued that the adverse social and economic effects of the environmental crisis are the new reality in which the ECtHR must find a pragmatic way to operate. The proposed minimum ecological standards, while far from exhaustive, are appropriate to guide the interaction between the environmental concerns of today's society and human rights. Ultimately, they are likely to lead to better environmental protection. Judicial incorporation of these standards would, in itself, be an important step towards ecological human rights, but it would also prepare the necessary conceptual basis for the ultimate addition of a right to a healthy environment, whether as a result of the ongoing political process or an explicit judicial decision.

127 "Carpintero Lagoon Case" (n 65) § 134.

Climate litigation between international law and domestic remedies: the virtuous example of collective claims*

Giorgia Pane
University of Palermo
ORCID: https://orcid.org/0000-0003-4136-5025
DOI: 10.54103/milanoup.151.c191

Claims concerning the environment and its relationship with human rights are growing in number and impact. This relationship is mainly explored in different *fora* through the lens of international human rights law. In this very heterogeneous framework, an interesting perspective is offered by domestic case-law in Europe, in which human rights' obligations stemming from the jurisprudence of the ECtHR are used as a means of interpretation of States' obligations towards their citizens. The focus on domestic jurisdiction offers various levels of facilitation to the access to environmental justice. On the other hand, it clashes with obstacles deriving from the risk of the lack of impact that a single decision can have, especially in legal systems of civil law typical of continental Europe. A possible way of contrasting these inherent obstacles is that of the "collective claim", through which issues of a communal interest can be brought forward. The prospected solution, which shows appreciable margins of success, is that of the application of international human rights' law standards of interpretation of international commitments on a national level and from a collective point of view.

Keywords: international human rights law; European Convention of Human Rights; climate litigation; international environmental law; collective remedies; intergenerational equity

* This contribution is a reworking of the following paper: G. Pane, *Pro e contro dei rimedi domestici: prospettive di sinergia europea nel contenzioso climatico collettivo*, in *Ordine internazionale e diritti umani* 2023, p. 375 ss.

1. Introduction

The term "climate litigation" encompasses a multitude of cases,[1] directed both against public authorities and against private actors, held responsible for not taking adequate measures to combat climate change.[2] Such measures are identified, for most States, in the objectives set by the Paris Agreement.[3] Article 2, specifically, states the need to respond to the threat posed by climate change, inter alia, "holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change".[4]

The Paris Agreement contributed to the recognition of the link between environmental issues and human rights that gave rise to the "rights-based

1 Some of the cases are designed to achieve results that go beyond the individual dispute. These cases seek to advance climate policies and encourage public debate. In these cases, stakeholders make strategic decisions about who will raise the case, where and when the case will be presented, and what legal remedy will be required. These cases are sometimes referred to as "strategic litigation" cases. The term "climate litigation" also includes civil and administrative proceedings raised in the name of individual interests. See J. Setzer, R. Byrnes, *Global trends in climate change litigation: 2022 snapshot policy report*, London, June 2022.

2 On *climate litigation* see W. Kahl, M.P. Weller, *Climate change litigation. A handbook*, London, 2021; F. Sindico, M. Moise Mbengue, *Comparative climate change litigation: beyond the usual suspects*, Berlin, 2021; L. Burgers, *Should Judges Make Climate Change Law?,* in *Transnational Environmental Law* 2020, p. 55 ss. On "*human rights-based approach*" applied in case-law, S. Jodoin, A. Savaresi, M. Wewerinke-Singh, *Rights-based approaches to climate decision-making*, in *Current Opinion in Environmental Sustainability* 2021, p. 45 ss., which shows the evolution of the relationship between human rights and climate change legislation and policy.

3 The Paris Agreement was signed by 195 Member States of the United Nations Framework Convention on Climate Change (UNFCCC).

4 Paris Agreement, Article 2, letter a).
As highlighted by M. Burger, J. Wentz, R. Horton, *The Law and Science of Climate Change Attribution*, in *Columbia Journal of Environmental Law* vol. 45, 2020, p. 147: "Evidence linking human influence on climate to the harmful impacts of climate change plays an important role in lawsuits seeking to compel action on climate change as well as the legal defense of programs and regulations aimed at reducing greenhouse gas emissions or advancing adaptation objectives". There is now scientific consensus about the need to limit the emission of greenhouse gases – in particular CO2 – that cause the temperature of the planet to rise. According to the Paris Agreement, global warming must be kept "well below" 2ºC compared to pre-industrial average levels, trying to limit the increase in temperature to 1.5ºC. If the global temperature rise exceeds 2ºC this would result in flooding due to rising sea levels, heat stress due to more intense and prolonged heat waves, increased respiratory diseases associated with deterioration of air quality due to periods of drought (severe forest fires), increased spread of infectious diseases, severe flooding due to torrential rains, and interruptions of food production and drinking water supply. Ecosystems, flora and fauna would be seriously damaged, and biodiversity would be lost. An inadequate climate policy would, in the second half of the century, result in hundreds of thousands of victims in Western Europe alone. The risk of reaching such a point of no return worsens exponentially with an increase in temperature between 1ºC and 2ºC.

approach",[5] through which climate issues are anchored to fundamental rights. This connection has the dual function of giving climate issues a transversal legitimacy – based on a plurality of rights – and relying on the interpretation given by the regional courts on human rights in order to clarify the scope of State obligations.[6]

It is interesting to note that human rights-based climate cases have been predominantly raised in Europe, followed by North America, Latin America, Asia-Pacific and Africa, and that only about 13% of disputes were submitted to international and regional human rights bodies.[7] Even though a substantial part of the climate dispute relies on the rights enshrined in international human rights conventions, these courts are not always best suited to address climate change issues.

Climate cases mainly involve environmental associations,[8] which tend to be more suitable for promoting widespread interests such as the environment, and are directed to the States,[9] the main recipients of human rights obligations.

In this very heterogeneous framework, an interesting perspective is offered by domestic case-law in Europe, in which human rights' obligations stemming from the jurisprudence of the ECtHR are used as a means of interpretation of

5 Paris Agreement, Preamble: "Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity […]". On the recognition of the relationship between climate change and human rights' violations, see the two Reports by J. Knox, Special Rapporteur on the Environment and Human Rights at the United Nations Human Rights Council (UNHRC): *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Climate Change Report*, UN Doc A/HRC/31/52 (2016); *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Framework Principles*, UN Doc A/HRC/37/59 (2018).

6 On this dual funcion, see P. Pustorino, *Cambiamento climatico e diritti umani: sviluppi nella giurisprudenza nazionale*, in *Ordine internazionale e diritti umani*, 2021, p. 600: «[…] il richiamo della disciplina normativa sui diritti umani – sia essa specificamente dedicata alla protezione ambientale o ricavata per via ermeneutica dal diritto alla vita, alla salute, *etc.* – sembra in grado di svolgere una funzione correttiva di specificazione del contenuto degli obblighi statali a livello internazionale e interno in materia ambientale […]».

7 A. Savaresi, J. Setzer, *Rights-based litigation in the climate emergency: mapping the landscape and new knowledge frontiers*, in *Journal of Human Rights and the Environment*, cit.

8 J. Setzer, R. Byrnes, *Global trends in climate change litigation: 2022 snapshot policy report*, cit., p. 11 ss.: more than half of all cases (307 out of 576) and about 90% (56 out of 63) of cases in the reference study period were raised by non-governmental organisations, individuals, or both.

9 J. Setzer, R. Byrnes, *Global trends in climate change litigation: 2022 snapshot policy report*, cit., p. 11 ss.: just over 70% (421 out of 576) of all global cases and 73% (46 out of 63) of cases in the reference study period were filed against governments.

States' obligations towards their citizens (i.e., the so-called *Urgenda Case*, and its "followers").

The present paper aims at analysing the pros and cons of this pattern.

The focus on domestic jurisdiction offers various levels of facilitation to the access to environmental justice [para. 2]. First, it provides "softer" criteria of admissibility than international ones. Secondly, it produces binding judgments already installed in the domestic legal system, which are fully and immediately enforceable. And lastly, it often recognizes locus standi for third parties or it offers the possibility of class actions.

On the other hand, domestic remedies clash with obstacles deriving from the separation of powers argument and the risk of the lack of impact that a single decision can have, especially in legal systems of civil law typical of continental Europe [para. 3].

A possible way of contrasting these inherent obstacles is precisely that of the "collective claim". The impact that environmental and climate deterioration have on human rights cannot and should no longer be tackled as a case-by-case issue.

By analysing national case law on climate change, we can observe a trend of application of international human rights' law standards of interpretation of international commitments on a national level and from a collective point of view. This demonstrates that, although the protection afforded by the European Convention on Human Rights to the Environment is limited, the use of its interpretative standards can serve as an effective instrument of environmental protection at national level, contributing to raising the threshold set by the Convention itself.

2. The ECHR as a means of interpretation of international environmental commitments: *Urgenda and Climate case Ireland*

Within the European regulatory framework, human rights are enshrined in the European Convention on Human Rights (ECHR), whose monitoring body is the European Court of Human Rights ("the European Court").

Although the Convention does not protect the environment as such,[10] the European Court has been called upon several times to interpret its Articles with

10 The European Convention on Human Rights is the only regional human rights treaty that does not provide for a right to a healthy environment, or its equivalent. On 29 September 2021, the Parliamentary Assembly of the Council of Europe passed a resolution urging member States to adopt an Additional Protocol that would adequately protect the environment, encouraging "[…] the Council of Europe to recognise, in time, the intrinsic value of nature and ecosystems in the light of the interrelationship between human societies and

the purpose of developing its case-law on the environment, in view of the fact that the exercise of certain rights of the Convention may be undermined by the existence of environmental damage and exposure to environmental risks.[11]

This is done mainly through the application of Articles 2 (right to life) and 8 (right to respect for private and family life). It is worth noting that, although the substantive scope of these two provisions is different, the Court held that in the context of hazardous activities the scope of positive obligations under Article 2 of the Convention overlaps to a large extent with those under Article 8.[12] Therefore, the State is required to take the appropriate measures not only in the case of material damage but also if there is a "real and immediate risk" that such damage occurs.[13] In this context, the term "immediate" does not mean that the risk must materialise within a short period of time, but rather that the risk in question is directly threatening the people involved, even if it were to materialise only in the longer term.[14]

---

nature" (Parliamentary Assembly, Res. 2396, 29 September 2021, para. 6). More recently, the Committee of Ministers has recommended that all 46 Member States actively consider the recognition of the human right to a clean, healthy and sustainable environment (CM/Rec(2022)20, 27 September 2022).

11 The first case in which the European Court of Justice ruled on the matter was European Court of Human Rights, *Lopez Ostra v. Spain*, application no. 16798/90, judgment of 9 December 1994. At para. 51, the Court stated: "Severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health".

12 ECtHR, *Budayeva and others v. Russia*, applications nos. 15339/02, 21166/02, 20058/02, 11673/02 e 15343/02, judgment of 20 March 2008, para. 133: "It has been recognised that in the context of dangerous activities the scope of the positive obligations under Article 2 of the Convention largely overlap with those under Article 8 (see Öneryıldız, cited above, §§ 90 and 160). Consequently, the principles developed in the Court's case-law relating to planning and environmental matters affecting private life and home may also be relied on for the protection of the right to life".

13 O.W. Pedersen, *The European Court of Human Rights and International Environmental Law*, in *The Human Right to a Healthy Environment*, J.H. Knox e R. Pejan (eds), Cambridge, 2018, p. 86 ss.

14 ECtHR: *Öneryildiz v. Turkey*, application no. 48939/99, judgment of 30 November 2004 (in the case of a gas explosion in a landfill, the risk of this happening had existed for years and had been known to the authorities for years); *Budayeva and others v. Russia*, applications nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, judgment of 20 March 2008 (the authorities were aware of the danger of mudslides and the possibility of them occurring); *Kolyadenko and others v. Russia*, applications nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, judgment of 28 February 2012 (the authorities knew that in case of exceptionally heavy rains, evacuation would be necessary); *Taskin and others v. Turkey*, application no. 46117/99, judgment of 10 November 2004 (threat of environmental pollution that could materialise in twenty or fifty years); *Tătar v. Romania*, application no. 67021/01, judgment of 27 January 2009 (possible long-term health risks from heavy metal emissions from gold mining).

The Court has repeatedly pointed out that the crucial element to trigger the violation of the rights referred to in Article 8 is the existence of a harmful effect on a person's private or family life.[15]

More generally, under Article 34 of the Convention, a person lodging an application must be able to declare that he or she is a victim of an infringement of the Convention. This means in general that the applicant must be directly affected by the infringement. Art. 34, therefore, does not provide for the possibility of an *actio popularis*, as confirmed by the case law of the Court.[16] This limit has repercussions on the possibility for non-governmental organisations to base their dispute at national level on Articles 2 and 8 of the ECHR.

Indeed, one of the main issues in climate cases is determined by national legislation on legal standing. This is often invoked as a parameter of respect for the principle of the separation of powers,[17] in fact standing up as a defence of democracy, as such difficult to overcome. This is further complicated when national legislation is intertwined with the relevant legislation within the European Convention on Human Rights. The cases dealt with in this paragraph represent two ways of dealing with the relationship between international law and domestic remedies on the matter of legal standing.

The first case, also from a chronological point of view, is the famous *Urgenda* case, issued in 2015 by a Dutch environmental group, the Urgenda Foundation (from the English words "urgent" and "agenda"), and about nine hundred Dutch citizens, which sued the Dutch government, demanding that it implement more effective measures to prevent global climate change.

The Hague Tribunal ordered the Dutch State to limit greenhouse gas emissions to 25% above 1990 levels by 2020, finding the government's current commitment to reduce emissions by 17% insufficient to meet the State's fair contribution to the UN target of keeping global temperature increases within 2°C above pre-industrial conditions. The judges concluded that the State has a duty to take climate change mitigation measures because of the "severity of the consequences of climate change and the great risk of climate change occurring".[18]

15 *Ex multis* ECtHR, *Kyrtatos v. Greece*, application no. 41666/98, judgment of 22 May 2003, para. 52: "The crucial element which must be present in determining whether, in the circumstances of a case, environmental pollution has adversely affected one of the rights safeguarded […] is the existence of a harmful effect on a person's private or family life and not simply the general deterioration of the environment".

16 ECtHR: *Aksu v. Turkey*, applications nos. 4149/04 e 41029/04, judgment of 15 March 2012; *Burden v. UK*, application no. 13378/05, judgment of 29 April 2008; *Dimitras and others v. Greece*, applications nos. 59573/09 e 65211/09, decision of 4 July 2017; *Cordella and others v. Italy*, applications nos. 54414/13 e 54264/15, judgment of 24 January 2019; *Kalfagiannis and Pospert v. Greece*, application no. 74435/14, decision of 9 June 2020.

17 See below, para. 3.1.

18 To combat climate change, art. 4 para. 2 of the Paris Agreement states that each State "[…] shall prepare, communicate and maintain successive nationally determined contributions that

In order to arrive at this conclusion, the court cited, without directly applying them, the principles of the European Convention on Human Rights.

Both the government and Urgenda appealed. The latter, incidentally, challenging the court's decision that the Foundation could not rely directly on Articles 2 and 8 of the European Convention on Human Rights in the proceedings.

On 9 October 2018, the Hague Court of Appeal upheld the District Court's judgment, concluding that, failing to reduce greenhouse gas emissions by at least 25% by the end of 2020, the Dutch Government was acting illegally in breach of its "duty of care" under Articles 2 and 8 of the ECHR.[19]

The Dutch government appealed to the Supreme Court, which, on 20 December 2019, confirmed the decision pursuant to Articles 2 and 8 of the ECHR, with a ruling that was defined as "a landmark for future climate change litigation".[20]

In par. 5 – entitled «Do articles 2 and 8 ECHR oblige the State to take measures?» – the Court answered a number of questions concerning the scope and application of Articles 2 and 8 of the ECHR.

Recognising that Articles 2 and 8 impose positive obligations on States, the Supreme Court focuses on a dual impact of the European Court's interpretation standards. First, it states that, in accordance with established case-law of the European Court of Human Rights, the provisions of the ECHR must be interpreted and applied in such a way as to make its guarantees practical and effective.[21] This shows that, in its assessment, the Supreme Court recognises

---

it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions".

19 The Court upheld Urgenda's appeal, stating that the Dutch Government has an obligation under the European Convention to protect these rights from the real threat of climate change. In so doing, it rejected the government's argument that the lower court's decision constituted "an order to create legislation" or a violation of the principle of separation of powers (see below, para. 3.1). In response to those arguments, the Court affirmed the obligation to apply the provisions with direct effect of the treaties to which the Netherlands is a party, including Articles 2 and 8 of the ECHR. It also made clear that nothing in Article 193 of the Treaty on the Functioning of the European Union prohibited a Member State from taking more ambitious action than the EU as a whole, or that the adaptation measures adopted could offset the government's obligation to reduce greenhouse gas emissions. Finally, it stated that the global nature of the climate emergency did not justify the failure of the Dutch Government to act.

20 A. Nollkaemper, L. Burgers, *A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case*, in *EJIL:Talk!*, 6 January 2020. Per un'analisi dettagliata del caso e dei suoi punti di forza, si veda M. Montini, *Verso una giustizia climatica basata sulla tutela dei diritti umani*, in *Ordine internazionale e diritti umani*, 2020, p. 506 ss.

21 Supreme Court of the Netherlands, *Urgenda Foundation v. State of the Netherlands*, judgment of 20 December 2019, para. 5.4.1: "According to established ECtHR case law, the provisions of the ECHR must be interpreted and applied so as to make its safeguards practical and effective. According to the ECtHR, this 'effectiveness principle' ensues from 'the object and purpose of the Convention as an instrument for the protection of individual human beings'". See also ECtHR, *Kiliç v. Turkey*, application no. 22492/93, judgment of 28 March

that the interpretation of international human rights standards should depend on the relevant international case law. In this way, it explicitly states that before applying those rules in an internal case, the national court must ask itself how those rules are interpreted in the referring international Court.

As confirmed by par. 5.6.1, in which the Court examines the value of the ECHR's interpretation rules for the Dutch courts,[22] since the ECHR subjects the Netherlands to the jurisdiction of the European Court of Human Rights (Art. 32 ECHR), the Dutch courts must interpret these provisions as the European Court of Human Rights has done or interpret them according to the same standards of interpretation as the European Court of Human Rights.

Secondly, in par. 5.8, the Supreme Court states that, despite the global nature of climate change, Articles 2 and 8 of the ECHR should be interpreted in such a way as to oblige States Parties to "play their part" in combating this danger. This obligation is derived, according to the Supreme Court, from the no harm principle of international law,[23] as evidenced by the Preamble to the United Nations Framework Convention on Climate Change (UNFCCC). Applied to greenhouse gas emissions, the principle implies that States can be called upon to contribute to the reduction of greenhouse gas emissions. This approach justifies a partial responsibility: each State is responsible for its own part and can therefore be called upon to respond.[24]

2000; and *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, application no. 47848/08, judgment of 17 July 2014.

22 *Urgenda Foundation v. State of the Netherlands*, cit., para. 5.6.1: "Pursuant to Articles 93 and 94 of the Dutch Constitution, Dutch courts must apply every provision of the ECHR that is binding on all persons. Because the ECHR also subjects the Netherlands to the jurisdiction of the ECtHR (Article 32 ECHR), Dutch courts must interpret those provisions as the ECtHR has, or interpret them premised on the same interpretation standards used by the ECtHR".

23 According to the no harm principle a State is duty-bound to prevent, reduce and control the risk of environmental harm to other States. More generally, on the international responsibility of States on the matter of climate change see M. Gervasi, *Le regole della responsabilità internazionale degli Stati dinanzi alla sfida del cambiamento climatico*, in A. Spagnolo, S. Saluzzo (a cura di), *La responsabilità degli Stati e delle organizzazioni internazionali: nuove fattispecie e problemi di attribuzione e di accertamento*, Milano, 2017, p. 61 ss.

24 The Netherlands had argued that the 25% target applied to 'developed nations' as a group, not to individual Netherlands. The Court rejected this argument as the State had not demonstrated why a lower percentage should be applicable to the Netherlands. See A. Nollkaemper, L. Burgers, *A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case*, in *EJIL:Talk!*, cit.: It is relevant that the Netherlands belongs to the countries with the highest emissions per capita in the world. Moreover, the State failed to demonstrate that the 25% reduction by the end of 2020 would have been an unreasonable or unbearable burden under the case law of the European Court. Moreover, this is perfectly consistent with the provisions of the Paris Agreement, in that they provide that each State must submit its NDCs every five years, and with the principle of common but differentiated responsibilities adopted by the UNFCCC. See S. Jolly, A. Trivedi, *Principle of CBDR-RC: Its Interpretation and*

Finally, and this is one of the most interesting aspects of the judgment, the Supreme Court states that the lack of victim status of Urgenda before the European Court does not affect Urgenda's right to initiate national proceedings. This does not deprive Urgenda of the power to appeal under Dutch law under Article 3:305a of the Dutch Civil Code on behalf of residents who are direct victims (para. 5.9.3).[25] Therefore, the fact that Urgenda would not be in a position to initiate proceedings before the European Court in order to prove a violation of the rights laid down in Articles 2 and 8 of the ECHR does not affect the possibility of invoking those same rights – on the basis of those same articles – before the national court. This passage, more than any other, shows the impact of the European Court's interpretation standards in the Supreme Court's ruling.[26]

The issue in *Climate Case Ireland* is mostly identical to *Urgenda*,[27] but the national legislative framework provides a very different conclusion.

Implementation Through NDCS in the Context of Sustainable Development, in *Washington Journal of Environmental Law and Policy* Vol. 11, 2021, p. 309 ss.

25 Art. 3:305a of the Dutch Civil Code guarantees the possibility of a 'class action', stating that any entity that results from its statute as a bearer of specific interests – e.g. the environmental one – can sustain "a legal claim that intents to protect similar interests of other persons", to obtain the following remedies: "[…] in order to force the defendant to disclose the judicial decision to the public, in a way as set by court and at the costs of the persons as pointed out by the court. It cannot be filed in order to obtain compensatory damages (3); A legal action as meant in paragraph 1 cannot be based on specific behaviour as far as the person who is harmed by this behaviour opposes to this (4); A judicial decision has no effect with respect to a person whose interests are protected by the legal action, but who has made clear that he does not want to be affected by this decision, unless the nature of the judicial decision brings along that it is not possible to exclude this specific person from its effect (5)".

26 However, a comment needs to be made on this, as it relates to the issue of the direct applicability of the European Convention. The Netherlands adopts a 'monist' approach to international law and gives the ECHR the same legal status as national law. Courts of 'dualist' States prefer to rely on national laws rather than external sources. H. Keller, A. Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, Oxford, 2008; L.R. Helfer, A.M. Slaughter, *Towards a Theory of Effective Supranational Adjudication*, in *Yale Law Journal* 1997, p. 332 ss. On the direct applicability of the European Convention in Italy, still under discussion, see the contributions presented at the SIDI webinar of 3 December 2020, entitled *Diretta applicabilità della CEDU. Quo vadis dopo la sentenza Padula delle Sezioni Unite?* whose proceedings are published in *Diritti umani e diritto internazionale* vol. 1, 2022.
It should be noted, however, that the impact of sources of international law, and in particular of the ECHR, is not necessarily limited by the choice of a 'dualist' approach, which does not preclude the possibility that the jurisprudence of international courts, as the European Court of Human Rights, played a role and was considered in the deliberative and heuristic phase. See J. Bell, *The Argumentative Status of Foreign Legal Arguments*, in *Utrecht Law Review* 2012, p. 8 ss.

27 Friends of the Irish Environment ("FIE") appealed in 2017 to the High Court alleging that the Irish Government's approval of the National Mitigation Plan violated the Ireland's Climate Action and Low Carbon Development Act 2015 ("the 2015 Act"), the Irish Constitution and the European Convention on Human Rights, in particular the right to life and the right to

After the High Court ruled for the government in 2019,[28] the association appealed directly to the Supreme Court, which quashed the National Mitigation Plan ("the Plan") in 2020 because it was *ultra vires* in respect to the 2015 Act that approved it. However, in its judgment, the Supreme Court affirmed that Friends of the Irish Environment lacked standing to bring its claims under the ECHR.[29]

Indeed, the Supreme Court reinstates that in Irish law there's no such thing as an *actio popularis*, and, in addition, the Irish Constitution does not provide a *jus tertii*, which means that Friends of the Environment could not even represent the interests of others.[30]

While in line with the conclusions reached by the Supreme Court in *Urgenda*, namely that the lack of victim status before the European Court did not affect the possibility of an appeal under national law, the Supreme Court based its analysis on the general rule of Irish case law that, in order to be legitimised, the applicant must be able to demonstrate that the rights he enjoys have suffered effective – or potential – harmful interference because of the measure whose constitutionality is in question.[31] The judges admitted, however, that since it is a "rule of practice", it is subject to expansion, exception or qualification when the justice of the case so requires. In this sense, since the fundamental consideration in the exercise of court jurisdiction is to ensure that persons are not adversely affected by the unjust deprivation of a constitutional right,

private and family life. FIE argued that the Plan, which aimed to move to a low-carbon economy by 2050, was inconsistent with Ireland's human rights law and commitments because it was not designed to achieve substantial reductions in short-term emissions. The case was brought before the High Court on 22 January 2019. FIE asked the High Court to annul the government's decision to approve the Plan and, if appropriate, to order the drafting of a new plan.

28 The judges rejected the argument that the Plan was not valid for failing to achieve substantial short-term emission reductions, concluding that the Act did not require special interim targets. The Court stated that the government had properly exercised the political discretion offered by the law, explaining that the Plan was only a first step in achieving the targets for the transition to a low-emission and environmentally sustainable economy by 2050, which would be reviewed and updated. The Court concluded that FIE was entitled to make rights-based claims but rejected the argument that the government had violated the Irish Constitution and the commitments under the European Convention on Human Rights because the Plan was only "one, albeit extremely important, piece of the jigsaw".

29 For a critical analysis of the judgment and its actual impact, see V. Adelmant, P. Alston, M. Blainey, *Human Rights and Climate Change Litigation: One Step Forward, Two Steps Backwards in the Irish Supreme Court*, in *Journal of Human Rights Practice* 2021, p. 1 ss.

30 Supreme Court of Ireland, *Friends of the Irish environment v. the Government of Ireland*, judgment of 31 July 2020, para. 5.37. The Supreme Court has reported, departing from it, the position of the judge of first instance, according to which the *locus standi* of FIE was to be recognized on the basis of "important issues of a constitutional nature which affected both its own members and the public at large, as well as significant issues in relation to environmental concerns".

31 Supreme Court of Ireland, *Cahill v. Sutton*, judgment of 9 July 1980, para. 284.

there will be cases where the lack of locus standi may be overlooked if, in the circumstances of the case, there is a "transcendent need".[32]

On the other hand, the Supreme Court, par. 7.18, stated that no "real attempt" had been made to explain why FIE had initiated this procedure and why individual plaintiffs had not initiated the procedure, or tried to intervene. After all, "[i]t is not suggested that the potential class of individual plaintiffs (which is very extensive indeed) suffers from any vulnerability or would face any difficulty in asserting the claim or that the claim would in any way be limited if brought by individuals".[33]

This last passage, that *prima facie* ratifies the definitive lack of locus standi of FIE, emphasises that the issue is not insuperable at all. While the decision of the Supreme Court suggests an evident refusal to take a step forward, it can be argued instead that on the basis of the exception mentioned above – "where there would be a real risk that important rights would not be vindicated unless a more relaxed approach to standing were adopted" – the question of representation, intrinsically linked to intergenerational equity, could be raised again in the future, to be addressed and – possibly – overcome. Indeed, at par. 9.5 of the judgment under examination, having stated that FIE had not sufficiently argued for the existence of an autonomous right to a healthy environment, the Supreme Court concludes that the possibility of invoking rights and obligations of constitutional status is not excluded, stating that they should be addressed in an "appropriate case", but leaving open the question of what the characteristics of the latter might have. Therefore, it would seem that the real question pertains to the rank conferred on the value of the environment, and not to the procedural problem of the lack of legitimacy, wrongly used as an indicator of the violation of the principle of separation of powers.

32 In particular, the judges mention, as acceptable exceptions, those given by the rights of the "unborn" and prisoners with psychiatric disorders. See O. Kelleher, *A critical appraisal of Friends of the Irish Environment v. Government of Ireland*, in *Review of European, Comparative & International Environmental Law* 2020, p. 145: "It is difficult to see how a case, taken by an NGO with a bona fide interest in environmental protection and climate action and strong track record in environmental litigation, challenging a systemic environmental issue that affects the wider community is all that different from these earlier cases. Like those earlier cases that recognized an exception to the general standing rules, those whose interests are prejudiced by the government's inadequate response to climate change are 'the most vulnerable and disadvantaged members of our society'. […] Given the urgent, far-reaching and unprecedented threat runaway climate change poses to a panoply of rights, it is questionable whether the nominal addition of an individual plaintiff would have made the constitutional rights arguments canvassed any more concrete".

33 *Friends of the Irish environment v. the Government of Ireland*, cit., para. 7.18.

3. The other side of domestic remedies: issues and possible ways to overcome them

As stated above, while offering a privileged forum for climate litigation, domestic jurisdiction faces difficulties inherent to its nature. National disputes are often dismissed on the basis of an "anti-democratic" interference of judges in the political process. Environmental concerns are still considered to be a political question, in which the determinations should be left to the democratically elected representatives in Parliaments.

Moreover, issues arise even when the case is considered admissible and there is a favourable ruling. Indeed, national judgments, while being immediately enforceable, are still confined to national borders. This poses the question of the effective impact that these decisions can have for the development of an environmentally conscious case-law in Europe.

These two questions show the apparent limits of domestic remedies. To try and answer them, it is necessary to analyse the theoretical bases of the argument of the separation of powers, and to explore the possibility of a dialogue among courts in Europe.

3.1 The argument of the separation of powers in national jurisprudence: *Neubauer v. Germany*

The principle of separation of powers is one of the arguments most used by judges to justify the inadmissibility of climate cases.[34] However, the thesis does not seem sufficient to stem – or delegitimise – the phenomenon of climate litigation.

The constitutional structure of the governments of most nations in Europe is based on the principle of the separation of powers, pillar of the rule of law, which arose from the need to protect citizens against the arbitrariness of the sovereign.[35] With regard to the role of the judiciary in some climate cases, the

34 To mention some: *Plan B Earth v. The Secretary of State for Business, Energy and Industrial Strategy*, 2019 (alleged violation by the government of the Climate Change Act 2008 for failure to revise its emission reduction target, denied on the basis of government discretion); *Family Farmers and Greenpeace Germany v. Germany*, 2019 (alleged violation of the constitutional rights of plaintiffs with insufficient action to achieve its greenhouse gas reduction targets by 2020, denied on the basis of government discretion); *Association of Swiss Senior Women for Climate Protection v. Federal Department of the Environment, Transport, Energy and Communications*, 2016 (adequacy of the climate change mitigation objectives and implementing measures of the Swiss Government and possible human rights violations, rejected as a "matter for the democratic process, non-judicial". The Association applied to the European Court of Human Rights in 2020, making it the first climate change case to be brought before the European Court after the exhaustion of domestic remedies. In 2022 it was referred to the Grand Chamber).

35 See *Two treaties of government* by John Locke (1690) and, for the *trias politica*, *L'esprit des lois* by Montesquieu (1748). See also, E.G. Assanti, *Il ruolo innovativo del contenzioso climatico tra*

doubt arises that the decisions of judges result in a judicial activism that goes beyond the boundaries reserved for the judiciary.[36]

On the other hand, it is argued that these judicial decisions confirm a working system of separation of powers based on the "right to justification".[37] According to this theory, which sees the "right to justification" as the true foundation of liberal democracies, judges in climate cases push those who exercise public power to better justify their choices in the light of established scientific knowledge, in order to protect the individual autonomy of future generations.[38] In this sense, the "interference" of judges does not put under pressure the principle of separation of powers, but actually contributes to its full realisation.

Moreover, it is worth considering the collective approach that is considered the basis of the climate cases faced so far. Although neither *Urgenda* nor *Climate Case Ireland* makes explicit mention of intergenerational equity, in both cases the collective and precautionary approach underlies the understanding of the need to protect the environment not only at present but also, and above all, towards the future. The basis of the collectiveness of climate cases relies heavily on the concept of intergenerational equity, enshrined in Principle 1 of the Stockholm

---

legittimazione ad agire e separazione dei poteri dello Stato. Riflessioni a partire dal caso Urgenda, in *federalismi.it*, 14 July 2021. The Author affirms that in the structure of the *trias politica*, it is already possible to identify the evolution of the founding principle of modern constitutionalism. Montesquieu affirms that it is necessary that the system of State powers be designed in such a way that each can control and, if necessary, restrain the other: it is, therefore, a strictly negative vision of the principle (one power as the limit of the other).

36 For example, in *Urgenda*, the Supreme Court established climate policy in place of the government without a specific legal basis (only on the basis of civil law institutes). While in one case in 2003 the Supreme Court adopted a more sober tone and decided that the judiciary was not allowed to order the legislature to enact legislation. Therefore, a more conservative way was actually possible. See L.F.M. Besselink, *Supreme Court of the Netherlands (Hoge Raad der Nederlanden), 21 March 2003, Civil Chamber, No. C01/327HR. Stichting Waterpakt, Stichting Natuur en Milieu, Vereniging Consumentenbond and three othe*, in *Common Market Law Review* 5, 2004, p. 1429 ss.

37 R. Forst, *Justification and Critique: Towards a Critical Theory of Politics*, Ciaran Cronin (tr.), Polity, 2014.

38 C. Eckes, *Separation of Powers in Climate Cases*, in *Verfassungsblog*, 10 May 2021. The Author critically addresses the concept of "democratic legitimacy", stating that: "[c]onstitutional democracies are committed to an understanding that democratic legitimacy is not necessarily improved by greater majoritarianism. By allocating different functions to the three branches, executive, legislature, and judiciary, separation of powers aims to ensure that the tension between law and majoritarian politics is perpetuated and that neither law nor politics dominates the other. The judiciary has the important function of protecting individual autonomy as a crucially necessary element". See also L. Burgers, *Should Judges Make Climate Change Law?*, in *Transnational Environmental Law* 2020, p. 55 ss, for an emphasis on the role of the environment as a "prerequisite for democracy", and the "updating" function of judicial decisions, which represent "the voice of democracy: they confirm a societally changed interpretation of the law not (yet) made explicit by legislators".

Declaration,[39] which states that men have "a solemn responsibility to protect and improve the environment for present and future generations" and in all the following international instruments that have taken up this formulation.[40] The idea of an intergenerational responsibility evokes the concept of rights and obligations that affect all of humanity. It means that present generations are to some extent responsible for the conditions under which they leave the planet to future generations.[41]

---

39 The Stockholm Declaration is the first official action on the environment in international law issued at the 1972 United Nations Conference in Stockholm. On this occasion it was affirmed that men have a fundamental right to freedom, equality and adequate living conditions, in an "environment that [...] allows them to live in dignity and well-being" and that they have the "solemn responsibility" to protect and improve the environment for present and future generations. The conference participants adopted a non-binding instrument: an action plan containing recommendations for States. Although this is a non-binding legislative act, as is often the case, it has over time led to the conclusion of several treaties and other regulatory instruments dealing with environmental issues, both non-binding – as the Rio Declaration on Environment and Development (1992) – and binding – the Kyoto Protocol (1997) and the Paris Agreement on Climate Change (2015). In addition to these general recognitions, some instruments adopted after 1972 contain, instead, an explicit reference to the protection of the environment. These include Art. 24 of the United Nations Convention on the Rights of the Child (1989) and Art. 29 of the United Nations Declaration on the Rights of Indigenous Peoples (2007). Particularly significant is the General Comment n. 14 of the International Committee on Economic, Social and Cultural Rights which, in interpreting the content of the right to the best standard of health guaranteed by art. 12 of the Pact, specified that it includes the right to a healthy environment.

40 The only legal instruments that have accepted the wording of the Stockholm Declaration are art. 24 of the African Charter of Human and Peoples' Rights (1981) and Principle 28 f of the ASEAN Declaration on Human Rights. A more explicit formulation of a right to a healthy environment is contained in art. 11 of the Additional Protocol to the American Convention on Human Rights (San Salvador Protocol).

41 For further analysis of the concept of intergenerational equity see E.B. Weiss, *Intergenerational Equity*, in *Max Planck Encyclopedia of Public International Law*. On its theoretical bases, E.B. Weiss, *In Fairness To Future Generations and Sustainable Development*, in *American University International Law Review* 8, no. 1, 1992, p. 19 ss. Of particular importance is the question of rights and obligations. It is discussed whether the principle of intergenerational equity also conveys rights, with related obligations on the present generation. In this context, the obligations of the present generation towards future generations would be obligations or duties for which there are no related rights, because there are not yet certain persons to whom the right is attributed. According to Weiss' reconstruction, the rights of future generations could be more like "group rights" that protect common interests. In this sense they would represent "valued interests that attach to future generations" and that the representatives of future generations could protect.
On this point, the *Advisory Opinion OC-23/17 on the Environment and Human Rights* of the Inter-American Court of Human Rights, in which the judges stated that "[t]he human right to a healthy environment has been understood as a right that has both individual and also collective connotations. In its collective dimension, the right to a healthy environment constitutes a universal value that is owed to both present and future generations […]".

In this respect, Article 13 of the ECHR (right to an effective remedy)[42] is relevant in relation to the infringements of Articles 2 and 8 mentioned above. If we recognise, as provided for in some of the mentioned cases, that future generations will be directly affected by today's decisions, it is possible, through the lens offered by Article 13, to foresee the violation caused by depriving future generations of their representation. The case of *Neubauer v. Germany* provides a positive analysis of the topic.

In February 2020, a group of young Germans filed an appeal against the Federal Act on Climate Protection ("Bundesklimaschutzgesetz" or "KSG") in the Federal Constitutional Court, claiming that it was unlawful, contrary to constitutionally recognised human rights, in that it set the insufficient target of reducing emissions by 55% from 1990 levels by 2030.[43] Indeed, the KSG's 2030 target did not take into account the obligation imposed by the Paris Agreement on the German State to limit the global temperature increase well below 2°C. To achieve the objectives of the Paris Agreement, Germany should have reduced its emissions by 70% from 1990 levels by 2030. Their claims stemmed mainly from alleged violations of the fundamental right to a future consistent with the human dignity enshrined in Article 1 and the fundamental right to life and physical integrity enshrined in Article 2 of the Constitution, in conjunction with Article 20a of the Constitution, which binds the political process to the protection of future generations.

The applicants asked the Federal Constitutional Court to declare that the German legislature had violated the Constitution and that it was obliged to issue new reduction quotas to ensure that Germany's emissions were kept as low as possible, taking into account the principle of proportionality.

On 29 April 2021, the Federal Constitutional Court ruled that parts of the KSG were incompatible with fundamental rights. The Federal Constitutional Court ordered the legislature to establish clear provisions for reduction targets from 2031 onwards by the end of 2022. In response to the decision, federal legislators passed a bill approving an adapted KSG that requires, as a minimum, a 65% reduction in emissions from 1990 levels by 2030, which has been in force since 31 August 2021. It is worth noting that the government's response in the

42 Art. 1 ECHR provides for the obligation for States to ensure "to every person under their jurisdiction the rights and freedoms set out in Title I of the (...) Convention". Therefore, it is mainly the national authorities that must implement and enforce the rights and freedoms enshrined in the Convention, leaving the Court a merely subsidiary role. Moreover, the requirement of the "effectiveness" of the action has been interpreted in a progressively more restrictive manner by the Strasbourg courts, having to be existing, available and appropriate on the basis of the circumstances of the specific case (*ex multis*, ECtHR, *McFarlane v. Ireland*, application no. 31333/06, judgment of 10 September 2010; *Parrillo v. Italy*, application no. 46470/11, judgment of 27 August 2015; *De Souza Ribeiro v. France*, application no. 22689/07, judgment of 13 December 2012).

43 Federal Constitutional Court, *Neubauer and others v. Germany*, judgement of 24 March 2021.

person of Environment Minister Svenja Schulze has resulted in the proposal for a real "intergenerational climate contract".

In its judgment, the Court found that Article 20a of the Constitution not only obliges the legislator to protect the climate and aim to achieve climate neutrality, but also covers "how environmental burdens are spread out between different generations". The federal judges stated that the legislature had not proportionately distributed the budget between current and future generations,[44] arguing that a generation cannot be allowed to consume large portions of the CO2 balance by bearing a relatively smaller share of the reduction effort, if this means leaving subsequent generations with a drastic reduction burden and so "expose their lives to serious losses of freedom".

Moreover, the Court, accepting the reconstruction proposed by the applicants, stressed the constraint placed by Art. 20a to the democratic process, affirming that in Art. 20a environmental protection is elevated to "question of constitutional importance" because the democratic political process – underlying the enactment of ordinary laws – is organised according to a shorter-term perspective based on electoral cycles. This entails a structural risk that the Parliament will be less reactive in addressing the environmental issues that need to be pursued in the long term. Finally, the Court argues, "[i]t is also because future generations – those who will be most affected – naturally have no voice of their own in shaping the current political agenda". In the present judgment, the Court does not seem to be escaping the confrontation with democratic institutions, but, on the contrary, proposes reasons justifying this apparent erosion of the principle of separation of powers.

Moreover, we have reached a point in human history where most of the damage caused by climate change will not be reversible. This means that future generations will not be able to obtain an effective remedy before a national – or international – authority unless we invoke their rights today.

Therefore, as regards the possibility of raising the case, the separation of powers does not seem to be a convincing doctrine. This is partially different if we discuss the possibility of obtaining injunction orders.[45] As the Appeal Court in *Urgenda* stated "the District Court correctly held that Urgenda's claim is not intended to create legislation, either by parliament or by lower government

44 *Neubauer and others v. Germany*, judgment of 24 March 2021, para. 183 (official English translation): "[…] As intertemporal guarantees of freedom, fundamental rights afford the complainants protection against the greenhouse gas reduction burdens imposed by Art. 20a GG being unilaterally offloaded onto the future […]".

45 Court of First Instance of Brussels, *VZW Klimaatzaak v. Kingdom of Belgium & Others*, judgment of 17 June 2021. The Court recognised "un effet néfaste direct sur la vie quotidienne des générations actuelle et future" (para. 61), on the basis of articles 2 and 8 ECHR, as interpreted by the ECtHR. Although the judges considered that the government had breached its duty of care, they refused to set specific reduction targets on the basis of the argument of the separation of powers, which led VZW to appeal.

bodies, and that the State retains complete freedom to determine how it will comply with the order. The order also will in no way prescribe the substance which this legislation must have. For this reason alone, the order is not an 'order to enact legislation"'. Therefore, since no specific measure had been ordered, there would be no breach of the principle of the separation of powers. The judges, limiting themselves to setting an objective – to which the State is, moreover, already bound by its international commitments – left to the State the choice of the appropriate means to achieve it, in no way interfering with the sphere of competence reserved to the executive power.

The topic of injunction orders is a recurring argument when it comes to the separation of powers, which may indeed constitute a limit to what the national jurisdiction can obtain. However, it need not necessarily be understood in that sense. The absence of an injunction of specific objectives can also be considered a more flexible and perhaps more effective alternative, involving faster and more immediate "step by step" monitoring, and maintaining a channel of dialogue with the institutions.

3.2 One lonely soldier: the lack of international impact of domestic case law

The questions of "follow-up" and the actual impact of domestic case law are complicated by many factors. Among these, account must be taken of the differences between legislation and judicial systems, as well as political ones.[46] Once again, as already noted regarding *locus standi*, also responses to the argument of the separation of powers depend on national legislation. The same can be said virtually about any issue related to domestic jurisdiction. For the same reason, one of its weaknesses lies in its lack of international impact.

However, the parameter of the rules of the European Convention on Human Rights – as interpreted by the European Court – can offer, at least in part, common ground for national case law across Europe.

In its appeal in *Climate Case Ireland*,[47] Friends of the Irish Environment relied heavily on *Urgenda* and suggested that the Irish Supreme Court consider the Supreme Court of the Netherlands' reasoning convincing as to the correct application of the ECHR to climate change.[48] Friends of the Irish Environment

46 In this sense, P. Pustorino, *Cambiamento climatico e diritti umani*, cit., p. 600. According to the Author, this raises the question of the lack of uniformity between the legal systems applied by the individual States, given that only the most sensitive national courts, forward-looking and independent of national governments have already adopted or are likely to adopt such an approach in the short term, thereby imposing on their governments strengthened obligations compared to other countries, which will benefit from the economic advantage resulting from the provision of additional obligations imposed on other States.

47 Cfr. *supra* para. 2.

48 The Irish Government's arguments against this appear to be at least partially acceptable. First, national courts are warned about the weight to be given to decisions of other national courts under the Convention in cases where the European Court itself has not addressed the issue.

argued that, if the relevant interpretation of the Convention established by the Dutch Supreme Court is correct, it follows, on the basis of the facts, that Ireland also infringes its obligations under the Convention. The Irish Supreme Court, in (not) addressing the issue, relied largely on the considerations of the Court of First Instance, which concluded that *Urgenda* distinguished itself from *Climate Case Ireland* on the basis that in the latter case "no particular Statutory framework had been impugned".[49] In coming to this conclusion, it actually considered the decision of the Dutch Supreme Court.

In turn, the Federal Constitutional Court in *Neubauer*,[50] in affirming the need to specify further reduction targets in good time, mentions, as a source of prime relevance, the reasoning of the Irish Supreme Court in *Climate Case Ireland*.[51] A further mention of the case is made in par. 161 of the same judgment, which also refers to the decision of the Dutch Supreme Court in *Urgenda*.[52] *Urgenda* is undoubtedly the most frequently mentioned case.[53] In *Neubauer* it is mentioned four times,[54] in *Klimatická žaloba ČR v. Czech Republic* ten times.[55] In *VZW Klimaatzaak v. Belgium*, the court shares the interpretation offered by the Dutch Supreme Court, stating that the global dimension of the climate emergency does not remove the Belgian public authorities from their obligations under Articles 2 and 8 of the ECHR.[56]

The Prague Municipal Court in *Klimatická žaloba ČR* defines the ruling in *Urgenda* "inspiring" and relies largely on the reasoning of the Dutch Supreme

---

It is stressed that a State signatory to the Convention does not have the right to bring an action before the European Court to suggest that the interpretation given to the Convention by its own national legal system, which was unfavourable to the State, was incorrect. In addition, the Government suggested that FIE did not establish the requirements deemed necessary to give significant weight to the judgment of a national court on matters relating to the Convention. It has been said that the precise status of the ECHR in Dutch law has not been established and it has also been suggested that the Netherlands applies a monist system under which, unlike Ireland, international treaties can affect domestic law without the need for legislation.

49 *Friends of the Irish environment v. the Government of Ireland*, cit., para. 5.17.

50 Cfr. *supra* para. 3.1.

51 *Neubauer and others v. Germany*, cit., para. 253.

52 *Neubauer and others v. Germany*, cit., para. 161: here in the context of the interpretation of the Special Report of the Intergovernmental Panel on Climate Change (IPCC), which indicates that the reduction target of 1.5°C clearly reduces the likelihood of reaching so-called "tipping points" (IPCC, Special Report, *Global Warming of 1.5°C*, 2018; also IPCC, Special Report, *Global Warming of 1.5°C, Summary for Policymakers*, 2018).

53 All national complaints mention it, and most decisions take it into account (again, see the Sabin Centre database, available at www.climatecasechart.com).

54 *Neubauer and others v. Germany*, cit.

55 Prague Municipal Court, *Klimatická žaloba ČR v. Czech Republic*, judgment of 15 June 2022.

56 *VZW Klimaatzaak v. Kingdom of Belgium & Others*, cit., p. 61: "la dimension mondiale de la problématique du réchauffement climatique dangereux ne soustrait pas les pouvoirs publics belges à leur obligation pré-décrite découlant des articles 2 et 8 de la CEDH".

Court to address the question of the application of the standards offered by Articles 2 and 8 of the ECHR.[57] It proceeds to use them as a basis for interpreting the obligations arising from the Paris Agreement, sharing the consideration of the Dutch Supreme Court, and stating that if the government had properly fulfilled its obligations, climate change would have been milder and avoiding it, as enshrined in Article 2(1)(a) of the Paris Agreement, would have been more likely.[58]

It is relevant to note that the effect of such interconnections can also be appreciated in the preparation of the claim, where the reference to "twin" cases settled in a manner favourable to the applicants is used for the purpose of invoking the same legal arguments.[59]

Cases built on compliance with Articles 2 and 8 of the European Convention on Human Rights can rely on standards of interpretation developed by the prolific case law of the European Court. In fact, although the *Urgenda* judgment had a different impact depending on the State in which the proceedings took place, it is nevertheless constantly mentioned in almost all judgments, whether rights have been recognised or not.[60] The fact that attention has been given to the principles set out in *Urgenda* demonstrates the beginning of a dialogue between the Courts in Europe which, in the future, could provide national interpreters with more than sufficient tools to address climate and environmental issues at national level.

4. Conclusions

The analysis provided in this paper has offered the possibility to draw some conclusions on the matter of national climate litigation.

---

57 *Klimatická žaloba ČR v. Czech Republic*, cit., para. 234 ss. In *Urgenda*, the Dutch Supreme Court had interpreted the obligations arising from Articles 2 and 8 ECHR, and stated in paragraphs 5.6.2, 5.7.9 and 5.8 that these provisions oblige Member States of the ECHR to take climatic measures deriving from international law and generally accepted scientific standards. The Prague Municipal Court shares this conclusion, stating that the ECHR cannot be interpreted independently from other sources of international law. It states that the level of protection of subjective public rights within the meaning of Article 36(2) of the Charter of Fundamental Rights and Freedoms of the Czech Republic must not be lower than that required by Article 13 of the ECHR. Therefore, the right to effective judicial protection also entails the obligation of the court to verify whether there is a sufficient objective legal basis for determining the specific obligations of the State.

58 *Klimatická žaloba ČR v. Czech Republic*, cit., para. 325 ss.

59 It is necessary to mention the *Giudizio universale* case ("last judgment"), the first case of its kind in Italy, promoted by the association "A Sud" and currently in progress. For a thorough analysis of the elements of the appeal, see R. Luporini, *The "Last Judgment": Early reflections on Upcoming Climate Litigation in Italy*, in *Questions of International Law*, 2021, p. 27 ss.

60 And, as we have seen, the same happened with other "bold" judgments.

While indeed showing several problematic issues, in the light of what has been stated above, we can nevertheless affirm that domestic jurisdiction is a useful venue and collective claims are a virtuous example.

National judges have a unique view of the socio-political environment in which their decisions will be installed. They come from that same environment, they understand it and know how to navigate it. They tend to represent in some way the cultural and juridical background of the State. Therefore, their judgments, however "bold" they may be, are still generally more easily enforceable than international ones.

The experience of *Urgenda* and the other cases analysed shows that international human rights' law standards can have a profound environmental impact, even when they do not explicitly refer to the environment. They also demonstrate how the issues of *locus standi* can be overcome, and push towards a full recognition of the right to a healthy environment.

Indeed, other issues with domestic jurisdiction – namely, separation of powers doctrine and lack of international impact – can be overcome with the consideration of the relevance of the value of environmental protection. If a healthy environment has a constitutional weight on the juridical system, as can be said for most of the Constitutions in Europe,[61] than justiciability of the same should not be considered as a threat to the democratic foundation of the State, but as its very realisation.

Moreover, the practice of cross-referencing put in place by national courts can answer to the concern about the true impact of these judgments. The fact that national judges quote each other shows the birth of a trend in continental Europe. The pattern that emerges confirms a tendency to recognise climate claims based on human rights and contributes to creating a European consensus around these issues.[62] The latter refers to the level of uniformity in the

61 United Nations Environment Programme, *Global Judicial Handbook on Environmental Constitutionalism (3rd Edition)*, 2019, p.19: "Approximately 150 of the world's 193 UN members have constitutions from about 90 nations that expressly or implicitly recognize some kind of fundamental right to a quality environment, while a similar number imposes corresponding duties on individuals or the state to protect the environment, and about three dozen establish procedural rights in environmental matters. Constitutions also identify environmental protection as a matter of national policy, and some recognize specific rights concerning water, sustainability, nature, public trust and climate change. And that about two-thirds (126) of the constitutions in force address natural resources in some fashion, including water (63), land (62), fauna (59), minerals and mining (45), flora (42), biodiversity or ecosystem services (35), soil/sub-soil (34), air (28), nature (27), energy (22), and other (17). Some countries have constitutions that do many if not most of these things, while others do none of them. Most fall somewhere in between."

62 The European consensus is a concept used by the Court arising from the evolutionary nature of the interpretation of the European Convention on Human Rights. As the Court has repeatedly stated, the Convention is a living instrument anchored in the reality of the Member States in which it applies. On the subject, see P. Łącki, *Consensus as a Basis for Dynamic*

regulatory frameworks of Council of Europe member States on a particular subject. In this perspective, the national cases mentioned so far show an additional possible impact direction, not only downwards, within their territory, or horizontally, aimed at other national courts, but also upwards, with a view to transposition at supranational level.

Although a reversal of the trend is desirable,[63] allowing the European Court to clarify its position on environmental protection and climate change, the Court's essentially subsidiary role remains to be taken into account, mechanism which by its very nature implies a privilege of the domestic courts. Whether it acts as a spur to the advancement of domestic law, or as a receiver of it, it is clear that the future of the fight against climate change must pass through a "multi-voice" dialogue, within the European national courts, and between them and the European Court of Human Rights, through an exchange that is not limited to being one-way.

Interpretation of the ECHR – A Critical Assessment, in *Human Rights Law Review* 21, 2021, p. 186 ss. In the article the Author analyses the problems that the theory of consensus encounters in its practical application.

63 See C. Heri, *Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability*, in *European Journal of International Law* 2022. The article argues that an examination of climate change as a human rights issue by the Strasbourg Court, though requiring changes to current case law, is not only possible but also legally desirable.

What future for litigation on climate change adaptation? The potential of a human rights approach

Riccardo Luporini*
Sant'Anna School of Advanced Studies, Pisa
ORCID: 0000-0002-9248-0763
DOI: 10.54103/milanoup.151.c192

Climate change litigation is rising on a global scale. In most cases, especially the high-profile or 'strategic' ones, litigants are focusing on mitigation, i.e., reducing sources or enhancing sinks of greenhouse gases, rather than on adaptation. In this context, the present contribution aims to investigate how and to what extent litigation on climate change adaptation can progress in the future. Adaptation obligations are less developed than those on mitigation, and this may explain, at least in part, why litigation on adaptation is less advanced. However, the contribution points out that human rights arguments can complement the paucity of binding obligations on climate change adaptation and serve as a basis for adaptation cases. To this end, the chapter surveys the extant rights-based cases aimed to advance adaptation action, distinguishing between cases brought before domestic courts and complaints filed with international judicial or quasi-judicial bodies. The chapter discusses these cases and concludes with some reflections on the future of litigation on climate change adaptation.

Keywords: Climate change; climate change adaptation; climate change law; climate change litigation; international law; human rights law; environmental law; environmental litigation.

1. Introduction

Driven by the necessity to bridge the accountability and enforcement gap that affects climate change law, climate litigation is rising on a global scale.[1]

* The author wishes to thank the organising committee of the workshop "What future for environmental and climate litigation?" held on September 16 at the University of Milan. The author acknowledges support from the European Union: Project "European and International Human Rights Standards in Conflicts and Disasters"- EIHRSCaD GA 101127519.

1 See J. Setzer and C. Higham, *Global trends in climate change litigation: 2022 snapshot*, Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, 2022.

Litigants are currently focusing their efforts on "climate change mitigation", i.e., reducing sources or enhancing sinks of greenhouse gases (GHG),[2] which is widely recognised as the climate policy priority. However, besides mitigating climate change, human society must take all appropriate measures to adapt to its adverse effects. The Intergovernmental Panel on Climate Change (IPCC) defines "climate change adaptation" as "the process of adjustment to actual or expected climate and its effects, in order to moderate harm or exploit beneficial opportunities".[3] Adaptation thus includes a variety of measures, ranging from building flood defences to developing drought-tolerant crops. Compared to mitigation cases, litigation on climate change adaptation is far less developed.[4] Similarly, adaptation cases are a minority even in the Global South, where one would expect adaptation to be the first action to take, as countries are generally small emitters and already heavily affected by climate impacts.[5] Adaptation is far less involved in high-profile or high-impact cases, also known as "strategic litigation",[6] especially in that set of lawsuits that seek to replicate the "Urgenda success" before other European domestic courts.[7] However, given that the impacts of climate change are being increasingly felt worldwide and adaptation gaps are widening, litigation could serve as a strategic tool to advance this climate policy in the future. Among other legal grounds, human rights arguments may well play a crucial role in this type of lawsuit, because the link between adaptation action and human rights protection is direct and straightforward.

Against this background, the present contribution aims to investigate how and to what extent litigation on climate change adaptation may develop in the future, with a focus on cases that aim to advance adaptation action on the basis of human rights arguments. Section 2 deals with the law on adaptation, outlining how adaptation has unfolded in the international climate change regime. The Section shows that adaptation obligations are less developed than those on mitigation, which may be one of the reasons why litigation on adaptation is less advanced. Section 3 explains how and to what extent the human rights

2 See IPCC [O. Edenhofer, R. Pichs-Madruga et al. (eds)], *Climate Change 2014: Mitigation of Climate Change. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge University Press, 2014, 4.

3 See IPCC [C B Field, V Barros, et al. (eds)], *Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation, A Special Report of Working Groups I and II of the Intergovernmental Panel on Climate Change*, Cambridge University Press, 2012, 5.

4 See J. Setzer, C. Higham (n 1).

5 See J. Peel and J. Lin, *Transnational Climate Litigation: The Contribution of the Global South*, in *American Journal of International Law*, vol.113, 2019.

6 Strategic litigation has been defined as "cases, where the claimants' motives for bringing the cases go beyond the concerns of the individual litigant and aim to bring about some broader societal shift", see J. Setzer and C. Higham (n 1).

7 See R. Luporini, *Strategic litigation at the domestic and international levels as a tool to advance climate change adaptation? Challenges and prospects*, in *Yearbook of International Disaster Law*, vol.4, 2023. On the *Urgenda* case, see also the contribution to the present volume by G. Pane.

approach can complement the lack of binding obligations on climate change adaptation and serve as a basis for adaptation cases. Section 4 discusses some extant rights-based cases concerning climate change adaptation, distinguishing between cases brought before domestic courts and complaints filed with international human rights bodies. Building on the previous sections and the case survey, Section 5 concludes the paper with some reflections on the future of litigation on climate change adaptation.

2. The law on climate change adaptation

The United Nations Framework Convention on Climate Change (UNFCCC) is focused on mitigation, as reflected first and foremost in the objective of the Convention, enshrined in Article 2, namely to achieve "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system".[8] Actually, Article 2 mentions adaptation, stating that "[s]uch a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change". However, the wording seems to suggest that adaptation only concerns ecosystems (and not human society) and that it should occur "naturally".

In the whole international climate change regime, mitigation has always taken priority over adaptation.[9] This is because mitigation and adaptation were initially understood as two alternative strategies and because adaptation has long been viewed as an issue of concern only for those developing and least developed countries that are particularly vulnerable to the adverse effects of climate change.[10] On the contrary, developed States have normally resisted the development of adaptation law, because they feared that they would have been compelled to financially assist less developed and most vulnerable countries.[11]

That being said, Article 4 on "Commitments" binds all Parties to "formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to…facilitate adequate adaptation to climate change" and cooperate "in preparing for adaptation to the impacts of

8 The UNFCCC was agreed upon and adopted at the 1992 Earth Summit in Rio de Janeiro, entered into force in 1994 and today it has 197 Parties. See United Nations, in *Treaty Series*, vol.1771, p.107.

9 See in general D. Bodansky, J. Brunnée, L. Rajamani, *International Climate Change Law*, Oxford University Press, 2017; C. P. Carlarne, K. R. Gray, and R. Tarasofsky (eds), *The Oxford Handbook of International Climate Change Law*, Oxford University Press, 2016; B. Mayer, *The International Law on Climate Change*, Cambridge University Press, 2018.

10 D. Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, in *Yale Journal of International Law*, vol. 18, 1993; P. Sands, *The United Nations Framework Convention on Climate Change*, in *Review of European Community & International Environmental Law*, vol.1, 1992.

11 See D. Bodansky, J. Brunnée, L. Rajamani (n 9).

climate change".[12] At the same time, in the UNFCCC, adaptation has a strong international assistance component. This is outlined in Article 4.4, according to which "[t]he developed country Parties…*shall* also assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation" (emphasis added).[13] The provision, however, does not define what adaptation costs are, nor does it set a level or minimum threshold of funding. In addition, it establishes a general obligation for developed country parties as a whole, and not for "each Party".

If the 1997 Kyoto Protocol confirmed the primacy of mitigation over adaptation,[14] under the Cancun Adaptation Framework (CAF) adopted in 2010, the Parties agreed for the first time that "adaptation must be addressed with the same priority as mitigation".[15]

The adoption of the Paris Agreement in 2015 marked an important step forward for adaptation.[16] First, adaptation is included in the objectives of the Agreement. According to Article 2, "[i]ncreasing the ability to adapt to the adverse impacts of climate change and foster climate resilience" is one of the ways in which the Agreement aims to "strengthen the global response to the threat of climate change".[17] Second, Article 7 establishes "the global goal on adaptation of enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change".[18] This is, however, a qualitative and long-term goal and the Agreement itself does not provide any requirements regarding its operationalisation. At the Glasgow Climate Change Conference

12 UNFCCC, Art. 4.1 (b), (e).

13 See also UNFCCC, Preamble, para 19; and Arts 3.2 and 4.8.

14 Kyoto Protocol to the United Nations Framework on Climate Change, entered into force on 16 February 2005, see UNITED NATIONS, *Treaty Series*, vol. 2303, p.162.

15 UNFCCC COP, Decision 1/CP.16, *The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention*, FCCC/CP/2010/7/Add.1, March 2011, para 13. See also J. Verschuuren (ed.), *Research Handbook on Climate Change Adaptation Law*, Edward Elgar Publishing, 2013.

16 Paris Agreement, adopted 12 December 2015 and entered into force 4 November 2016, United Nations, *Treaty Series*, vol.3156. On the Paris Agreement, see D. Bodansky, *The Legal Character of the Paris Agreement*, in *Review of European, Comparative & International Environmental Law*, vol.25, 2016; D. Bodansky, *The Paris Climate Change Agreement: A new hope?*, in *American Journal of International Law*, vol.110, 2016; L. Rajamani, *The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations*, in *Journal of Environmental Law*, vol.28, 2016; M.-C. Cordonier Segger, *Advancing the Paris Agreement on Climate Change for sustainable development*, in *Cambridge Journal of International and Comparative Law*, vol.5, 2016; C. Voigt, *The Paris Agreement: What is the standard of conduct for parties?*, in *Questions of International Law*, vol. 26, 2016; J. E. Viñuales, *The Paris Climate Agreement: An Initial Examination*, in *C-EENRG Working Papers*, vol.3, 2015; A. Savaresi, *The Paris Agreement: Reflections on an International Law Odyssey*, in *ESIL Annual Conference Paper Series*, vol.13, 2016; A. Savaresi, *The Paris Agreement: A New Beginning?*, in *Journal of Energy & Natural Resources Law*, vol.34, 2016.

17 Paris Agreement, Art. 2.1 (b).

18 Paris Agreement, Art. 7.1.

in October-November 2021, the "Glasgow–Sharm el-Sheikh work programme on the global goal on adaptation" was established and launched with the overall aim of enhancing the understanding and facilitating the implementation of the global goal.[19]

In the following paragraphs of Article 7, the Parties acknowledge that adaptation action should adopt a "country-driven, gender-responsive, participatory and fully transparent approach", taking into specific account vulnerable groups, communities and ecosystems, indigenous peoples and their traditional know edge, under the guidance of the "best available science".[20] As some observers have already noted, the importance of this and similar provisions "lies less in their legal character but in their ability to provide a political dimension that raises adaptation as a cornerstone of action under the Paris Agreement and a context for adaptation efforts".[21]

Arguably, the lack of development of international norms on adaptation has brought a similar paucity of norms at the national (or regional) level, where most of the laws concern GHG emissions reduction and adaptation provisions are often included only in administrative plans or are procedural in nature.[22]

The limited development of adaptation-specific laws could be due to the very nature of adaptation, which is inherently multi-sectorial, i.e., it cuts across different sectors, such as disaster risk reduction, agriculture, and water management. On these bases, Mayer argued that "climate change adaptation should not be conceived of as a separate policy or legal field, but rather as a consideration to be mainstreamed in various policy and legal regimes".[23] While this is reasonable to a certain extent, one may counterargue that climate change mitigation is also multi-sectoral, as emissions reduction efforts span different domains such as energy production, transport, and agriculture; this, however, does not prevent the existence of climate change mitigation laws that set specific targets and emissions reduction pathways. What certainly characterises adaptation is its very place- and context-specific dimension. Adaptation measures differ locally, involving a diverse set of local administrative and legal instruments and actors. Moreover, measuring and evaluating adaptation action is much more complex than mitigation. The key challenge is that for adaptation there is "no common reference metrics in the same way that tonnes of GHGs or radiative forcing

19 See UNFCCC Decision 7/CMA.3 "Glasgow–Sharm el-Sheikh work programme on the global goal on adaptation", 8 March 2022.

20 See Paris Agreement, Arts. 7.2, 7.4, 7.5, and 7.6.

21 I. Suárez Pérez, A. Churie Kallhauge, *Adaptation (Article 7)*, in D. R. Klein et al., *The Paris Agreement on Climate Change: Analysis and Commentary*, Oxford University Press, 2017, p.202.

22 National laws and plans on adaptation can be found in the Climate Change Laws of the World database at the Grantham Research Institute on Climate Change and the Environment.

23 B. Mayer, *Climate Change Adaptation and the Law*, in *Virginia Environmental Law Journal*, vol.39, 2021 and B. Mayer, Climate Change Adaptation Law: Is There Such a Thing?, in B. Mayer, A. Zahar, *Debating Climate Law*, Cambridge University Press, 2021.

values are for mitigation".[24] The field of adaptation monitoring and evaluation or "adaptation tracking" is still under development.[25]

The scarcity of legal obligations at both international and national levels and difficulties in tracking adaptation progress (or lack thereof) are certainly major obstacles to litigation strategies on adaptation. On this basis, the next section addresses the question of whether, how and to what extent a human rights approach can complement the dearth of adaptation-specific norms and substantiate claims on adaptation.

3. The human rights approach to climate change adaptation

The human rights approach to climate action first emerged as a useful tool to address the underlying questions of (in-)justice related to climate change. In his 2009 seminal work, Humphreys suggested that "human rights occupy much of the space of justice discourse and therefore represent an 'essential term of reference' to address justice and equity questions in the context of climate change".[26] Not surprisingly, the most vulnerable to the adverse effects of climate change were the first to bring the link between human rights and climate change onto the international stage. The Inuit people decided to use a 'confrontational strategy' and launched the first complaint about climate change based on international human rights law.[27] On the other hand, the Maldives and other Small Islands Developing States (SIDS) embarked on a different strategy, aimed to influence the international law-making process on climate change.[28] In November 2007, the SIDS adopted the "Male Declaration on the Human Dimension of Global Climate Change", which is the first international instrument to explicitly acknowledge and express concern that climate change has "clear and

24 See IPCC [C. B. Field, V. Barros, et al. (eds.)] (n 3), p.853.

25 See United Nations Climate Change, *Monitoring and evaluation of adaptation at the national and subnational levels: Technical paper by the Adaptation Committee*,2023; UNEP, *The Adaptation Gap Report 2014. A Preliminary Assessment*, 2014; J. D. Ford et al., *Adaptation tracking for a post-2015 climate agreement*, in *Nature Climate Change*, vol.5, 2015.

26 S. Humphreys (ed.), *Human rights and climate change*, Cambridge University Press, 2009. Similarly, in 2008, he wrote: "human rights today occupy much of the space of justice discourse, to the extent that injustices that cannot be easily articulated in human rights terms can appear exotic or abstruse". See International Council on Human Rights Policy, *Climate Change and Human Rights: A Rough Guide*, 2008.

27 See *infra* Section 4.2.

28 SIDS are recognised as being among the States most seriously affected by climate change, see UN Office of the High Representative for the Least Developed Countries, *Landlocked Developing Countries and Small Island Developing States*. See also J. H. Knox, *Linking Human Rights and Climate Change at the United Nations*, in *Harvard Environmental Law Review*, vol.33, 2009.

immediate implications for the full enjoyment of human rights".[29] With the Male Declaration, the SIDS "solemnly requested" the international community to devote due attention to the link between human rights and climate change.[30] Following the Declaration, the Human Rights Council (HRC) adopted its first resolution on the topic and invited the Office of the High Commissioner on Human Rights (OHCHR) to conduct a study, which will serve as the incipit of the UN human rights system's activities on climate change.[31]

Today, a wide array of authoritative documents adopted by different UN human rights bodies have recognised that climate change affects the enjoyment of virtually all human rights.[32] States have also acknowledged this situation, with the preamble of the Paris Agreement specifying that parties "should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights".[33]

While the human rights discourse has been linked to climate action as a whole, some difference exists between the applicability of human rights obligations to mitigation and adaptation respectively. Hall and Weiss were among the first to point out this distinction in 2012.[34] They stressed that the human rights approach is "far more able" to address adaptation than mitigation, because, among other things, "adaptation more easily fulfills human rights' rigid state-actor and causation requirements than does mitigation".[35] This difference was also highlighted by the former Special Rapporteur on Human Rights and the Environment in his 2016 report.[36] In outlining human rights obligations at the national level, the Rapporteur states that these are "relatively straightforward with respect to the establishment and implementation of effective adaptation measures". Accordingly, "States must adopt a legal and institutional framework that assists those within their jurisdiction to adapt to the unavoidable effects

29 *Male Declaration on the Human Dimension of Global Climate Change*, adopted on 14 November 2007, preamble recital 12.

30 Ibid.

31 HRC, Resolution 7/23, *Human rights and climate change*, March 2008; OHCHR, *Report on the relationship between climate change and human rights*, UN Doc. A/HRC/10/61, January 2009.

32 See, among others, OHCHR, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc. A/HRC/31/52, 1 February 2016; OHCHR, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc. A/74/161, 1 October 2019; and OHCHR, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change*, UN Doc. A/77/226, 26 July 2022.

33 *Paris Agreement,* preamble.

34 M. J. Hall, D. C. Weiss, *Avoiding Adaptation Apartheid: Climate Change Adaptation and Human Rights Law*, in *Yale Journal of International Law*, vol.37, 2012.

35 Ibid., p.313-315.

36 OHCHR, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* (n. 32).

of climate change".[37] Among the measures to take – which vary depending on the specific context – the Special Rapporteur mentions early warning systems, physical infrastructure to reduce the risk of floods, and emergency response plans. The Rapporteur recognizes that with respect to mitigation "the situation is more complicated".[38] The Rapporteur emphasises that no State can prevent climate change impacts only by reducing its own GHG emissions, if emissions of other States continue to grow. While this in no way means that human rights law does not cover mitigation, the international cooperation component is certainly crucial in defining human rights obligations in this specific area.

Mayer has also recently pointed this out. In particular, he stressed that "the benefits of a state's mitigation action for the enjoyment of human rights are not as direct, immediate, and predictable as those of adaptation action".[39]

In addition, one should consider that mitigation action might severely impact the enjoyment of human rights, due, for example, to the collateral effects of decarbonization and energy transition policies and projects on labour rights and to the impacts of large renewable energy projects on local communities.[40]

On the other hand, however, it is important to recall that adaptation also has an important international cooperation component. The least developed and most vulnerable states need financial and technological support to advance adaptation on their territory. It would be unfair to place the entire burden of protecting the rights of the most affected individuals and communities on their shoulders, when the impacts of climate change are mainly due to the activities of developed states. International climate change law recognises this state of affairs.[41]

Curiously, this different applicability of human rights obligations to mitigation and adaptation has so far not been reflected in human rights-based climate litigation, which has mainly targeted mitigation.[42] This situation has also been at the centre of a heated debate in the specialised legal doctrine. When Heri contended that the European Court of Human Rights (ECtHR) examining climate

37 Ibid, paras 68–71.

38 Ibid.

39 B. Mayer, *Climate Change Mitigation as an Obligation Under Human Rights Treaties?*, in *American Journal of International Law*, vol.115, 2021.

40 Incidentally, it is worth noting that a new trend of litigation on these issues is emerging, which has been recently categorized as "just transition litigation". See: A. Savaresi and J. Setzer, *Rights-based litigation in the climate emergency: mapping the landscape and new knowledge frontiers,* in *Journal of Human Rights and the Environment*, vol.13, 2022; M.A. Tigre, et al., *Just Transition Litigation in Latin America: An initial categorization of climate litigation cases amid the energy transition*, in *Sabin Center for Climate Change Law*, January 2023.

41 See *supra* Section 2, and in particular: UNFCCC, Arts. 4.3, 4.4, 4.5, 4.7, 4.8, 4.9 and Paris Agreement, Arts. 2.1 (c), 4.5, 7.6, 7.7 (d), 9.1, 9.3, 9.4, 10.6, 11.1. See also: J. Auz, *Global South climate litigation versus climate justice: duty of international cooperation as a remedy?*, in *Völkerrechtsblog*, 2020.

42 A. Savaresi, J, Setzer (n 40).

cases "is not only possible but also normatively desirable", Zahar replied by arguing that she conflated adaptation and mitigation issues, and if human rights bodies might well adjudicate the former, this does not apply to the latter. [43]

To be clear, the present author does not endorse the view that human rights obligations do not cover mitigation action or that mitigation cannot be adjudicated by human rights bodies. What is argued here is that adaptation is easier to 'fit into' the human rights framework than mitigation, and, as a result, human rights-based litigation might more easily and effectively address adaptation than mitigation. The typical obstacles of causation and attribution are softened in relation to adaptation. Once established that the impacts of climate change interfere with the enjoyment of human rights and that adaptation measures are useful to prevent or reduce these impacts, States have to take action in this direction, even regardless of the causes of climate change. The responsibility to advance adaptation lies principally with the territorial State. Establishing the extent to which the given State is contributing to climate change is not a determining factor for adaptation obligations, and there is no need of envisaging complex shared responsibility patterns and 'fair share' quotas. [44]

In this way, a more effective role of human rights law can complement the weaker legal strength of adaptation law and foster rights-based cases on climate change adaptation.

4. Rights-based cases on climate change adaptation

The human rights approach can complement the shortage of legal obligations on climate change adaptation, and, on this basis, rights-based cases can serve as a useful tool to address adaptation gaps. This section includes a survey and discussion of the extant cases concerning adaptation, distinguishing between cases brought before domestic courts and complaints filed with international judicial or quasi-judicial bodies.

---

43 C. Heri, *Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability*, in *European Journal of International Law*, vol.33, 2022; A. Zahar, *The Limits of Human Rights Law: A Reply to Corina Heri*, in *European Journal of International Law*, vol.33, 2022. See also C. Heri, *Legal Imagination, and the Turn to Rights in Climate Litigation: A Rejoinder to Zahar*, in *EJIL:Talk*, October 2022; B. Mayer, *Climate litigation and the Limits of Legal Imagination: A Reply to Corina Heri*, in *Center for International Law, National University of Singapore*, 4 November 2022.

44 On the 'fair share' issue, see: L. Rajamani, et al., *National 'fair shares' in reducing greenhouse gas emissions within the principled framework of international environmental law*, in *Climate Policy*, vol.21, 2021; G. Liston, *Enhancing the efficacy of climate change litigation: how to resolve the "fair share question" in the context of international human rights law*, in *Cambridge International Law Journal*, vol.9, 2020.

4.1 The domestic level

Climate change litigation is mainly taking place before national courts.[45] This is also true for rights-based cases.[46] As explained above, most of these cases address mitigation. However, some prominent cases concerning adaptation have been litigated in different jurisdictions.[47]

A leading example is *Leghari v Pakistan*.[48] Mr Leghari sued the Pakistani government with a public interest lawsuit for its failure to implement the 2012 National Climate Change Policy and the Framework for Implementation of Climate Change Policy (2014–2030). In the complaint, he contends that climate change affects the constitutional rights to life and human dignity and to a healthy and clean environment. The Lahore High Court decided the case in favour of the applicant in 2015. Along with constitutional rights arguments, the Court based the ruling on "the international environmental principles of sustainable development, precautionary principle, environmental impact assessment, and inter and intra-generational equity".[49] The ruling states that "Pakistan is not a major contributor to global warming, it is actually a victim of climate change and requires immediate remedial adaptation measures to cope with the disruptive climatic patterns".[50] The Court established a Climate Change Commission tasked with the implementation of the climate change legal frameworks. In a subsequent ruling in 2018, the Court took note that the Commission successfully implemented a significant number of priority adaptation actions in different sectors, such as "coastal and marine areas", "agriculture and livestock", "forestry", "biodiversity", "wetlands", "energy", "disaster management and water".[51]

Leghari v Pakistan can serve as a model of public interest and adaptation-focused litigation. This type of case is easier to be brought in jurisdictions that grant easy access to justice for public interest purposes. Different jurisdictions in the South Asian region are relatively open to this type of complaint with regard to environmental matters.[52]

Latin America is another region at the forefront of rights-based climate change litigation.[53] Among others, a set of complaints targeted deforestation

45 J. Setzer, C. Higham (n 1).
46 A. Savaresi, J. Setzer (n 40).
47 R. Luporini (n 7); E. Donger, *Lessons on "Adaptation Litigation" from the Global South*, in *Verfassungsblog*, 2022.
48 Lahore High Court, 25501/2015, *Leghari v Pakistan*, 2015.
49 Ibid., para 7.
50 Ibid., para 3.
51 Lahore High Court, 25501/2015, *Leghari v Pakistan*, January 2018.
52 Asian Development Bank, *Climate Change, Coming Soon to a Court Near You, Climate Litigation in Asia and the Pacific and Beyond*, December 2020.
53 J. Auz, *Human rights-based climate litigation: a Latin American cartography*, in *Journal of Human Rights and the Environment*, vol.13, 2022.

activities in the Amazon.[54] Some of these complaints have also an adaptation component. Adaptation action is indeed key to protecting exposed ecosystems from climate change impacts, while, at the same time, ecosystems play an important role in the adaptation of human society.[55] D*emanda Generaciones Futuras v Minambiente et al* is the leading case in this context. [56] In April 2018, Colombia's Supreme Court of Justice ruled that deforestation and climate change impacts in the Colombian Amazon were threatening the fundamental rights of a group of young plaintiffs. In its ruling, where it also recognised the Colombian Amazon as a "subject of rights", the court ordered the government to develop a "*Pacto intergeneracional por la vida del amazonas colombiano*" with the active involvement of the affected communities.[57] In addition to measures to reduce deforestation and GHG emissions, the plan had to cover the "implementation of strategies of a preventative, mandatory, corrective, and pedagogical nature, directed towards climate change adaptation".[58] However, what types of adaptation strategies are envisaged is not at all clear, also because the ruling has yet to be properly implemented.[59]

In the Global North, adaptation litigation is well developed in Australia, where, however, cases are generally less politically charged, and are not based on rights arguments. These cases are normally taking place before specialised environment and land management courts. They deal with diverse sectoral aspects, such as land use, water management and coastal protection, and climate change is often only indirectly, peripherally, or incidentally discussed in the proceedings.[60]

On the contrary, to the best of the author's knowledge, there are no successful strategic cases based on human rights arguments concerning adaptation in the Global North, yet. In Europe, *Urgenda* and 'replica cases' do not

54 J. Setzer, D. Winter de Carvalho, *Climate litigation to protect the Brazilian Amazon: Establishing a constitutional right to a stable climate*, in *RECIEL*, vol.30, 2021; C. Garfalo, *As the Lung of the Earth Dries Out, Climate Litigation Heats Up: Can Rights-Based Strategies Become a Valid Tool for the Protection of the Amazon Forest?*, in *Völkerrechtsblog*, 2022.

55 IPCC [H.-O. Pörtner et al. (eds)], *Climate Change 2022 Impacts, Adaptation and Vulnerability*. Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policy Makers, Cambridge University Press, 2022, B.1.2. "Ecosystem-based adaptation" is an emerging approach that uses ecosystem services as part of a holistic adaptation strategy. See in general: IUCN, *Ecosystem-based Adaptation*, Issues Brief, 2017; UNEP, *Ecosystem-based Adaptation*.

56 Supreme Court of Justice of Colombia, STC4360-2018, *Demanda Generaciones Futuras v Minambiente et al.*, 2018.

57 *Ibid,* 49.

58 Ibid.

59 *Dejusticia*, the NGO that promoted the case, issued two informs of "failure to comply".

60 See J. Peel and H. M. Osofsky, *Sue to adapt?*, in *Minnesota Law Review*, vol.99, 2015 and J. Peel and H. M. Osofsky, *Litigation as an adaptation tool*, in J. Peel and H. M. Osofsky (eds.), *Climate Change Litigation: Regulatory Pathways to Cleaner Energy*, Cambridge University Press, 2015.

deal with adaptation.[61] Adaptation has been only marginally considered in two important climate cases before French domestic courts: *Notre Affaire à Tous and others v France* (also known as the '*Affaire du siècle*') and *Commune de Grande-Synthe v France*.[62] Both cases are focused on mitigation, and are grounded on the French Charter for the Environment and Environmental Code, the European Convention on Human Rights (ECHR) and the Paris Agreement. While both cases were successful, the (marginal) adaptation component was dismissed. The reason for these failures is likely to lie in the fact that adaptation was clearly peripheral to the cases and dealt with in a rather vague manner.

In *Notre Affaire à Tous and others v France*, the applicants argued that the French National Climate Change Adaptation Plan (PNACC): (i) was adopted in delay; (ii) does not contain binding regulatory provisions; (iii) has unclear and often incoherent goals and objectives; (iv) includes a totally inadequate estimated budget; and (v) contains several measures that have not been implemented.[63] Thus, the applicants demanded the court to bind the French Government "to take any necessary measure for the adaptation of the national territory, and especially the vulnerable zones, to the effects of climate change".[64] In its decision of February 2021, the Administrative Court of Paris declared that the French State's inaction on climate change caused an ecological damage, however, in relation to adaptation, the court declared that the inadequacy of the French adaptation plan "cannot be regarded as having directly caused the ecological damage for which the applicant associations are seeking compensation", hence the adaptation component of the claim was rejected.[65]

In *Commune de Grande-Synthe – which is a small French municipality at serious risk from sea-level rise* – the dismissal of the adaptation component seems to be due to the fact that, for the specific claim on adaptation, the applicants relied exclusively on Paris Agreement provisions. In the French internal legal system, these international law provisions have no 'direct effect'; therefore, their breach cannot

61 Supreme Court of the Netherlands, ECLI:NL:HR: 2019:2007, *The State of the Netherlands v Stichting Urgenda* December 2019, English version. For a comment: A. Nollkaemper and L. Burgers, *A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case*, in *EJIL: Talk!*, 2020.

62 Tribunal Administratif de Paris, 1904967, 1904968, 1904972, 1904976, *Notre Affaire à tous et al v France*, October 2021 ; Conseil d'État, 427301, *Commune de Grande Synthe v France*, November 2020. For a comment, see C Huglo, *Procès climatique en France: la grande attente Les procédures engagées par la commune de Grande-Synthe et son maire*, in *AJDA Dalloz*, 2019; B. Parance and J. Rochfeld, *Un tsunami juridique: la première décision "climatique" rendue par le Conseil d'État français le 19 novembre 2020 est historique*, in *leclubdejuristes*, 2020.

63 *Notre Affaire à Tous et al v France* (n 62), *Demande Préalable Indemnitaire*, 2018, 37–39.

64 Ibid.

65 *Notre Affaire à tous et al. v France*, (n 62), para 33 (Official French version: « *l'insuffisance de ces mesures ne peut être regardée comme ayant directement causé le préjudice écologique dont les associations requérantes demandent la réparation* »).

be invoked before the *Conseil d'État*.[66] In fact, the *Municipality of Grande-Synthe* also filed a second lawsuit, which attracted much less attention, and which was entirely devoted to adaptation.[67] The lawsuit challenged the French National Adaptation Plan on the basis of French administrative law. This case was also dismissed. It was not, however, based on the ECHR, or constitutionally recognised fundamental rights.

4.2 The international level

International human rights bodies have been called upon to hear climate change-related complaints since 2005, when the *Inuit*, an Indigenous People from the Artic, lodged a pioneering complaint against the United States (US) with the Inter-American Commission on Human Rights (IAComm).[68] The complaint, which was dismissed at an early stage, claimed that the US was responsible for human rights violations as the largest GHG emitter. The alleged human rights violations were not tied to the failure to adapt. Adaptation was only mentioned within the remedies requested. Among other things, indeed, the Inuit demanded an adaptation plan to be implemented by the US in coordination with the affected communities. However, the required adaptation plan was not properly outlined in the complaint, and the adaptation solutions envisaged remained vague.[69]

The UN human rights treaty monitoring bodies have also received three climate change-related complaints in recent years. The first complaint was brought by an asylum seeker before the Human Rights Committee (HRComm). In *Ioane Teitiota v New Zealand*, Mr Teititota claimed that his right to life had

66 *Commune de Grande Synthe v France* (n 62). The decision (unofficial English translation) reads: "If the commune of Grande-Synthe maintains that the decision it is attacking disregards the stipulations of article 2 of the Paris Agreement cited in point 9, these stipulations, as well as stated in point 12, are of *no direct effect*. Consequently, their mere ignorance cannot be usefully invoked against the contested decision" (para 18), and "the conclusions of the request of the commune of Grande-Synthe for the annulment of the decision of the court of Grande-Synthe for abuse of power of implied refusals to take any regulatory initiative action to…implement measures of immediate adaptation to climate change are rejected", (para 4 decision).

67 Conseil d'État, *Commune de Grande-Synthe v France,* 428177, 12 February 2021.

68 Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (*Inuit Petition*), December 2005. On the role of international human rights bodies in climate change litigation see R. Luporini, A. Savaresi, *International human rights bodies and climate litigation: Don't look up?*, in RECIEL,vol.32, 2023.

69 *Inuit Petition* (n 68), Request for relief, p.118. A similar request was formulated by the Athabaskan peoples, which filed a petition with the IACommHR in 2013, see Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada, *Athabaskan Petition*, April 2013.

been violated due to New Zealand's refusal to grant him asylum after he was displaced from Kiribati because of the impacts of sea-level rise and extreme weather events.[70] The complaint, which was rejected on the merits, does not directly concern adaptation. Adaptation is, however, indirectly involved; in its decision, the HRComm stated that "without robust national and international efforts, the effects of climate change in receiving States may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the '*non-refoulement'* obligations of sending states".[71] The national and international efforts called into question include international cooperation on adaptation. Accordingly, this type of complaint could prompt international support and assistance to improve adaptation in the most vulnerable countries as a way to prevent or limit displacement.

A second complaint was brought before the UN Committee on the Rights of the Child (CRC). In *Sacchi et al v Argentina et al,* a group of children of diverse nationalities filed a complaint against multiple States claiming that they had breached their rights to life, health, culture and best interest of the child, as a result of failure to adopt adequate action on climate change.[72] The CRC dismissed the complaint for non-exhaustion of domestic remedies. In this case the focus is on climate change mitigation, while increasing adaptation efforts is only briefly mentioned in the requests for relief, without much elaboration.[73]

It is only with the third complaint, namely *Daniel Billy et al v Australia*, that adaptation takes centre stage. A group of eight members of different indigenous groups from the Torres Strait Islands (Australia) filed a complaint with the HRComm in May 2019.[74] The Torres Strait Islands are exposed to heightened climate change risks, including sea level rise and rising sea temperatures, king tides and floods, erosion and land accretion, increasing storm frequency, and strong winds. According to the applicants, these risks have been insufficiently addressed by the Australian authorities, which pursued insufficient GHG mitigation targets and plans, and failed to adopt adequate adaptation measures,

70 UN HRComm, *Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 3624/2019,* UN Doc CCPR/C/127/D/2728/2016, 7 January 2020. For a commentary: E. Sommario, *When Climate Change and Human Rights Meet: A Brief Comment on the UN Human Rights Committee's Teitiota Decision,* in *Questions of International Law*, vol.77, 2021.

71 Ibid., para 9.11.

72 UN CRC, *Sacchi et al v Argentina et al*, Decision Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning, Communication No. 104/2019*,* UN Doc CRC/C/88/D/104/2019, 11 November 2021.

73 *Sacchi et al.* (n 72), Communication, para 33.

74 UN Human Rights Committee, *Daniel Billy and others v Australia*, CCPR/C/135/D/3624/2019, 22 September 2022. See also: M. Cullen, *'Eaten by the sea': human rights claims for the impacts of climate change upon remote subnational communities*, in *Journal of Human Rights and the Environment*, vol.9, 2018.

such as building sea-walls, and other similar coastal defense and resilience measures. The applicants lamented Australia's violation of several articles under the ICCPR, namely Article 6(1) on the right to life, Article 17(1) on the right to be free from arbitrary interference with privacy, family and home, and Article 27 on the right to culture, religion and language (rights of minorities). They also claim violations of Article 24 (1) concerning children's rights. The applicants demanded that Australia implement effective adaptation measures to secure the communities' existence on the islands.

In September 2022, the HRComm adopted its Views on the case, accepting the claims of the applicants. This is the first case in which the claims of climate applicants are accepted by an international human rights body. While the complaint addressed both mitigation and adaptation, the HRComm Views focused only on the latter. The HRComm found that Australia had failed to comply with its positive obligation to adopt "timely adequate" adaptation measures to protect the applicants' home, private and family life, their collective ability to maintain a traditional way of life and to transmit their customs and culture to future generations.[75] However, the HRComm did not find a violation of the right to life, as the applicants had not shown the effects that climate change had already had on their health, or demonstrated a concrete and reasonably foreseeable risk to which their life would be exposed to. As in *Teitiota*, the HRComm emphasised that, in the 10–15-year period in which the islands would allegedly become uninhabitable, Australia could adopt preventative measures and, if necessary, relocate the applicants.[76] The HRComm did not pronounce on the alleged human rights violations associated with the state's failure to mitigate climate change.

The ECtHR has also been receiving with very strategic and high-profile climate complaints. [77] However, they all focus on mitigation, while adaptation is not addressed. This reflects the same situation described above in relation to cases before domestic courts in Europe, which did not delve into the issue of adaptation. Jurisdiction over three of these climate complaints has been relinquished to the Grand Chamber.[78] Although they do not directly concern

75 *Daniel Billy et al v Australia* (n 74), paras 8.9–8.14.

76 Ibid., para 8.7.

77 See R. Luporini, A. Savaresi (n 68); C. Heri (n 43); H. Keller, C. Heri, R. Piskóty, *Something Ventured, Nothing Gained? – Remedies before the ECtHR and Their Potential for Climate Change Cases*, in *Human Rights Law Review*, vol.22, 2022; J. Hartmann, M. Willers, *Protecting rights through climate change litigation before European courts*, in *Journal of Human Rights and the Environment*, vol.13, 2022; O. W. Pedersen, *Any Role for the ECHR When it Comes to Climate Change?*, in *European Convention on Human Rights Law Review*, vol.3, 2021.

78 ECtHR, *Verein KlimaSeniorinnen Schweiz et al v Switzerland,* App No 53600/20*,* relinquished in favour of the Grand Chamber 26 April 2022*; Carême v France,* App No 7189/21, relinquished in favour of the Grand Chamber 31 May 2022; *Duarte Agostinho et al v Portugal et al,* App No 39371/20*,* relinquished in favour of the Grand Chamber 29 June 2022.

adaptation, the ECtHR's ruling on these cases will in any case be very valuable in figuring out the opportunities for future rights-based adaptation claims in the region.

5. Conclusions

In its 2023 Report, the IPCC stated that "human-caused climate change is already affecting many weather and climate extremes in every region across the globe" and that "there is a rapidly closing window of opportunity to secure a liveable and sustainable future for all".[79] The UNFCCC negotiation process, however, proceeds slowly and international climate change law is not able to guarantee accountability and enforcement. Climate change litigation is rising as a strategic tool to narrow these gaps. Litigants have so far mainly targeted the insufficient mitigation action by States and corporate actors. This makes sense, since reducing GHG emissions is the priority for tackling climate change. However, adaptation action also becomes crucial to alleviate the widespread adverse effects that are already felt among the most vulnerable and increasingly in the Global North, including Europe.

In this contribution it is argued that while it is true that adaptation law is less developed than mitigation law, a human rights approach can complement this disparity. Human rights obligations are more direct and straightforward in relation to adaptation than mitigation. Thus, litigants can increasingly rely on human rights arguments to foster adaptation action and bridge adaptation gaps. The contribution discussed some important rights-based adaptation cases that have already been heard by domestic courts and international human rights bodies. Among others, *Leghari v Pakistan* may be a useful model for South Asian jurisdictions, where, despite climate impacts being among the highest in the world, adaptation litigation is still "relatively novel and limited in scope".[80] Similarly, an adaptation component might be further included in lawsuits aimed at protecting vulnerable ecosystems, such as the Amazon rainforest. At the same time, the Views adopted by the HRComm in *Daniel Billy et al v. Australia* show that adaptation could also take centre stage in strategic complaints before international human rights bodies. The Views confirmed that the lack of "timely adequate" adaptation action can result in human rights violations and that States can be held internationally responsible for this failure.

On the other hand, rights-based adaptation litigation struggles to develop in Europe. Litigants are justified in their efforts to hold accountable those who have not taken sufficient action to mitigate climate change in the Old Continent.

79 IPCC, *Synthesis Report of the IPCC, Sixth Assessment Report (AR6), Summary for Policymakers*, A.2, p.5 and C.1, p.25.

80 Asian Development Bank (n 52), p. 153.

This includes both States and corporate actors that are among the world's largest emitters. Still, the growing climate-related disaster events in the region make it clear that addressing adaptation is also crucial.[81] Adaptation cases should thus be increasingly attempted in this context. Given the dearth of binding national laws on adaptation, human rights arguments can serve as a convenient "gap filler". The human rights guarantees enshrined in the ECHR, combined with fundamental rights provisions of national constitutions, can provide an appropriate ground for this type of lawsuit.

81 See, among others, W. Cornwall, *Europe's deadly floods leave scientists stunned*, in *Science*, 2021.

Towards Climate Democracies? Legal Systems' Adaptation to Climate Change Litigation*

Carlo Maria Masieri
University of Milan
ORCID: https://orcid.org/0000-0003-2442-8151
DOI: 10.54103/milanoup.151.c194

The fight against global warming and its tragic effects has become a political issue. Climate change litigation arose as an important way to pursue this value, but it could also lead to significative changes in legal systems. In climate change litigation cases, international law becomes the main ground for claiming domestic remedies – especially those of tort law – that may undergo relevant modifications, putting also into discussion EU legal standards. Courts seem to be playing – even in Civil Law countries – a quasi-legislative role through trials, at the end of which they order governments or legislatures to adopt new mitigation policies. But effective enforcement tools are still to be shaped. This contribution focuses on the need to govern these aspects of climate change litigation in order to create real climate democracies.

Keywords: climate change litigation; international law; European Convention on Human Rights; European Union law; tort law; negligence; standard of care; injunctions; effectiveness; courts; policymaking.

1. Introduction

In the last few decades legal systems and law scholars have given considerable attention to the phenomena related to climate change, and especially to global warming, which is the well-known process of rise of temperatures happening since at least the half of the 20th century. On these aspects and on their causes

* This contribution is a research product of the project "*La riduzione degli impatti del climate change nell'attività legislativa, amministrativa e nella litigation: un'analisi di diritto comparato – CLICHLEX*," co-funded by the FSE – React EU programme of PON "*Ricerca e innovazione 2014-2020*."

– primarily human activities and especially the use of fossil fuels – there is an overwhelmingly wide consensus among scientists.[1]

Moving from the analysis of phenomena to policymaking, the fight against global warming and its tragic effects has also become a political goal itself. It must be noted that since the beginning of '90s governments and legislatures have been dealing with these issues at international,[2] European,[3] national[4] and local[5] level.

Academics – also in Italy – have been discussing even longer about mitigation and adaptation strategies,[6] including how to combat earth temperature rise.[7]

---

1 See Intergovernmental Panel on Climate Change (IPCC), *Technical Summary*, in *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge University Press, Cambridge (UK) and New York (USA), 2021, p. 41: "It is unequivocal that the increase of CO2, methane (CH4) and nitrous oxide (N2O) in the atmosphere over the industrial era is the result of human activities;" p. 80, Box TS.5: "Based on multiple lines of evidence using interhemispheric gradients of CO2 concentrations, isotopes, and inventory data, it is unequivocal that the growth in CO2 in the atmosphere since 1750 (see Section TS.2.2) is due to the direct emissions from human activities. […] Of the total anthropogenic CO2 emissions, the combustion of fossil fuels was responsible for about 64% ± 15%, growing to an 86% ± 14% contribution over the past 10 years. The remainder resulted from land-use change;" p. 60: "The *likely* range of human-induced change in global surface temperature in 2010–2019 relative to 1850–1900 is 0.8°C to 1.3°C, with a central estimate of 1.07°C (Figure Cross-Section Box TS.1, Figure 1), encompassing the best estimate of observed warming for that period, which is 1.06°C with a very likely range of [0.88°C to 1.21°C], while the *likely* range of the change attributable to natural forcing is only –0.1°C to +0.1°C. […] Over the same period, well-mixed greenhouse gas forcing likely warmed global surface temperature by 1.0°C to 2.0°C, while aerosols and other anthropogenic forcings likely cooled global surface temperature by 0.0°C to 0.8°C."

2 See, e.g., the United Nations Framework Convention on Climate Change (UNFCCC), which entered into force on 21 March 1994; on this topic, see generally B. Pozzo, voce *Tutela dell'ambiente (dir. internaz.)*, in *Enciclopedia del diritto. Annali*, III, Milano, Giuffrè, 2010, p. 1163.

3 See, e.g., Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (European Climate Law).

4 In Italy, see d.l. 14 ottobre 2019, n. 111, converted with modifications into l. 12 dicembre 2019, n. 141.

5 See, e.g., l. r. Emilia-Romagna 17 giugno 2019, n. 7, a regional statute.

6 See, inter alia, B. Pozzo, *Verso una strategia per l'adattamento al cambiamento climatico in Italia*, in *Rivista giuridica dell'ambiente*, 2015, 1, p. 1 ff.; S. Fanetti, *Adattamento ai cambiamenti climatici e proprietà edilizia in contesti urbani*, in *Annuario di diritto comparato e di studi legislativi*, 2019, p. 227 ff.; S. Bruno, *Cambiamento climatico e organizzazione delle società di capitali a seguito del nuovo testo dell'art. 2086 c.c.*, in *Banca Impresa Società*, 2020, 1, p. 47 ff.; F. E. Celentano, *Il sistema internazionale di contrasto al cambiamento climatico tra inefficacia e astrattezza. Il necessario coinvolgimento dei privati*, in *La Comunità Internazionale*, 2020, p. 43 ff.

7 See, e.g., T. Scovazzi, *Il riscaldamento atmosferico e gli altri rischi ambientali globali*, in *Rivista giuridica dell'ambiente*, 1988, 3, p. 707 ff.

Lately, also the judiciary has been asked to consider the same problems: climate change litigation[8] took the stage as an important way to reach the aforementioned political goal. There are in truth several kinds of climatic lawsuits: besides cases related to climate refugees,[9] which are not analysed herein, citizens and associations sue states for their inaction before domestic,[10] international[11] or supranational[12] courts. Sometimes the defendants are companies, which claimants deem responsible of excessive greenhouse gasses (GHGs) emissions.[13]

As of today, most of the successful legal actions have taken place in Civil Law jurisdictions.[14] Among pending cases, some involve Italy, both at supranational

8 For a definition, see V. Jacometti, *La sentenza Urgenda del 2018: prospettive di sviluppo del contenzioso climatico*, in *Rivista giuridica dell'ambiente*, 2019, 1, p. 122-123, n. 5.

9 At the international level, see Human Rights Committee, *Teitiota v. New Zealand*, Communication No. 2728/2016, Views of 24 october 2019, on which see A. Maneggia, *Non-refoulement of Climate Change Migrants: Individual Human Rights Protection or 'Responsibility to Protect'? The Teitiota Case Before the Human Rights Committee*, in *Diritti umani e diritto internazionale*, 2020, 2, p. 635 ff.; G. Citroni, *La "stagione dell'ambiente" del Comitato delle Nazioni Unite dei diritti umani*, in *Rivista giuridica dell'ambiente*, 2020, 1, p. 20-27; T. Scovazzi, *Gli effetti del cambiamento climatico su Kiribati di fronte al Comitato dei diritti umani*, in *Rivista giuridica dell'ambiente*, 2020, 1, p. 199 ff.; in Italy, see Cass. civ., sez. II, ord. 24 febbraio 2021, n. 5022, in *De Jure*.

10 See, e.g., Juliana v. United States, 947 F.3d 1159 (2020). In Australia, see the recent *Sharma* case: the decisions of the court of first instance are *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560, and *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment [No 2]* [2021] FCA 774; the appeal decisions are *Minister for the Environment v Sharma* [2022] FCAFC 35 and *Minister for the Environment v Sharma [No 2]* [2022] FCAFC 65; on this case, see C. M. Masieri, *La Law of Torts alla prova dei cambiamenti climatici*, in *Rivista giuridica dell'ambiente*, 2022, 2, p. 457 ff.

11 See UN Committee on the Rights of the Child, cases n. 104-108/2019, *Sacchi et al. v. Argentina et al.*, on which see M. La Manna, *Cambiamento climatico e diritti umani delle generazioni presenti e future: Greta Thunberg (e altri) dinanzi al Comitato sui diritti del fanciullo*, in *Diritti umani e diritto internazionale*, 2020, 1, p. 217 ff.

12 See for example ECJ, Case T-330/18, *Carvalho and Others v Parliament and Council*, Order of the General Court (Second Chamber) of 8 May 2019, ECLI:EU:T:2019:324.

13 In the Netherlands, see the *Shell* case: Rechtbank Den Haag, 26 mei 2021, C/09/571932 / HA ZA 19-379 (engelse versie), hereinafter 'Shell', which is the decision of the court of first instance; appeal is pending.

14 First of all, see the famous *Urgenda* case: in particular, the decision of the court of first instance, Rechtbank Den Haag, 24 juni 2015, C/09/456689 / HA ZA 13-1396 (English translation), hereinafter 'Rechtbank Den Haag', on which see T. Scovazzi, *La corte condanna lo stato a ridurre le emissioni di gas a effetto serra*, in *Rivista giuridica dell'ambiente*, 2015, 2, p. 305 ff.; the appeals decision, Gerechtshof Den Haag, 9 oktober 2018, 200.178.245/01 (Engelse vertaling), on which see E. Corcione, *Diritti umani, cambiamento climatico e definizione giudiziale dello standard di condotta*, in *Diritti umani e diritto internazionale*, 2019, 1, p. 197 ff., and see also V. Jacometti, *supra* note 8, at p. 121 ff.; the Supreme Court decision, Hoge Raad, 20 december 2019, 19/00135 (Engels), on which see S. Dominelli, *Sui limiti – giurisdizionalmente imposti – all'emissione di gas serra: i giudici olandesi diventano i 'front-runners' nella lotta ai cambiamenti climatici*, in *Rivista giuridica dell'ambiente*, 2020, 4, p. 749 ff.; F. Passarini, *Cedu e cambiamento climatico, nella decisione della corte suprema dei Paesi Bassi nel caso Urgenda*, in *Diritti umani e diritto internazionale*, 2020, p. 777 ff. In Germany, see the *Neubauer* case decided by the Bundesverfassungsgericht,

and domestic level: a group of young Portuguese citizens brought 33 countries – including the Italian Republic – to the European Court of Human Rights (ECtHR);[15] after a few months, two young Italian women seem to have filed similar suits in Strasbourg;[16] citizens and associations summoned the Italian State to a civil trial in Rome, also known as the *Giudizio Universale* case;[17] lastly, while this contribution was under peer review a suit known as the *Giusta causa* has been brought against an Italian oil company and its controlling shareholders, including the Italian Ministry of Economy and Finance.[18]

Thus, quite recently, climate change litigation itself has been studied by scholars.[19] While almost everyone would agree that these cases may induce states and companies to make greater mitigation efforts, less attention has been given to the fact that they could also lead to significant changes in legal systems.

As will be illustrated below, in climate change litigation, international law becomes the main ground for claiming domestic remedies – especially those of tort law – that may undergo relevant modifications, putting also into discussion EU legal standards. Courts seem to be playing – even in Civil Law countries – a quasi-legislative role through trials, at the end of which they order governments or legislatures to adopt new mitigation policies. But effective enforcement tools are still to be shaped.

This contribution will thus focus on the need to govern these aspects of climate change litigation in order to create real climate democracies.

---

i.e., the Federal Constitutional Court: BVerfG, Beschluss des Ersten Senats vom 24. März 2021 – 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20. In France, see the *Affaire du Siècle*: TA Paris, 3 février 2021, N° 1904967, 1904968, 1904972 et 1904976; TA Paris, 14 octobre 2021, N° 1904967, 1904968, 1904972, 1904976/4-1.

15 See ECtHR, Requête n° 39371/20, *Cláudia Duarte Agostinho et autres contre le Portugal et 32 autres États*; the Complaint has been published in the Online Climate Change Litigation Databases of the Sabin Center for Climate Change Law.

16 See ECtHR, Application number 14615/21, *Uricchio v. Italy and 31 others states;* ECtHR, Application number 14620/21, *De Conto v. Italy and 32 other States*, on which very limited information is available in the Online Climate Change Litigation Databases of the Sabin Center for Climate Change Law.

17 See Trib. Roma, sez. II, R.G. n. 39415/2021, giudice dott.ssa Canonaco. Some information about this lawsuit can be found on the claimants' website, including an English translation of the *Atto di citazione* [Summons].

18 See Trib. Roma, sez. II, R.G. n. 26468/2023, giudice dott. Cartoni. Extensive information about this lawsuit can be found in Italian on the website of Greenpeace Italia, while an English translation of the *Atto di citazione* [Summons] has been published in the Online Climate Change Litigation Databases of the Sabin Center for Climate Change Law.

19 See, e.g., W. Kahl, M-P. Weller (eds.), *Climate change litigation. A Handbook*, Hart-Beck-Nomos, München-Oxford-Baden-Baden, 2021; B. Pozzo, *Climate change and the individual*, in *Annuario di diritto comparato e di studi legislativi*, 2018, p. 459 ff.; E. Fasoli, *State responsibility and the reparation of non-economic losses related to climate change under the Paris agreement*, in *Rivista di diritto internazionale*, 2018, 1, p. 90 ff.; M. Montini, *Verso una giustizia climatica basata sulla tutela dei diritti umani*, in *Ordine internazionale e diritto umani*, 2020, 3, p. 506 ff.; S. Valaguzza, *Liti strategiche e cambiamento climatico*, in *Rivista giuridica dell'ambiente*, 2021, 1, p. 67 ff.

2. The Rise of International Law, the Mutations of Tort Law and the Defeat of EU Law

In cases framed within the scope of tort law, the main argument of the claimants is that the defendant states or companies are acting below a standard of care, which would somehow derive from international law.

This path has been very successful in the *Urgenda* case. The Urgenda Foundation – a citizens' platform that develops plans and measures to prevent climate change –, acting also on behalf of 886 individuals, sued the Netherlands, claiming that "The current global greenhouse gas emission levels, particularly the CO2 level, leads to or threatens to lead to a global warming of over 2 °C, and thus also to dangerous climate change with severe and even potentially catastrophic consequences," that "The greenhouse gas emissions in the Netherlands additionally contribute to the (imminent) hazardous climate change," that their "levels are excessive, in absolute terms and even more so per capita," and that this would have made "the greenhouse gas emissions of the Netherlands unlawful," also "towards Urgenda,"[20] according to art. 6:162 *Burgerlijk Wetboek* [BW] [Civil Code], which is the general tort rule under Dutch Law.[21] The claimants asked the District Court of The Hague to issue an order against the State "to reduce or have reduced the joint volume of annual greenhouse gas emissions in the Netherlands […] by 40% by the end of 2020, in any case by at least 25%, compared to 1990."[22]

To prevent an excessive increase of earth temperatures, such an emissions reduction was deemed necessary by relevant scientific documents, such as the Fourth Assessment Report (AR4) of the Intergovernmental Panel on Climate Change (IPCC),[23] to which the Netherlands and the European Union contributed and later publicly praised,[24] without being under any legal obligation to adopt the aforementioned emissions reduction. Nonetheless, the court found

20 See *Rechtbank Den Haag* para. 3.2.

21 "1. A person who commits a tort against another which is attributable to him, must repair the damage suffered by the other in consequence thereof.
2. Except where there are grounds for justification, the following are deemed tortious: the violation of a right and an act or omission breaching a duty imposed by law or a rule of unwritten law pertaining to proper social conduct.
3. A tortfeasor is responsible for the commission of a tort if it is due to his fault or to a cause for which he is accountable by law or pursuant to generally accepted principles," see H. Warendorf, R. Thomas, I. Curry-Sumner, *The Civil Code of the Netherlands*, Kluwer Law International, Alphen aan den Rijn, 2013, p. 676.

22 *Rechtbank Den Haag* para. 3.1.

23 See *id.* paras. 2.8. ff., 4.13. ff., 4.23.-4.24. As stated on its website – on which the AR4 is also available – the IPCC "is an organization of governments that are members of the United Nations or WMO," and provides "governments at all levels with scientific information that they can use to develop climate policies."

24 See *Rechtbank Den Haag* paras. 3.49.-2.51., 2.64., 4.14.-4.15., 4.24., 4.31.

for the claimants, construing the negligence rule of art. 6:162 BW – especially as regards the existence and the breach of a duty of care – in light of international law: the decision made reference to climate conventions and protocols and to the "no harm" principle,[25] as well as to European Convention on Human Rights (ECHR) art. 2 and art. 8,[26] and to general principles of EU law.[27]

The Court of Appeals of The Hague and the Supreme Court of the Netherlands went even further: they directly applied the ECHR,[28] even in the absence of Strasbourg precedents on the matter of climate change.

---

25 See *id.* paras. 4.42.-4.43.: "4.42. From an international-law perspective, the State is bound to UN Climate Change Convention, the Kyoto Protocol (with the associated Doha Amendment as soon as it enters into force) and the 'no harm' principle. However, this international-law binding force only involves obligations towards other states.
4.43. This does not affect the fact that a state can be supposed to want to meet its international-law obligations. From this it follows that an international-law standard – a statutory provision or an unwritten legal standard – may not be explained or applied in a manner which would mean that the state in question has violated an international-law obligation, unless no other interpretation or application is possible. This is a generally acknowledged rule in the legal system. This means that when applying and interpreting national-law open standards and concepts, including social proprietary, reasonableness and propriety, the general interest or certain legal principles, the court takes account of such international-law obligations. This way, these obligations have a 'reflex effect' in national law."

26 ECHR art. 2, para. 1: "Everyone's right to life shall be protected by law. […];" ECHR art. 8: "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."
According to *Rechtbank Den Haag* para. 4.46.: "both articles and their interpretation given by the ECtHR, particularly with respect to environmental right issues, can serve as a source of interpretation when detailing and implementing open private-law standards in the manner described above, such as the unwritten standard of care of Book 6, Section 162 of the Dutch Civil Code."

27 See *Rechtbank Den Haag* para. 4.44.: "citizens cannot directly rely [on the Treaty on the Functioning of the European Union (TFEU) stipulations]. The Netherlands is obliged to adjust its national legislation to the objectives stipulated in the directives, while it is also bound to decrees (in part) directed at the country. Urgenda may not derive a legal obligation of the State towards it from these legal rules. However, this fact also does not stand in the way of the fact that stipulations in an EU treaty or directive can have an impact through the open standards of national law described above".

28 See *Gerechtshof Den Haag* para. 37: "individuals who fall under the State's jurisdiction may invoke Articles 2 and 8 ECHR in court, which have direct effect;" *Gerechtshof Den Haag*, para. 76: "the State is acting unlawfully (because in contravention of the duty of care under Articles 2 and 8 ECHR) by failing to pursue a more ambitious reduction as of end-2020, and […] the State should reduce emissions by at least 25% by end-2020;" see also *Hoge Raad*, paras. 5.6.1.-5.6.2.

In the *Shell* case, the association Milieudefensie – also on behalf of 17,379 individuals – together with other associations sued Royal Dutch Shell (RDS), a public limited company established under the laws of England and Wales but headquartered in The Hague. The defendant is the top holding of the Shell group, therefore being "the direct or indirect shareholder of over 1,100 separate companies established all over the world" and determining "the general policy of the Shell group."[29] This owns in turn assets and infrastructure, with which it produces and trades in oil, gas or other energy sources, having also permits for the exploitation, production or extraction of oil.[30]

The claimants argued that "RDS has an obligation, ensuing from the unwritten standard of care pursuant to" art. 6:162 BW, "to contribute to the prevention of dangerous climate change through the corporate policy it determines for the Shell group,"[31] and asked the District Court of The Hague to order that the defendant, "both directly and via the companies and legal entities […] with which it jointly forms the Shell group, […] limit or cause to be limited the aggregate annual volume of all CO2 emissions into the atmosphere (Scope 1, 2 and 3) due to the business operations and sold energy products of the Shell group to such an extent that this volume at year-end 2030: principally: will have reduced by at least 45% or net 45% relative to 2019 levels."[32]

The court stated that "when determining the Shell group's corporate policy," the defendant "must observe the due care exercised in society"[33] according to art. 6:162 BW. In order to identify the "unwritten standard of care" owed by the company, several factors have been considered, among which "the right to life and the right to respect for private and family life of Dutch residents and the inhabitants of the Wadden region."[34] Referring to *Urgenda*, the court recalled that according to ECHR art. 2 and art. 8 these rights are protected from violations committed by the states, and added that the same is done under International Covenant on Civil and Political Rights (ICCPR) art. 6 and art. 17.[35] Even if they are inapplicable "in relationships between states and citizens" so that the

29 See *Shell* paras. 2.2.2.-2.2.3, 2.5.1. ff.

30 See *id.* para. 2.2.2.

31 *Id.* para. 3.2.

32 *Id.* para. 3.1.

33 *Id.* para. 4.4.1.

34 *Id.* para. 4.4.2.

35 ICCPR art. 6, para. 1: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life;" ICCPR art. 17: "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks."
See *Shell* para. 4.4.10.: "From the Urgenda ruling it can be deduced that Articles 2 and 8 ECHR offer protection against the consequences of dangerous climate change due to Co2 emissions induced global warming. The UN Human Rights Committee, which decides on violations of the ICCPR, determined the same as regards Articles 6 and 17 ICCPR."

claimants "cannot directly invoke" them with respect to the defendant company, "Due to the fundamental interest of human rights and the value for society as a whole they embody" they "may play a role in the relationship between" the parties of this case, and so the court considered them "in its interpretation of the unwritten standard of care."[36]

The Dutch judges availed themselves also of soft law, mentioning the UN Guiding Principles on Business and Human Rights (UNGP),[37] according to which there is a "duty to respect human rights" owed by companies, requiring them to "avoid causing or contributing to adverse human rights impacts through their own activities," to "address such impacts when they occur," to "seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts"[38] and to "take 'appropriate action'."[39] Even if the UNGP are just a "'soft law' instrument" and "do not create any new right nor establish legally binding obligations," they are "authoritative and internationally endorsed," they "are in line with the content of other, widely accepted soft law instruments, such as the UN Global Compact (UNGC) 'principles' and the OECD Guidelines for Multinational Enterprises (the OECD guidelines)" and "Since 2011, the European Commission has expected European businesses" to abide by them: therefore, the court considered "the UNGP […] suitable as a guideline in the interpretation of the unwritten standard of care."[40]

The claimants in the *Giudizio Universale* case are trying to take great advantage of international law too. Their summons mentions a report from Climate Analytics, a German foundation that has some Italian (also governmental) agencies as partners.[41] This document, which was prepared using IPCC methodology and official data from the Italian government, indicates that "in order to put in place climate actions that are consistent with a global temperature increase within +1.5°C – the long-term temperature objective of the Paris Agreement – Italy is required, by 2030, to cut its emissions by 92% from 1990 levels."[42] From the perspective of the claimants, "Italy's climate actions" – which are not intended to reach such an emissions reduction – "are insufficient and inadequate

36 *Shell* para. 4.4.9.
37 See *id.* para. 4.4.2.
38 *Id.* para. 4.4.17.
39 *Id.* para. 4.4.21.
40 See *id.* para. 4.4.11.
41 *Summons* para. III.15. A copy of the Climate Analytics report can be found on the foundation's website.
42 *Summons* para. III.15.

for the purposes of combating anthropogenic climate change,"[43] and thus the State would be liable either in tort[44] or for breach of an obligation.[45]

As in *Urgenda*, the Italian claimants do not seek monetary compensation, but ask the Court to "order the defendant, pursuant to art. 2058, paragraph 1, of the Italian Civil Code, to take all necessary steps to reduce, by 2030, the artificial national emissions of CO2-eq to 92% compared to 1990 levels."[46] The above-mentioned statutory provision allows specific remedy instead of damages, provided that it wouldn't be excessively onerous for the defendant.[47]

As regards the duty of care – or the source of the obligation – the summons in *Giudizio Universale*, going even further than the *Urgenda* decisions, asserts firstly that the United Nations Framework Convention on Climate Change (UNFCC)[48] and the Paris Agreement[49] should have a direct effect on the Italian legal system, creating a climatic obligation of the State towards its citizens,[50]

43 *Id.* para. III.9.

44 In particular, the *Summons* mentioned art. 2043 *Codice civile* [C.c.] [Civil Code], which is the general tort law rule in Italy, stating that: "[a]ny fraudulent, malicious, or negligent act that causes an unjustified injury to others obliges the person who has committed the act to pay damages," see *The Italian Civil Code and Complementary Legislation*, trans. by M. Beltramo, G. E. Longo, J. H. Merryman, Oceana, New York, 1991; in the alternative, art. 2051 C.c. has been invoked, which contains "the discipline of liability for injury caused […] by things […] the defendant uses or controls […]," see M. Bussani, B. Pozzo, A. Venchiarutti, *Tort Law*, in J. S. Lena, U. Mattei (eds.), *Introduction to Italian Law*, Kluwer Law International, The Hague-London-New York, 2002, p. 220.

45 The claimants refer both to a climatic obligation theory – further discussed in this paragraph – and to the *contatto sociale qualificato* [qualified social contact] doctrine, on which see Cass. civ, 22 aprile 1999, n. 589, in *Giustizia civile*, 1999, I, p. 999 ff.; C. Castronovo, *L'obbligazione senza prestazione ai confini tra contratto e torto*, in *Le ragioni del diritto. Scritti in onore di Luigi Mengoni*, I, Giuffrè, Milano, 1995, p. 147 ff.; C. Castronovo, *La nuova responsabilità civile*, Giuffrè, Milano, 2006, p. 443 ff.

46 See the Conclusions of the *Summons*.

47 For a translation of art. 2058 C.c., see A. Gambaro, U. Mattei, *Property Law*, in J. S. Lena, U. Mattei (eds.), *supra* note 44, at p. 311, n. 99: "The injured party can demand specific redress when this is wholly or partially possible.

The judge however can order that the redress be made only by providing an equivalent, if specific redress would prove to be excessively onerous for the debtor."

48 See *supra* note 2.

49 On which see M. Montini, *Riflessioni critiche sull'accordo di Parigi sui cambiamenti climatici*, in *Rivista di diritto internazionale*, 2017, 3, p. 719 ff.; M. Gervasi, *Rilievi critici sull'accordo di Parigi: le sue potenzialità e il suo ruolo nell'evoluzione dell'azione internazionale di contrasto al cambiamento climatico*, in *La Comunità Internazionale*, 2016, 1, p. 21 ff.

50 See *Summons* para. IV.14: "the UNFCCC climate obligation integrates the open catalogue of obligations, enabled by art. 1173 of the Italian Civile Code, thus assuming relevance also at the level of domestic civil law, for the specific matter of combating climate change; (e) consequently, the UNFCCC (with its additional 'legal instruments') interacts with the rights of private parties, according to the Italian Civil Code."

which would have been breached by Italy. The claimants seem to have been inspired here by innovative scholarly work.[51]

On the opposite side, the State may argue that the Paris Agreement does not mandate to keep the temperature increase at +1,5°C, but requires just "Holding" it "to well below 2°C above pre-industrial levels and pursuing efforts to limit" it "to 1.5°C above pre-industrial levels,"[52] as the *Bundesverfassungsgericht* – the Federal Constitutional Court of Germany – already noted in the *Neubauer* case,[53] another climate change litigation lawsuit.

The defendant could also point to the fact that the international legal sources mentioned by the claimants are not self-executing,[54] and that they give considerable discretion to governments regarding their implementation.[55]

Moreover, as of today, in Italy there has been no room for a direct application of international treaties – even after they have been ratified and executed – in favour of citizens, who may not invoke them against other private subjects, nor against the Italian government or against foreign states.[56] Accordingly, the adoption of the "direct effect" thesis would make quite a change to the Italian legal system.

Because there were no Strasbourg precedents on these issues, the claimants in *Giudizio Universale* referred much to *Urgenda* when they came to invoke the ECHR.[57] Here another interesting interaction between international and domestic law might happen.

Differently from what is allowed in Germany under art. 93(1) no. 4a *Grundgesetz* [GG] [Basic Law], Italian citizens who suffer from violations of their fundamental rights committed by the state do not have the possibility to file complaints into the *Corte costituzionale* – the Italian Constitutional Court – and have consequently to go to civil courts seeking noneconomic damages.

In particular, claimants can be awarded a sum of money if some constitutional right has been infringed. However, according to the *Corte di cassazione* – the highest Italian civil court – this is not the case when there has been a violation of the ECHR, which in Italy is not deemed a constitutional source of the law.[58] Of course, fundamental rights enshrined into the Italian Constitution are sometimes the same enumerated into the ECHR, and in that case the claimant

51 See M. Carducci, voce *Cambiamento climatico (diritto costituzionale)*, in *Digesto delle discipline pubblicistiche*, 2021, in *Leggi d'Italia*.

52 Paris Agreement art. 2, para. 1, lett. a.

53 See *Neubauer* paras. 160 ff.

54 On this topic, see R. Baratta, *L'effetto diretto delle disposizioni internazionali self-executing*, in *Rivista di diritto internazionale*, 2020, 1, p. 13.

55 It has also been argued that these treaties do not even create an "obligation of result" towards other states, see E. Fasoli, *supra* note 19, at p. 94.

56 See S. Dominelli, *supra* note 14, at p. 759-761.

57 See *Summons* paras. V.17 ff.

58 See Cass. civ., sez. un., 11 novembre 2008, n. 26972, in *De Jure*.

can seek damages.[59] Luckily enough, in the *Giudizio Universale* case the claimants invoked rights that are expressly protected by the Italian Constitution, like e.g., art. 32 *Costituzione* [Cost.] [Constitution],[60] whose contents seem to overlap at least in part with those of ECHR art. 2.[61]

Nonetheless, as will be discussed below, the issuance of the specific remedy sought in this suit seems still to be difficult under current Italian law, because of the nature of the defendant and of the purported illicit conduct, i.e., insufficient or lacking policymaking by the government or by the legislature.

Climate change litigation leads also to conflicts between international law and European law.

Many EU legal acts carry plenty of climate change provisions – well known by the claimants[62] – that leave some discretion to Member States regarding their implementation,[63] also providing specific control mechanisms.[64] Consequently, these acts do not seem to grant the citizens damages in case of non-implementation by EU countries.[65]

---

59 See Cass. civ., sez. un., 1 febbraio 2017, n. 2611, in *De Jure*.

60 See *Constitution of the Italian Republic*, translation supervised by the Senate International Affairs Service, Senato della Repubblica, Roma, 2018, p. 16: "The Republic shall safeguard health as a fundamental right of the individual. […]"

61 "Everyone's right to life shall be protected by law. […]"

62 See, e.g., *Summons* para. IV.3., which refers to "EU Regulations nos. 2018/842, 2018/1999, 2020/852, 2021/241."

63 See, e.g., Regulation (EU) 2018/1999 art. 4, para. 1: "Each Member State shall set out in its integrated national energy and climate plan the following main objectives, targets and contributions […]."

64 See, e.g., Regulation (EU) 2018/1999 art. 31, para. 3: "Where, on the basis of its assessment of the integrated national energy and climate plans and their updates pursuant to Article 14, the Commission concludes that the objectives, targets and contributions of the integrated national energy and climate plans or their updates are insufficient for the collective achievement of the Energy Union objectives and, in particular, for the first ten-year period, for the Union's 2030 targets for renewable energy and energy efficiency, it shall propose measures and exercise its powers at Union level in order to ensure the collective achievement of those objectives and targets. With regard to renewable energy, such measures shall take into consideration the level of ambition of contributions to the Union's 2030 target by Member States set out in the integrated national energy and climate plans and their updates."

65 See ECJ, Joined Cases C-46/93 and C-48/93, Judgment of 5 March 1996, *Brasserie du Pêcheur – Factortame*, ECLI:EU:C:1996:79: "Where a breach of Community law by a Member State is attributable to the national legislature acting in a field in which it has a wide discretion to make legislative choices, individuals suffering loss or injury thereby are entitled to reparation where the rule of Community law breached is intended to confer rights upon them, the breach is sufficiently serious and there is a direct causal link between the breach and the damage sustained by the individuals. Subject to that reservation, the state must make good the consequences of the loss or damage caused by the breach of Community law attributable to it, in accordance with its national law on liability. However, the conditions laid down by the applicable national laws must not be less favourable than those relating to similar domestic claims or framed in such a way as in practice to make it impossible or excessively difficult to obtain reparation."

In the *Urgenda* case, the Netherlands did not breach European standards, which nonetheless were deemed to be too loose by Dutch judges, relying mostly on international law.[66] The claimants in *Giudizio Universale* brought their case to court despite the Italian government has recently been considered more than complying with European policies.[67]

Accordingly, it's no surprise that climate advocates do not seek any EU remedies but rather base their domestic claims primarily on international law and on general principles. Of course, this is possible because even one of the most important climate advocates in the World – namely the European Union – can better combat global warming. And everyone is aware that Member States can adopt more stringent protective measures.[68] Still, this requires some international or constitutional legal source. Otherwise, it would need national political will, which however the judiciary might be not in the best position to formulate, as will be argued below.

3. Some Shortcomings of Climate 'Policy by Litigation'

Some scholars are aware that climate change litigation may give judges the power to make very relevant political or administrative choices,[69] especially when legislatures and governments are tried for their inaction. Some courts refrain from exercising this power, and this seems to happen especially in Common Law countries.

Here the judiciary benefits from doctrines that have been elaborated by case law for decades, in order to abide by the constitutional principle of separation of powers.

For instance, in the *Juliana* case the plaintiffs sought a declaratory relief and an injunction ordering the U.S. government to implement a plan to phase out fossil fuel emissions and reduce excess atmospheric carbon dioxide, but a

66 See *Rechtbank Den Haag* para. 4.84.: "It is an established fact that with the current emission reduction policy of 20% at most in an EU context (about 17% in the Netherlands) for the year 2020, the State does not meet the standard which according to the latest scientific knowledge and in the international climate policy is required for Annex I countries to meet the 2°C target;" *Hoge Raad* para. 2.3.2.: "The State cannot hide behind the reduction target of 20% by 2020 at EU level."

67 See *Commission Staff Working Document. Assessment of the final national energy and climate plan of Italy*, Brussels, 29.1.2021, SWD(2020) 911 final/2, p. 7: "On the basis of information in the NECP, with planned policies and measures (WAM scenario), Italy would achieve 34.6% reductions in the ESR sectors in 2030 compared to 2005. Annual emission allocation budgets are only presented for 2025 and 2030. For the EU ETS sector, the EU-wide target of -43% compared to 2005 is applied, but under the WAM scenario the NECP shows an overachievement, assessing the reduction to -55.9%."

68 See TFEU art. 193.

69 Cfr. S. Valaguzza, *supra* note 19, at p. 68.

majority of the United States Court of Appeals for the Ninth Circuit – examining plaintiffs' standing[70] – held that "it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan," because it "would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches. […]. And, given the complexity and long-lasting nature of global climate change, the court would be required to supervise the government's compliance with any suggested plan for many decades. See Nat. Res. Def. Council, Inc. v. EPA, 966 F.2d 1292, 1300 (9th Cir. 1992). […] Rucho v. Common Cause, […] 139 S. Ct. 2484 […] (2019) reaffirmed that redressability questions implicate the separation of powers, noting that federal courts 'have no commission to allocate political power and influence' without standards to guide in the exercise of such authority [otherwise they] would inject 'the unelected and politically unaccountable branch of the Federal Government [into] assuming such an extraordinary and unprecedented role.' Id. at 2507."[71]

In Australia – even if the statutory requirements for standing are less stringent[72] and even if the "political question" doctrine has not been formally accepted by case law[73] – the majority of the Federal Court, sitting in Full Court on appeal, held that the choice between authorizing or denying the expansion of a coal mine, which could cause an increase of GHGs emissions, has to be considered core or high policymaking, which should not ultimately belong to the judiciary.[74] This conclusion derives from the nature and the features of this kind of choices, which can't be adequately reviewed through trials: they involve scientific, social, economic, and political assessments – to be made also in an international framework – that belong to the executive or to the parliament, and there would be a lack of legal standards in order to review them.[75] Another Justice concurred with the decision considering – among other things – that parties' procedural behaviour can have an excessive influence on the outcome

70 See 13A C. A. Wright, A. R. Miller et al., *Fed. Prac. & Proc. Juris.* §§ 3531 ff. (3d ed. 2008), Westlaw, (April 2022 Update); D. L. Parker, *La legittimazione ad agire nella giurisprudenza delle Corti americane: la lezione dell'esperienza italiana*, in *Rivista di diritto civile*, 1996, 1, p. 107 ff.

71 *Juliana*, at 1171-1173.

72 See A. Edgar, *Standing for environmental groups: Protecting private and public interests*, in M. Groves (ed.), *Modern Administrative Law in Australia*, Cambridge University Press, Port Melbourne, 2014, p. 140 ff., comparing Australian law with British and American law.

73 See *Melbourne Corporation v Commonwealth* [1947] HCA 26; 74 CLR 31, at 82; *Thorpe v Commonwealth (No 3)* [1997] HCA 21; 144 ALR 677 at 692; *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1998) 19 FCR 347 at 370–373.

74 See *Minister for the Environment* [2022] FCAFC 35.

75 See *id.*, [7], [15]–[17], [103], [230], [237]-[238], [246]-[251], [253], [255]-[260], [265]-[266], [291]-[293], [344]-[346] (Allsop CJ), [836], [853]-[868] (Wheelahan J.).

of the case, which in turn would have significative consequences for the public at large.[76]

Conversely, in the *Urgenda* case, the Court of Appeals of The Hague and the Supreme Court of the Netherlands – which had to answer to the claimants' request for an order against the government to reduce the aggregate volume of annual GHGs in that country – found that the ECHR offers legal standards for evaluating the conduct of the State, leaving to the discretion of the defendant only the specific measures to achieve the goal set by the district court order.[77] This – it is worth recalling – without any Strasbourg precedent on climate change.

These cases show first of all that the existence of legal standards in this matter is still questioned. Anyways, if we assume that the fight against climate change is a political value – and unless it is an absolute one – it should be balanced with other social goals: i.e., it requires making political compromises, which doesn't seem the ordinary task of a court. This appears to be particularly true in a field where decisions may influence each and every aspect of human life, including housing, transportation, freedom of movement, immigration, energy, business and – on a wider scale – international relations.

'Policymaking by courts' also raises time issues. And this is not only because compliance with decisions can take several years, but also because adaptation measures need to be adjusted to sudden changes or contingencies, such as war, energy crises, economic crises and so on. Such a flexibility does not seem to characterize judicial orders.

In addition, 'policy by litigation' might prove to be less democratic in some countries than in others. In some jurisdictions, justices are elected by citizens, including many state supreme courts in America.[78] More often, judges are appointed by the executive and/or by the parliament, i.e., by someone who holds a direct (or at least an indirect) electoral mandate, as it happens in the United States[79] and in Germany[80] at the federal level. In Italy, criminal and civil courts – even the *Corte di cassazione* – do not have such a link with constituencies,[81] because candidates for the office of judge are selected only by exams. Such

76 See *id.*, [368]-[372] (Beach J.); the argument was made also by another Justice: see *id.*, [278], [292] (Allsop CJ).

77 See *Gerechtshof Den Haag* para. 69; *Hoge Raad* para. 8.

78 This happens in 21 states out 50; in the others, judges are appointed by governments or parliaments.

79 See U.S. Const. art. II, s. 2.

80 See *Commission Staff Working Document. 2020 Rule of Law Report. Country Chapter on the rule of law situation in Germany*, (SWD(2020) 304 final), p. 2, n. 2; M. Maiwald, *Il ruolo dei magistrati in Germania*, in *Studi Urbinati, A – Scienze giuridiche, politiche ed economiche*, 2008, 2, p. 306.

81 See N. Zanon, F. Biondi, *Il sistema costituzionale della magistratura*, Zanichelli, Bologna, 2008, p. 175.

features of the judiciary may be tough to change, as they are enshrined in constitutions[82] and have been shaping the "mentality" of jurists[83] for years.

In Civil Law countries – even leaving aside the absence of *stare decisis*[84] – further obstacles to a democratic use of strategic litigation may be found. For instance, some hurdles derive from Civil Procedure Rules. In Italy, non-parties in civil trials may receive only limited and anonymized data about cases (e.g., dates of hearings),[85] and only if they already possess certain key information (e.g., the Court, and the docket number of the case or the date of the first hearing according to summons, and the names of the parties). Copies of the parties' filings and evidence are unavailable to third parties, unlike the orders of the judge,[86] which may be anonymized.[87] The hearings, during which the evidence is taken (e.g., court appointed expert testimonies, interrogatories of the parties), are usually not open to the public.[88] Thus, most information received by outsiders prior to judgment is provided by the parties.[89] Furthermore, in Italian civil courts – and even in *Cassazione* – amici curiae are not allowed,[90] so that little or no contribution can be formally offered to the decision making process from the outside. For a 'policy by litigation' to be democratic, all these aspects must be reconsidered.

4. Some Shortcomings of Current Remedies

Climate change litigation is also creating a new set of legal remedies. Again, this happens especially when the defendant is a state. When courts detect governments' unlawful or unconstitutional inaction, traditional judicial review disapplication of statutes or declaratory reliefs are inherently useless. Therefore, in these cases claimants request injunctions.

82 See art. 106 Cost.

83 See R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)*, in *The American Journal of Comparative Law*, Vol. 39, No. 2, (Spring, 1991), p. 387-388.

84 See generally U. Mattei, *Stare decisis. Il valore del precedente giudiziario negli Stati Uniti d'America*, Giuffrè, Milano, 1988.

85 See art. 51 d.lgs. 30 giugno 2003, n. 196, so-called *codice della privacy* [Privacy Code].

86 See artt. 743-744 *Codice di procedura civile* [C.p.c.] [Code of Civil Procedure]; art. 76 r.d. 18 dicembre 1941, n. 1368, so-called *Disposizioni per l'attuazione del Codice di procedura civile e disposizioni transitorie* [disp. att. C.p.c.] [Provisions for the implementation of the Code of Civil Procedure and transitory provisions]; but see art. 90, co. 3 r.d. 16 marzo 1942, n. 267, so-called *l. fallimentare* [Bankruptcy Law]; art. 199, co. 3 d.lgs. 12 gennaio 2019, n. 14, so-called *codice della crisi d'impresa e dell'insolvenza* [Code of Business Crisis and Insolvency].

87 See art. 52 *codice della privacy*.

88 See art. 128 C.p.c.; art. 84 disp. att. C.p.c.

89 See *supra* notes 17-18.

90 See Cass. civ., sez. un., ord. 31 maggio 2016, n. 11387, in *De Jure*.

Judges tend not to order defendants to adopt specific measures, but rather set emission reductions targets – like in the *Urgenda* case[91] – or at least point to gaps in legislation that must be filled – like in the *Neubauer* case[92] – and set deadlines for complying with their decisions. This happens even in countries where the legislature allows courts to specify the measures that shall be adopted by the defendant,[93] like in France, because – as it has been recalled while adjudicating in the *Affaire du Siècle* case – "concrete measures to enable the damage to be made good may take different forms and reflect the Government's freedom of discretion."[94]

But suits that are framed within tort law – like the *Urgenda* and the *Giudizio Universale* cases – could raise further issues.

Speaking again of Italian law, as stated above, damages are available when fundamental rights enshrined in the Italian Constitution are violated by the state. This is certainly true when the illicit conduct is an action. But government or parliament inaction – and especially insufficiency or lack of policymaking – might undergo a different treatment: as of today, Italian civil courts do not award damages for failure to adopt legislation – apart from transposition measures that EU law mandates to pass – nor when a statute is deemed void for violation of the Constitution, and this seems to be done for separation of powers issues.[95] As said before, in *Giudizio Universale* claimants have sought an injunction, which aims to give them a specific remedy: this is certainly more than merely requesting damages, and thus an Italian civil court issuing that kind of order would constitute a very relevant innovation.[96]

---

91 See *Rechtbank Den Haag* para. 5.1., where the Court "orders the State to limit the joint volume of Dutch annual greenhouse gas emissions, or have them limited, so that this volume will have reduced by at least 25% at the end of 2020 compared to the level of the year 1990, as claimed by Urgenda, in so far as acting on its own behalf."

92 See *Neubauer*, at p. 6: "3(1) second sentence and § 4(1) third sentence of the Federal Climate Change Act of 12 December 2019 (Federal Law Gazette I, p. 2513) in conjunction with Annex 2 are incompatible with fundamental rights insofar as they lack provisions on the updating of reduction targets for periods from 2031 that satisfy the constitutional requirements as set forth in the reasons. […] The legislator must enact provisions by no later than 31 December 2022 on the updating of reduction targets for periods from 2031 as set forth in the reasons."

93 See art. 1252 *Code civil* [C.c.] [Civil Code].

94 See TA Paris, 14 octobre 2021, an English translation of which has been provided by the claimants, at p. 44.

95 See Cass. civ., sez. III, 22 novembre 2016, n. 23730, in *De Jure*; Cass. civ., sez. I, 13 dicembre 2021, n. 39534, in *De Jure*.

96 See R. Fornasari, *La struttura della tutela inibitoria ed i suoi possibili utilizzi nel contrasto al cambiamento climatico*, in *Responsabilità civile e previdenza*, 2021, pp. 2061 ff., suggesting a wider use of injunctions in climate change litigation.

New remedies must also be effective. For instance, the scenario might be uncertain if the defendant moves to another country after the judgment.[97] Enforcement may be problematic also for decisions issued against states, both at domestic and supranational levels.

In Germany, new legislation in compliance with the *Neubauer* decision was passed in a few months.[98] But when specific targets must be met by a state in the short run, difficulties may arise. Some legislatures might not make it at all, and the Italian Parliament could be one of them.[99] Others may pass insufficient legislation: it has been argued that the Netherlands' compliance with *Urgenda* has more to do with Covid-19 restrictions than with reforms passed after the courts' decisions.[100]

Moreover, in case of non-compliance of an order setting just targets and timelines, the court charged with the task of enforcement would have to specify what measures should be taken by the non-compliant party,[101] which may be as difficult as it was at trial.

It has been said above that, in addition to domestic litigation, climate advocates accessed supranational jurisdictions, e.g., the Strasbourg Court.[102]

For instance, a suit has been brought against Switzerland[103] by "the umbrella of the Association Verein KlimaSeniorinnen Schweiz, and by four individual women over the age of 80."[104] According to their Application, "Recent summers in Switzerland have been the warmest ever recorded, resulting in climate change-induced excess mortality and temperature-related morbidity," which is especially threatening to the individual claimants and the other members of the Association;[105] the Swiss Confederation is failing to meet its GHGs emission targets,[106] thus violating the rights to life and to family of the claimants,

97 After the Judgment of 26 May 2021 entered by the Court of first instance, Royal Dutch Shell moved its headquarters from The Hague to London in December 2021.

98 See Erstes Gesetz zur Anderung des Bundes-KIimaschutzgesetzes 18. August 2021.

99 See E. Borghetto, M. Giuliani, *A Long Way to Tipperary: Time in the Italian Legislative Process 1987–2008*, in *South European Society and Politics*, Vol. 17, No. 1, 2012, p. 32: "On average, in Italy, successful bills take 11 months (328 days) to get adopted, although their lifetime ranges from a minimum of one day to a maximum of more than four years. These are remarkable records. As far as we know, they take respectively twice and three times as long as legislative processes in the Netherlands and in Germany, regardless of whether we look at the average time or the maximum duration."

100 See B. Mayer, *The Contribution of Urgenda to the Mitigation of Climate Change*, in *Journal of Environmental Law*, 27 September 2022.

101 See art. 612 C.p.c.

102 See *supra* notes 15-16.

103 See ECtHR, Requête n° 53600/20, *Verein KlimaSeniorinnen Schweiz et autres c. Suisse*; the Application, as well as other filings and updates, can be found on the claimants' website.

104 See *Observations on the facts, admissibility and the merits* of 2 December 2022 para. 1, on the claimants' website.

105 See *Application* paras. E.2-4; and see also Additional Submission paras. 1.1.-1.2.

106 See *Application* paras. E.9-12; and see also Additional Submission paras. 1.3. ff.

protected respectively by ECHR art. 2 and art. 8;[107] its government and courts have not granted domestic remedies despite the claimants' requests, thus violating ECHR art. 6 and art. 13.[108] Therefore, the ladies and the Association ask the court both to award them "non-pecuniary damages" – i.e., noneconomic damages – and to order the "Respondent to adopt the necessary legislative and administrative framework to protect their rights, which is to do its share to prevent a global temperature increase of more than 1.5°C above pre-industrial levels," including "a. ensuring a greenhouse gas emission level in 2030 that is net-negative as compared to the emissions in 1990;

b. reducing domestic emissions by 61% below 1990 levels by 2030, and to net-zero by 2050, as the domestic component of a.;

c. preventing and reducing any emissions occurring abroad that are directly or indirectly attributable to the Respondent, in line with the 1.5°C above pre-industrial levels limit;

d. permanently removing greenhouse gas emissions from the atmosphere and storing them in safe, ecologically and socially sound greenhouse gas sinks, if, despite a., b., c., any greenhouse gas emissions continue to occur within the control of the Respondent, or the concentration of greenhouse gases in the atmosphere is exceeding the level corresponding to the 1.5ºC above pre-industrial levels limit."[109]

In the *Duarte* case, the claimants assert that none of the 33 defendant States "has adopted adequate legislative or administrative measures which mandate the off-setting of emissions released through the production of goods that they import (or the restriction of such imports)," nor "which restrict the extent to which entities within their jurisdiction may contribute to the release of emissions overseas,"[110] putting thus at risk "lives and wellbeing" of the young Portuguese claimants,[111] who have already "experienced reduced energy levels, difficulty [with] sleeping and a curtailment on their ability to spend time or exercise outdoors during recent heatwaves,"[112] as well as "anxiety about the effects which climate change may have on them and their families, and the families they hope to have in future."[113] This would amount to violations of ECHR art. 2, art. 8 and art. 14 committed by the defendants,[114] and "Immediate action" would be "required to prevent or mitigate, to the extent possible, the risks (of yet greater magnitude) that the Applicants stand to endure later in their lives."[115]

---

107 See *Application* para. F.; and see also Additional Submission para. 3.2.

108 See *Application* para. F.; and see also Additional Submission paras. 3.1. and 3.3.

109 See *Request for Just Satisfaction and General Measures* of 31 October 2021 paras. 1 and 3, on the claimants' website.

110 *Complaint* paras. E.12-13; and see also Annex para. 4.

111 See *Complaint* para. E.23.

112 *Id.* para. E.21.

113 *Id.* para. E.22.

114 See *id.* para. F.

115 Annex para. 8; and see also *Complaint* para. 28.

Some official information on Mr. Damien Carême's case[116] is currently available to the public: his individual domestic claim was dismissed by the French *Conseil d'État* for lack of standing, whereas other claimants succeeded on the merits, and afterwards he brought France to the ECtHR, "Relying on Articles 2 and 8 of the Convention" and complaining "that the action taken by" the defendant "to deal with global warming had been insufficient, including the authorities' failure to take all appropriate measures enabling the State to meet its own targets for maximum levels of greenhouse gas emissions."[117]

All the aforementioned cases have been recently reassigned to the Grand Chamber,[118] which means that they either raise "a serious question affecting the interpretation of the Convention or the Protocols thereto" or imply "the resolution of a question" that may "result inconsistent with a judgment previously delivered by the Court,"[119] while the Court decided to adjourn its examination of other seven climate change cases – including *Uricchio* and *De Conto* – until the Grand Chamber has ruled on those before it.[120]

Of course, claims have also to meet the admissibility criteria set by the Convention,[121] and this is at least questionable for *Duarte*, because the young claimants completely skipped litigation in Portuguese courts for reasons that do not seem so convincing.[122] As far as it can be known, the same could be said also for *Uricchio* and *De Conto*.[123]

116 See ECtHR, Requête n° 7189/21, *Carême c. France*.

117 See the Information Note on the Court's case-law 263.

118 See the Press Releases ECHR 142 (2022) of 29.04.2022, ECHR 184 (2022) of 07.06.2022 and ECHR 226 (2022) of 30.06.2022 issued by the Registrar of the Court.

119 See ECHR art. 30.

120 See the Press Release ECHR 046 (2023) of 9 February 2023 issued by the Registrar of the Court.

121 See ECHR art. 34: "The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right;" ECHR art. 35, para. 1: "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of four months from the date on which the final decision was taken;" ECHR art. 13: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

122 They argue that Portugal couldn't evaluate the conducts of other states; that after *Urgenda* the defendant States should all give the claimants remedies for violations of ECHR art. 2 and art. 8, but also that there are compelling time reasons to sue them jointly in Strasbourg instead of accessing each State's jurisdiction separately; that claimants' families have insufficient means to afford litigation in multiple domestic *fora*, see *Complaint* para. G and Annex paras. 35 ff.

123 As said before, the *Uricchio* and *De Conto* cases are told to be similar to *Duarte*, but information on them is very limited.

If climate change cases were to address the merits – and this is likely at least for *KlimaSeniorinnen* and *Carême* – the justices could ascertain whether the defendant States have committed violations of the ECHR. If the court finds for the claimants, in addition to declaratory relief – which is ECtHR's "principal remedy"[124] – it may order the States to give them "just satisfaction," i.e., to pay – in addition to costs and expenses – damages,[125] which – if noneconomic – are usually modest.[126]

Moreover, the Strasbourg Court may order the defendant to take remedial measures – both individual and general ones[127] – and since 2011 it can also start "a pilot-judgment procedure […] where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications."[128] Judgments issued for the claimants at the end of this procedure shall "identify […] the type of remedial measures which the Contracting Party concerned is required to take at the domestic level by virtue of the operative provisions of the judgment,"[129] and may set deadlines for state compliance.[130] These measures can be "compensatory," such as – again – "damages to persons subjected to the violations caused by the [systemic] problem" of the defendant, or "Preventive remedies," which in turn "aim to resolve the actual problem" but are usually left quite unspecified by the judgment.[131]

---

124 See A. Nussberger, *The European Court of Human Rights*, Oxford University Press, Oxford, 2020, p. 161.

125 See ECHR art. 41: "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

126 See V. Fikfak, *Changing State Behaviour: Damages before the European Court of Human Rights*, in *The European Journal of International Law*, Vol. 29, No. 4, 2019, p. 1107-1108: "Even in the most serious cases, the awards tend to be modest – for example, € 20,000 for torture and about € 50,000 for the disappearance of a loved one. Figure 2 contains all of the non-pecuniary awards made in the last 13 years for violations of Article 3 (torture, inhuman and degrading treatment) and Article 5 (arbitrary detention). It clearly shows that the amounts of damages are low: 74.5 per cent of all Article 3 applicants are awarded compensation below € 10,000, and 94.8 per cent of victims are awarded compensation below € 20,000. For violation of Article 5, 80.7 per cent of victims receive below € 5,000, and 94.8 per cent of victims receive below € 10,000;" see also A. Nussberger, *supra* note 124, at. p. 162: "In comparison to non-pecuniary damages paid eg in the United States the sums granted are very modest indeed."

127 See generally A. Nussberger, *supra* note 124, at p. 164-172.

128 ECtHR Rules of Court 61, para. 1.

129 *Id.* para. 3.

130 See *id.* para. 4.

131 See L. R. Glas, *The Functioning of the Pilot-Judgment Procedure of the European Court of Human Rights in Practice*, in *Netherlands Quarterly of Human Rights*, 2017 34:1, p. 52-55.

In any event, the ECHR system – while promising on the merits – might face effectiveness issues. States could *de facto* not abide by judgments entered for the climate change advocates. "Supervision" of their execution is left to the Committee of Ministers of the Council of Europe, which may "refer to the Court the question whether that Party has failed to" comply with them; if the latter finds so, it refers in turn to the first "for consideration of the measures to be taken."[132] This procedure may put political pressure on the non-compliant state,[133] but it does not provide for any further specific sanction.[134]

5. Some Proposals

If litigation is going to be the way of pushing better climate policies, it must also be democratic, and remedies have to be effective.

At the domestic level, orders like those sought by climate advocates against the states seem to fit better with supreme courts vested with judicial review powers, like the *Bundesverfassungsgericht* in Germany, or the *Corte costituzionale* in Italy.

The latter doesn't seem to issue injunctions of that kind yet, despite having elaborated a procedural solution for other recent cases, which might be adopted also in the field of climate change litigation. In particular, since 2018, the *Consulta* – another name for the *Corte costituzionale* – allows the Parliament to avoid declarations of unconstitutionality of some statutes: before giving the decision, the court sets a deadline for Parliament to amend them, if the legislature wishes to do so.[135]

It must also be observed that art. 9 Cost. has been recently amended,[136] now requiring the Republic to safeguard the environment, biodiversity and ecosystems, also in the interest of future generations, improving the odds that

132 ECHR art. 46.

133 See F. Viganò, *Fonti europee e ordinamento italiano*, in *Diritto penale e processo*, 2011, *Speciale Europa*, p. 7.

134 See A. Szklanna, *Delays in the Implementation of ECtHR Judgments: The Example of Cases Concerning Electoral Issues*, in W. Benedek, P. Czech, L. Heschl, K. Lukas, & M. Nowak (Eds.), *European Yearbook on Human Rights 2018*, Intersentia, Cambridge (UK), 2018, p. 447, arguing that "in case of failure to implement a judgment, the ultimate sanction that is available for the [Committee of Ministers] is Article 8 of the 1949 Statute of Council of Europe, 3 which provides that a Member State which has seriously violated Article 3 of the Statute (according to which a Member State shall respect rule of law and human rights) may be suspended from its rights of representation or even expelled from the organisation. So far this provision has not been used and it is often believed that its mere existence is sufficiently dissuasive."

135 See. Corte cost., ord. 23 ottobre 2018, n. 207; Corte cost., 22 novembre 2019, n. 242; Corte cost., ord. 26 giugno 2020, n. 132; Corte cost., 12 luglio 2021, n. 150; Corte cost., ord. 11 maggio 2021, n. 97.

136 See l. cost. 11 febbraio 2022, n. 1.

climate change litigation will reach the *Consulta*, which by the way has recently allowed amici curiae.[137]

In private law, a new Italian act – which allows class-actions for damages and for orders "inhibiting acts and conducts" of the defendant[138] – recently entered into force: further cases may reveal whether this statute allows injunctions such as those usually sought by climate advocates against companies and governments.

Anyways, a "Public-interest litigation flag" for all climate change litigation cases should be adopted by the legislature, giving public access to information, dockets and hearings, and allowing amici curiae to offer their contribution also to civil courts.

With the aim of improving the effectiveness of court orders that merely set targets and timelines, it should be kept in mind that legal systems have already developed economic disincentives for the non-compliant party, like *astreintes* in France[139] or the sum of money owed by the defendant according to art. 614-*bis Codice di procedura civile* [C.p.c.] [Code of Civil Procedure]. As long as sums are available, these 'side-orders' may put significant economic pressure on the defendants if they delay or try to avoid execution.

There are also criminal law provisions, which punish contempt of court,[140] but when the non-compliant party is a state – leaving separation of powers aside – individual liability could be hardly found given the composition of the executive and of the legislature, i.e., a host of people changing quite frequently, as occurs – again – in Italy.[141]

Paradoxically, traditional tort remedies could be more effective than those currently sought by climate advocates. Once a domestic court has ascertained that the state or a company committed a tort or breached an obligation towards the claimants, the same might be found in subsequent suits brought by a multitude of other victims, who could in turn request payment of damages. While the quantification of the awards might be difficult at trial, it seems less difficult

137 See Cort cost., delib. 8 gennaio 2020, in G.U. 22 gennaio 2020, n. 17.

138 See artt. 840-*bis* ff. C.p.c., on which see P. F. Giuggioli, *L'azione di classe. Un nuovo procedimento collettivo*, Wolters Kluwer, Milano, 2019; M. Stella, *La nuova azione inibitoria collettiva* ex *art. 840* sexiesdecies *c.p.c. tra tradizione e promesse di deterrenza*, in *Il Corriere giuridico*, 2019, 12, p. 1453 ff.

139 On which see S. Patti, voce *Pena privata*, in *Digesto delle discipline privatistiche. Sezione civile*, XIII, Torino, Utet, 1995, p. 356; in case of environmental harm in the French system, see art. 1250 C.c.

140 See, e.g., artt. 388 and 650 *Codice penale* [C.p.] [Criminal Code] in Italy.

141 See E. Borghetto, M. Giuliani, *supra* note 99, at p. 24: "Between 1987 and 2008, […] citizens have been represented by six different parliaments, elected by three diverse electoral systems; they have been governed by 15 executives, with varied degrees of alternation under completely different political alliances representing the whole range of formal types of coalitions: from minority governments to oversized ones, from minimal winning to technical governments."

to enforce such decisions (provided funds are available), creating concern for defendants in such matters.

At the supranational level, if climate advocates prevail in – at least some of – the ECtHR pending cases, they can uncover "structural or systemic problems" about mitigation policies of the defendant States, and many more suits could be filed afterwards, because almost everyone else may assert to be a victim of States' inaction.

On the one hand, the risk of small but innumerable awards to be issued by Strasbourg may alarm the defendants – and also other states that are committing similar violations of the ECHR – and could induce things to change. However, if the Court adopted the pilot-judgment procedure, it could properly manage such a litigation flood. The ECtHR could achieve both results if it went for a pilot-judgment and adjourned all similar pending applications after the time for its execution has expired.[142] But the issue of effectiveness of Strasbourg decisions would remain.

142 See L. R. Glas, *supra* note 131, at p. 56; A. Nussberger, *supra* note 124, at p. 170.

Section II
Conflict of laws and international trade law

Transnational corporate liability in the era of loss and damages: the case of *Asmania Et Al. V Holcim*

Laura Andrea Duarte Reyes
European Center for Constitutional and Human Rights (ECCHR)

Nina Burri[1]
Legal advisor for the Hilfswerk der Evangelisch-reformierten Kirche Schweiz (HEKS/EPER)
DOI: 10.54103/milanoup.151.c195

As the climate and ecological crisis exacerbates, its effects are increasingly contributing to loss and damage (L&D) around the world, disproportionately affecting those who have contributed the least to climate change and have the least economic capacity to cope with it. Despite this pressing scenario, efforts at the UN level have so far failed to secure sufficient funding for vulnerable states to address L&D. Against this background, attention has been increasingly focusing on litigation targeting public and private actors for their contribution to climate-related impacts. Civil litigation has been a primary course of action for attempting to attribute responsibility to major private polluters. Yet, despite offering an opportunity to embark on a potential road to reparation, tort-based claims face several procedural, legal and evidentiary challenges, especially when it comes to extraterritorial responsibility. This article presents a detailed analysis of *Asmania et al. v. Holcim*, the lawsuit filed by four inhabitants of the island of Pari, Indonesia, against the Swiss cement company Holcim for its contribution to climate change and consequently to the financial and non-financial damages suffered by the plaintiffs due to sea level rise on the island. The authors argue that despite the challenges posed by the traditional tort system a new interpretation of Swiss civil law provisions might open the possibility for a civil liability regime able to effectively address the question of climate related L&D in an extraterritorial setting.

Keywords: Loss and Damages; climate litigation; Small Island and Developing States; Swiss tort law; human rights; climate reparations; transnational litigation; corporate accountability

1 Laura Andrea Duarte Reyes is a legal advisor at the European Center for Constitutional and Human Rights (ECCHR) in Berlin. Nina Burri is a legal advisor for the Switzerland based Hilfswerk der Evangelisch-reformierten Kirche Schweiz (HEKS/EPER). Both authors have been involved in the campaign "Call for Climate Justice (https://callforclimatejustice.org/en/) in support of Asmania et al. v. Holcim.

1. Introduction

As the climate and ecological crisis exacerbates, its effects are increasingly contributing to loss and damage (L&D) around the world, particularly affecting Indigenous Peoples, small islands developing states and those in the Global South, who have contributed the least to climate change and have the least economic capacity to cope with it.[2] Although the UN Framework Convention on Climate Change (UNFCCC) does not provide a definition of the term L&D, the literature suggests that it encompasses both reversible and irreversible impacts that cannot be avoided either because they surpass the limits to adaptation and mitigation (unavoidable) or due to financial or technical constraints (unavoided).[3] Another categorization of L&D is that of economic and non-economic loss and damages (NELD). While economic L&D corresponds to harm that can be assigned a financial value or be associated with loss of earnings, NELD refers to tangible or intangible impacts that cannot be commercialised but still hold significant value for people, e.g. loss of biodiversity, territory, cultural heritage, or traditional knowledge.[4]

The latest IPCC report establishes that L&D are rising dramatically;[5] potential costs for developing countries have been estimated to amount to a total of US$290–580 billion in 2030 and reach US$1–1.8 trillion in 2050 (excluding

2 H. O. Pörtner, (Ed.), *Climate Change 2022: Impacts, Adaptation and Vulnerability: Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge University Press, 2022.

3 M. Doelle, & S. L. Seck, *Introducing loss and damage*, in *Research Handbook on Climate Change Law and Loss & Damage*, Edward Elgar Publishing, 2021, p. 1-16.

4 E. Boyd, B. C. Chafin, K. Dorkenoo, G. Jackson, L. Harrington, A. N'guetta, & Stuart-Smith, *Loss and damage from climate change: A new climate justice agenda,* One Earth, 4(10), 2021, p. 1365-1370.

5 See H. O. Pörtner. (Ed.), 2022 (n 2).

non-financial damages).[6] Despite this pressing scenario, efforts at the UN level have so far failed to secure finance for vulnerable states to address L&D, mainly due to a strong resistance by industrialised countries around questions of historical responsibility, equity and fairness.[7] The COP 27 decision to establish a fund to assist developing countries in responding to L&D[8] represents a major step forward, nevertheless it is yet to be operationalized and resourced sufficiently to meet the needs of those who are most affected.

Against this background, attention has been increasingly focusing outside the UN system, especially through litigation targeting not only states but also private corporations as actors to be held accountable for their contribution to climate-related impacts.[9] Recent research shows that 108 corporations are responsible for 52% of global industrial greenhouse gas emissions (GHG) since the industrial revolution.[10] Not only have these corporations profited massively "from their actions while externalising the associated harm",[11] but they have done so despite having access to scientific data on the significance of climate change and the contribution of their business activities to its impacts.[12]

Civil litigation has been a primary course of action – mainly due to its compensatory function – for attempting to attribute responsibility to major private polluters and to seek redress for the L&D they have contributed to.[13] Yet, despite offering an opportunity to embark on a potential road to reparation, tort-based claims face several procedural, legal and evidentiary challenges, especially when it comes to extraterritorial responsibility, which might be the course of action in the case of claimants from the Global South seeking monetary compensation from a corporation based in the Global North for the cross-border impacts of its GHG emissions. This is the case of four islanders of the island of Pari,

6 A. Markandya, M. Gonzalez-Eguino, *Integrated assessment for identifying climate finance needs for loss and damage: A critical review*, in R. Mechler, Reinhard, et al, *Loss and damage from climate change: Concepts, methods and policy options. Springer Nature*, 2019, p. 343-362.

7 Grantham Research Institute On Climate Change And The Environment, *What is climate change 'Loss and Damage'*, 28.10.2022.

8 UNFCCC, Decision -/CP.27 -/CMA.4, *Funding arrangements for responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage*, 20.11.2022.

9 Sabine Center for Climate Change, S. (ed.), *Corporation Archives*, in Global Climate Change Litigation Database, 19.03.2023.

10 P. Griffin, & C.R. Heede, *The carbon majors' database.* CDP carbon majors' report 2017, 14.

11 S. Mascher, *Towards a civil liability regime for climate-related loss and damage*, in M. Doelle, S. Seck (ed.), *Research Handbook on Climate Change Law and Loss & Damage,* Edward Elgar Publishing, 2021. p. 350-368.

12 P.C. Frumhoff, R. Heede, N. Oreskes, *The climate responsibilities of industrial carbon producer*s, Climatic Change, 2015, vol. 132, no 2, p. 157-171.

13 M. Doelle, S. Seck, *Loss & damage from climate change: from concept to remedy?* Climate Policy, 2020, vol. 20, no 6, p. 669-680.

Indonesia who, inspired by the German case *Luciano Lliuya v. RWE*[14], have filed a civil lawsuit against the Swiss based building materials company Holcim, seeking not only a reduction of absolute CO2 emissions, but also proportional compensation for climate change-related damages on the island, as well as a financial contribution to adaptation measures in Pari.[15]

Due to the transboundary nature of climate change the question of extraterritorial obligations of states and corporations is becoming increasingly relevant. This article will present a novel approach to transnational civil litigation in the context of climate change, through the analysis of the case *Asmania et al. v. Holcim*. It argues that despite the challenges posed by the traditional tort system a new interpretation of Swiss civil law provisions might open the possibility for a civil liability regime able to effectively address the question of climate related L&D. To this end, the first section will reflect on the use of civil litigation (primarily tort law) as a way forward in seeking redress for those affected by climate change in transnational contexts. The second section will present how the plaintiffs in *Asmania et al. v. Holcim* addressed the main challenges linked to a tort-based climate litigation in an extraterritorial setting. Finally, the third section will reflect on the value of advancing transnational litigation efforts in the context of climate change and its potential for addressing questions of climate and distributive justice.

2. Corporate accountability for climate related loss and damages

The extremely rapid pace at which climate impacts, including extreme and slow onset events, are increasingly affecting the lives of vulnerable communities worldwide, particularly in the Global South, combined with the lack of effective and timely solutions at the political level, have reinforced the need to seek alternative legal avenues to ensure redress for those on the frontlines of climate change. Within this context, large private corporations – primarily the so-called 'carbon majors'[16]- have become the focus of several claims seeking monetary compensation to reduce the financial burden of climate related L&D.[17] Due to the myriad of hurdles faced by such lawsuits, to date, most have been unsuccessful.

---

14 The Grantham Research Institute on Climate Change and the Environment at London School of Economics, *Luciano Lliuya v. RWE,* in Climate Change Laws of the World, 15.03.2023.

15 See Sabine Center for Climate Change, S. (ed.), *Asmania et al. vs. Holcim*, in Global Climate Change Litigation Database, 19.03.2023.

16 C. P. Frumhoff, et alt. 2015 (n 12).

17 D. A. Kysar, *What climate change can do about tort law,* in *Envtl. L.*, 2011, vol. 41, p. 1; C. Higham, H. Kerry, *Taking companies to court over climate change: who is being targeted?* LSE Business Review, 2022; P. Toussaint, *Loss and damage and climate litigation: The case for greater interlinkage*, in *Review of European, Comparative & International Environmental Law*, 2021, vol. 30, no 1, p. 16-33.

These include, most prominently, *Comer v. Murphy Oil* and *Native Village of Kivalina v. ExxonMobil Corp*, filed before US courts, in 2005 and 2007 respectively. In Comer,[18] plaintiffs sought financial compensation from a number of fossil fuel companies for their contribution to climate change and thereby to the ferocity of Hurricane Katrina, which caused catastrophic damages, particularly in New Orleans. The Court dismissed the case based on the plaintiffs' inability to prove a causal link between the alleged damage and the companies' GHG emissions.[19] In the same vein, the impossibility to prove causality together with questions around the justiciability of the matter – also known as the 'political question doctrine' in common law jurisdictions – precluded the inhabitants of Kivalina, Alaska from obtaining redress from major hydrocarbons and power companies for their potential relocation, due to the erosion of the Kivalina coast as a result of climate change.[20]

More recently, two unprecedented lawsuits, *Luciano Lliuya v. RWE* and *Asmania et al. v. Holcim*, were brought before German and Swiss courts respectively, seeking compensation from private corporations for climate related harm. As will be discussed in the following chapters, the particularity of these cases lies, first, in the extraterritorial aspect of the claims, as the plaintiffs are based in Peru and Indonesia respectively, and, second, in the way in which the plaintiffs have interpreted tort law so that it can respond to the complexity of climate change. Much has been written about the procedural and legal challenges posed by climate-related tort litigation, including primarily issues of attribution, causation and justiciability.[21] This section will first question whether, despite these obstacles, civil litigation can offer a way forward for individuals and communities affected by climate change. To this purpose it will discuss how the issues of causality, attribution and unlawfulness were addressed by Saúl Luciano Lluiya, the Peruvian plaintiff in the case against RWE. This will be followed by a reflection on the horizontal impacts of human rights based climate litigation in relation to tort law, as a phenomenon of legal cross-pollination that might increasingly contribute to moving beyond a restrictive interpretation of legal concepts that prevent effective climate litigation under civil law.

18 Sabine Center for Climate Change, S. (ed.), *Comer v Murphy Oil*, in Global Climate Change Litigation Database, retrieved on 19.03.2023.

19 M. Hinteregger, *Climate change and tort law*, in *Climate Change, Responsibility and Liability*, Nomos Verlagsgesellschaft mbH & Co. KG, 2022, p. 383-414.

20 Sabine Center for Climate Change, S. (ed.), *Native Village of Kivalina v. ExxonMobil Corp,* in Global Climate Change Litigation Database, retrieved on 19.03.2023.

21 D. A. Kysar, 2015 (n 17); M. Hinteregger, *Civil liability and the challenges of climate change: a functional analysis*, in *Journal of European Tort Law*, 2017, vol. 8, no 2, p. 238-259.

2.1. Civil litigation a way forward?

Although L&D has mainly been discussed at the political level, it remains true that climate change, and thus its impacts, are a legal issue and even more a matter of justice and rights.[22] In the absence of specific legislation relating to civil liability and compensation for climate change induced damages, tort law has become the default legal avenue to fulfil the basic principle of law determining that "those who cause significant, foreseeable harm to others should be held liable for damage they cause victims of this harm".[23] Nevertheless, such lawsuits have confronted the courts with complex questions around harm, causation and responsibility, calling into question the 'suitability' of conventional tort law for the compensation of climate damages. [24]

Along with procedural and justiciability related hurdles, evidentiary challenges remain one of the major obstacles plaintiffs face when seeking redress for L&D in court. The climate system is "diffuse and disparate in origin, lagged and latticed in effect"[25] which makes it complex to demonstrate a linear causal link between the defendant's behaviour (emissions) and the plaintiff's injury (climate related harm). This becomes even more challenging as there are multiple polluters contributing to climate change and in turn to its impacts. However, climate change is not the first constellation in which courts have found themselves facing a case that defied the existing system for compensating and deterring harm. In certain medical and toxic tort cases, like asbestos or tobacco, courts have developed innovative approaches that have provided solutions for complex causality scenarios.[26] Some of these theories acknowledge not only liability in case of concurrent, cumulative and alternative causality constellations, but they also provide for solutions to apportion compensation according to the statistical evidence of causation.[27]

As Verheyn explains, science can rarely determine cause-effect relationships with 100% certainty, rather scientists will generally refer to the likelihood of an event in terms of probability.[28] Since climate change may increase the likelihood or intensity of an extreme event, attribution statements in this context are typically probabilistic.[29] This has also been the case in lawsuits seeking compensation for medical conditions arising from exposure to tobacco and asbestos,

22 C. P. Frumhoff et alt. 2015 (n 12).

23 S. Mascher, (n 11) referring to R.V. Pervical, *Liability for environmental harm and emerging global environmental law*, Md. J. Int'l L., 2010, vol. 25, p. 37, 38.

24 M. Hinteregger, 2022 (n 19) at 383.

25 D. A. Kysar, 2015 (n 17) at 41.

26 M. Hinteregger, 2022 (n 19) at p. 397.

27 *Ibidem.*

28 R. Verheyen, *Loss and damage due to climate change: attribution and causation-where climate science and law meet,* in *International Journal of Global Warming*, 2015, vol. 8, no 2, p. 158-169.

29 R. F. Stuart-smith, F.E. Otto, A. I. Saad, G. Lisi, P. Minnerop, K. C. Laut, & T. Wetzer, *the evidentiary gap in climate litigation* in *Nature Climate Change*, 2021, vol. 11, no 8, p. 651-655.

where such conditions may have occurred in the absence of this exposure.[30] While it might be complex to meet the requirements of causality tests in different jurisdictions on the basis of probabilistic assessments, it is noteworthy that courts around the world have already ruled that anthropogenic climate change is happening (general causation), based on the IPCC reports, despite its probabilistic approach.[31]

Furthermore, recent developments in attribution science have made it possible not only to determine the contribution of a specific company to climate change in terms of GHG emissions[32] but also to establish when human made climate change has contributed to specific events (specific causation)[33] as well as the damages attributable at least partially, to anthropogenic climate change (damage attribution).[34] Similarly, in certain cases, attribution science would be able to provide evidence showing that the defendant's conduct has made a plaintiff worse off (in terms of intensity of the harm), which would align with the logic of the 'but-for' test and the *conditio sine qua non* formula.[35] Against this background, science seems to be expanding the horizon of tort law.

Along these lines, Ganguly et al. concluded that new developments in climate science, recent changes around legal discourse, particularly in relation to the augmented value of successful tobacco and asbestos litigation, have significantly raised the chances of success for plaintiffs in pending and future climate change cases.[36]

---

30 *Ibid,* at 652.

31 See Bundesverwaltungsgericht, Federal Administrative Court, 8 C 13/05, Judgement of 25.01.2006, Bundesverfassungsgerich (Federal Constitutional Court), 1 BvF 1/05, Judgement of 13.03.2007, LG Köln, 28 O 456/05, Judgement of 26 October 2005; Supreme Court of the United States, Massachusetts et al. v. Environmental Protection; Gerechtshof Den Haag, *Urgenda Foundation vs The State of Netherlands*, C/09/456689/HA ZA 13-1396, 9.10.2018; Bundesverfassungsgericht, *Neubauer et al. vs Germany*, Beschluss des Ersten Senats, BvR 2656/18, 78/20, 96/20, 288/20, 24.3.2021.

32 P. Griffin, & C.R. Heede, 2017, (n 10); B. Ekwurzel, J. Boneham, M.W. Dalton, R. Heede, R.J. Mera, M. R. Allen & P.C. Frumhoff, *The rise in global atmospheric CO2, surface temperature, and sea level from emissions traced to major carbon producers*, Climatic Change, 2017, vol. 144, no 4, p. 579-590.

33 R. F. Stuart-smith et al., 2021, (n 29) at 652; F. Stuart-Smith, G. H. Roe, S. Li, & M.R. Allen, *Increased outburst flood hazard from Lake Palcacocha due to human-induced glacier retreat,* in *Nature Geoscience*, 2021, vol. 14, no 2, p. 85-90 (b).

34 B. H. Strauss, P. M. Orton, K. Bittermann, M.K. Buchanan, D.M. Gilford, R.E.Kopp & S. Vinogradov, *Economic damages from Hurricane Sandy attributable to sea level rise caused by anthropogenic climate change* in *Nature Communications*, 2021, 12(1), 2720; J. Hinkel, G. Gussmann, V. Völz, D. Lincke, Heutige und zukünftige Auswirkungen des Klimawandels und Meeresspiegelanstiegs auf der Insel Pari, GCF Working Paper 1/2023, Global Climate Forum, Berlin 2023.

35 R. F. Stuart-smith et al et al., 2021, (n 29) at 652; R.F. Stuart-Smith, A. Saad, F. Otto, G. Lisii, K. Lauta, P. Minnerop & T. Wetzer, A*ttribution science and litigation: facilitating effective legal arguments and strategies to manage climate change damages*, 2021.

36 G. Ganguly, J. Setzer, V. Heyvaert, *If at first you don't succeed: Suing corporations for climate change, Oxford Journal of Legal Studies,* 2018, vol. 38, no 4, p. 841-868.

Following Dougals Kysar's thinking around the question of "what climate change can do about tort law?",[37] it can be argued that an influx of climate change claims, like the one filed by the people of Pari island against the cement giant Holcim, may force a reevaluation of tort law as they will require courts to better articulate or reform areas of doctrine that are not well equipped for the complexity of climate change.[38] These cases represent an opportunity for judges to reinterpret the law in a way that is aligned with the current risks to be adjudicated in our society as well as to address the corporate accountability gap – especially of carbon majors – within the framework of climate change.[39]

As the science of attribution continues to provide increasing clarity on the actors that have contributed heavily and historically to climate-related L&D as well as on the complexities underlying climate change, it will become harder for judges to continue to rely on rigid legal and evidentiary requirements that, as the toxic and asbestos cases demonstrate, can be reinterpreted in order to comply with demands of fairness and justice.

2.2. Breaking legal paradigms

The case of *Luciano Lliuya v. RWE* was the first transnational climate litigation case in civil courts when filed on 24 November 2015 in Germany.[40] In his claim, the Peruvian mountain guide and farmer Saúl Luciano Lliuya argues that his house is threatened by a flood wave from a nearby glacial lake Palcacocha, which is more likely to occur due to climate change. He asks the court to declare RWE – Germany's biggest energy corporation, with large operations in the coal business – responsible to bear a share of the costs of appropriate protective measures, in order to protect the plaintiff's property from the glacial flood. The relevant share in the case is 0.47 percent of the overall costs, because, as he argues, RWE caused 0.47 percent of all industrial greenhouse gas emissions.[41] Interestingly, the claim is built on German property rights, more specifically on Section 1004 of the German Civil Code, the basic nuisance provision for property under German law. Although more than 10'000 kilometres distance the corporation's headquarters in Germany from the village in the Peruvian Andes where the plaintiffs lives, he argues that they both live in a neighbourly relationship and that the corporate behaviour and emissions of RWE thus

37 D. A. Kysar, 2015 (n 17) at 41.

38 W. Bonython, *Tort law and climate change*, in *The University of Queensland Law Journal*, 2021.

39 J. Galperin, D.A. Kysar, *Uncommon Law: Judging in the Anthropocene, in Climate Change Litigation in the Asia Pacific*, Cambridge University Press 2020, 2020, no 2020-33.

40 For an overview of the timeline and legal documents see Germanwatch, *The climate case – Saúl vs. RWE*, retrieved on 20.3.2023 or Sabine Center for Climate Change, S. (ed.), *Luciano Lliuya v. RWE AG,* in Global Climate Change Litigation Database, retrieved on 20.03.2023.

41 Regional Court of Essen, *Lliuya vs. RWE*, claim filed on 23 November 2015, p. 18.

affects his property.[42] While rejected in the first instance by the Regional Court of Essen on 15 December 2016 due to lack of legal causality (yet conceding a potential 'scientific causality'), the second instance Higher Regional Court of Hamm acknowledged in November 2017 that the effect of climate change in the Global South can, in principle, be attributed to major emitters like RWE, even though such an emitter might be operative in a completely different part of the world.[43] The Higher Regional Court of Hamm found that climate change has cross border effects which has brought about a kind of global neighbourly relationship, which is why Section 1004 of German property law is applicable. In an oral hearing the judges stated: "We live at the bottom of a sea of air. This circumstance necessarily means that human action extends into the distance […] If the permission or prohibition of such an emission is to be determined, one must not only consider the relationship of neighbour to neighbour; rather, the scope of the owner's right can be made to bear on all people. […] Someone who causes or spreads imponderabilia must know that these go their own way. Their propagation across the border can be attributed to them as a consequence of their action."[44]

With these preliminary findings, the case already broke a legal paradigm. If upheld by the judgement and higher instances, this means that corporate emitters *can be* liable for the consequences of their emissions if there is sufficient scientific evidence to prove causation to the specific damage. Since then, the case entered the stage of assessing the case-specific causation in an extensive evidentiary proceeding. Thereto, the judges and court appointed independent experts travelled in May 2022 to the Peruvian Andes to assess the facts on the ground.[45] It remains to be seen if the scientific evidence presented to the judges convinces them of the threat to the plaintiff's property in question. Yet, importantly, the longer this case runs in court, the more scientific data and studies emerge on the relevant causality questions. A recent study published by researchers from the University of Oxford and the University of Washington, for example, concluded that it is virtually certain (>99% probability) that the retreat of Palcaraju glacier cannot be explained by natural variability alone, and that the retreat of the glacier until 1941 represented already an early impact of anthropogenic greenhouse gas emissions. They observe further that the overall retreat of the glacier is entirely attributable to the rise of temperature, and that

42 *Ibid*, p. 2-3, 25-31. See further N. Walker-Crawford, *Climate change in the courtroom: An anthropology of neighbourly relations*, in *Anthropological Theory*, 23/1 (2023), p. 76-99.

43 Oberlandesgericht Hamm, *Lliuya vs RWE*, Hinweis- und Beweisbeschluss, 30.11.2017 and oral hearing of 17.11.2017.

44 Quote mentioned in Germanwatch, *A precedent-setting case*, in The Climate Case – Saúl vs. RWE, retrieved on 20.3.2023.

45 See e.g. S. Kaplan, *A melting glacier, an imperilled city and one farmer's fight for climate justice*, in Washington Post, 28.08.2022.

the resulting change in the geometry of the lake and valley has substantially increased the outburst for local flood hazards.[46]

As for the question of unlawfulness, the Higher Regional Court of Hamm held in very general terms that it is in accordance with legal systematics that a person who acts lawfully can also be held liable for the impairment of property caused by him or her. Any reasons why this fundamental legal concept should not apply in the context of 1004 and 1011 BGB are not apparent and do not result from the intention of the legislator or from the principles of teleological interpretation either. The court stated further, as brought forward by the defendant, that the case was not about a question of an omission in breach of duty, but of active (co-)causation of the flood hazard through the active operation of the power generation companies or the subsidiaries controlled by RWE.[47] In addition to the preliminary findings mentioned above, this judicial conclusion is of great relevance for other civil proceedings, such as the case of *Asmania et al. v Holcim*.

2.3. Horizontal effects of climate change litigation

Since the first cases filed before US courts in 2005 and 2007 respectively, practitioners in the field of climate litigation have been carefully following the legal developments around the globe. The questions of attribution, unlawfulness and causation around climate change as well as the handling of scientific evidence in legal fora are relevant in each case, regardless of whether it is brought against a state or a corporation. And since climate litigation in recent years was increasingly put forward through a human rights lens addressing human rights bodies and courts,[48] findings of these institutions also inspired arguments in civil proceedings. The RWE claim, for instance, offered various references to the *Urgenda* case, which at the time was before lower Dutch courts.[49]

The rulings of the Dutch courts in *Urgenda* were furthermore the basis for the case *Milieudefensie et al. v. Royal Dutch Shell plc.*, which can be deemed as a major catalyst of this development.[50] The 2021 ruling of the Hague District Court in this case marks the first time a court imposes a specific mitigation obligation on

46 R. F. Stuart-smith et al. (n 33b), p. 85-90.

47 Oberlandesgericht Hamm, *Lliuya vs RWE*, Hinweis- und Beweisbeschluss, 30.11.2017, p. 2-3.

48 See for many J. Fraser and L. Henderson, *The human rights turn in climate change litigation and responsibilities of legal professionals*, in *Netherlands Quarterly of Human Rights*, Vol. 40/1 (2022), p. 3-11. C. Heri, *Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability*, in *The European Journal of International Law*, Vol. 33/3 (2022), p. 925-951.

49 *Lliuya against RWE*, claim filed on 23 November 2015 to Regional Court of Essen, p. 28, 33 and 36, referring to Gerechtshof Den Haag, *Urgenda Foundation vs The State of Netherlands*, C/09/456689/HA ZA 13-1396, 9.10.2018.

50 The Hague District Court, *Milieudefensie et al. vs Royal Dutch Shell plc.*, C/09/571932/HA ZA 19-379, 5.5.2021, referring to the Urgenda judgments in paras 2.4.13. and 4.4.10.

a private company based on its duty of care towards current and future Dutch residents based on an unwritten duty of care established in the Dutch civil code.[51] In its decision the Court took into consideration the United Nations Guiding Principles on Business and Human Rights (UNGPs), the OECD Guidelines for Multinational Enterprises, and other soft law instruments as a guideline for interpretation of the unwritten standard of care. The interpretation of the court showed that it considered the UNGPs to be "the global standard of expected conduct for corporations, establishing the corporate responsibility to respect human rights over and above compliance with national laws and regulations".[52]

The cascade of influence and reference continues with the German Federal Constitutional Court or the UN Human Rights Committee referring to the *Urgenda* judgement,[53] and the claims against Volkswagen[54] and BMW[55] in Germany referring again to the judgement of the German Federal Constitutional Court. Consequently, civil courts, as e.g. the Hague District Court, referred to arguments arising from human rights cases based on public law, but also constitutional courts and human rights bodies increasingly use arguments that were being developed under tort law in other jurisdictions. This, in turn, informed the arguments brought forward in *Asmania et al. v Holcim*, as will be described below in more detail.

3. Asmania et al v Holcim

3.1. Facts of the case

3.1.1. The Plaintiffs

The four plaintiffs, Asmania, Arif Pujianto, Mustaqfirin (Bobby) and Edi Mulyono live on Pari, a small island in the Indonesian Western Pacific Ocean. Pari is located about 40 km from Jakarta, the capital of Indonesia. The island is about 2.6 km long and measures 430 m at its widest point. Approximately 1,500 inhabitants live permanently on the island.[56]

---

51 The Hague District Court, *Milieudefensie et al. vs Royal Dutch Shell plc.*, C/09/571932/HA ZA 19-379, 5.5.2021. See further C. Macchi and J. van Zeben, *Business and human rights implications of climate change litigation: Milieudefensie et al. v Royal Dutch Shell*, in *Review of European, Comparative & International Environmental Law*, Vol. 30/3 (2021), p. 409-415.

52 The Hague District Court, *Milieudefensie et al. vs Royal Dutch Shell plc.*, C/09/571932/HA ZA 19-379, 5.5.2021, paras 4.4.2. and 4.4.11. See further C. Macchi and J. van Zeben, *Business and human rights implications of climate change litigation: Milieudefensie et al. v Royal Dutch Shell*, in *Review of European, Comparative & International Environmental Law*, Vol. 30/3 (2021), p. 409-415.

53 See Bundesverfassungsgericht, *Neubauer et al. vs Germany*, Beschluss des Ersten Senats, BvR 2656/18, 78/20, 96/20, 288/20, 24.3.2021, p. 59, 68, 69, 86 and 93; Human Rights Committee, *Daniel Billy et al,* CCPR/C/135/D/3624/2019, 22.09.2022, paras 4.7, 10 and 14.

54 *Anspruchsschreiben an Volkswagen AG*, 2.9.2021, p. 2, 6, 7, 22, 26.

55 See *Deutsche Umwelthilfe vs. Mercedes-Benz AG*, Claim filed on 21.09.2021 to the Regional Court of Stuttgart, p. 6-7, 28, 46, 67.

56 *Asmania et al. vs Holcim*, claim filed to the District Court of Zug on 30.01.2023, p. 18.

Asmania has lived on Pari Island since 2005 with her husband and three children. The family makes a living from fishing and started tourism activities in 2013. They own a fish farm and operate a so-called homestay, a private accommodation for tourists visiting Pari, predominantly holiday guests from the Jakarta area. In addition, they run a small shop for daily tourist groceries and rent out snorkel equipment for tourist trips to the nearby coral reefs.

Arif Pujanto came to the island as a young boy with his parents and has since lived, meanwhile with his wife and an adult son, at the south-western end of the island, very close to a picturesque beach called Pantai Bintang (starfish Beach). Arif Pujanto understands his cultural identity as a traditional fisherman. Nowadays he works as a mechanic since fishing has not brought enough income in recent years. He also coordinates the work of a neighbourhood group to keep the beach and its recreational facilities clean and maintained for guests.

Mustaqfirin, called Bobby, and Edi Mulyono both grew up in Pari, as did their ancestors. Bobby works as a traditional fisherman and is active as the coordinator of a local neighbourhood initiative called Forum Peduli Pulau Pari (Forum Care of Pari Island), which works for the well-being of the island and its inhabitants, including in particular environmental protection. He and his wife have four children. Edi Mulyono is also a traditional fisherman. He owns two homestays, which he rents out to short-stay tourists, and two boats which he uses for fishing as well as for tourist trips to the nearby coral reefs. Edi Mulyono is also a local tourism coordinator for the island and, as such, takes care of the protection of the island and its ecological and economic existence within the framework of community initiatives.[57] The four plaintiffs and their legal cause are supported by a strong community and a community-based association with the mandate to protect the island and its inhabitants.

3.1.2. The Effects of Climate Change on Pari Island

The Intergovernmental Panel on Climate Change (IPCC)[58] states that climate change is an existential threat to small islands and low-lying coasts.[59] Due to climate change induced sea level rise such areas are exposed to cascading and mutually reinforcing impacts (and this – in the IPCC's jargon – with a "high

57 *Ibidem*, p. 18-22.

58 The IPCC was founded in 1988 as an institution of the United Nations and is both a scientific body and an intergovernmental committee (UN institution) with 195 member states. In its regularly published Assessment Reports [AR], the current state of scientific knowledge on climate change is synthesised and evaluated by experts based on the analysis of thousands of scientific studies. The Assessment Reports are adopted with the consent of all Member States, which is why they have a particularly high level of legitimacy. The aim of these reports is to objectively assess the current and future dangers of climate change, as well as to generate possible solutions from the scientific community.

59 IPCC, *Summary for Policymakers*, in Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, B.4.5.

confidence level"): loss of coastal ecosystems and ecosystem services, salinisation of groundwater[60] or the flooding and damage to coastal infrastructure. These impacts in turn affect the health, well-being, food and water security, including access to safe drinking water, as well as the cultural values of the humans living in these areas.[61] On small islands, climate change leads to loss of assets, economic degradation due to the destruction of infrastructure, economic decline and collapse of livelihoods in fisheries and tourism. It causes loss of biodiversity in traditional agro-ecosystems and, ultimately, reduced habitability of small islands, leading to displacement of islanders.

Indonesia's geographic location and its many coastlines make it particularly vulnerable to these effects. The World Bank therefore classified Indonesia as particularly vulnerable to climate risks. Estimations show that by the end of the century, more than 4.2 million people in Indonesia will be exposed to flooding every year if no climate protection and adaptation measures are taken.[62]

The plaintiffs' claim that these abstract scenarios described in the IPCC and by the World Bank unfold on Pari island already today. In their claim, they present not only general scientific evidence on anthropogenic climate change, but also evidence on the causality chain of sea level rise and its impact in the region, ultimately leading to the specific damages brought forward by the plaintiffs (occurring in 2021 and impending for the future). They argue that due to anthropogenic greenhouse gas emissions, in the pacific region around Pari, the mean sea level rose by 11-21 cm between 1861 and 2005. From 2005 to 2021 human-induced sea level continued to rise again by 5 cm. That adds up to a total sea level rise of 16-26 cm from 1861 until 2021. With that pace, the average sea level around Pari is rising faster than on the global average.[63] Pari island lies on a coral reef, is partly forested, and has three main beaches maintained by the island's inhabitants, which are regularly visited by tourists. On its highest point in altitude, Pari Island's elevation measures 1.5 metres.[64] This geographic location combined with the low elevation above sea level and the relatively low variability of the water level (low tides, low extreme water levels, low waves),

60 IPCC, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Chapter 12*, p. 1786.

61 *Ibid*, at B.4.2, B.4.3, B.5.2 and figures SPM.2, SPM.3.

62 The World Bank Group, *Indonesia*, Climate Change Overview, World Bank Climate Change Knowledge Portal, 2020; The World Bank Group and Asian Development Bank, *Climate Risk Profile: Indonesia* (2021), p. 16, p. 2 and 17, Table 7.

63 Mean global sea level rose by 0.2 (range: 0.15-0.25) metres, or 20 cm, between 1901 and 2018. The average rate of sea-level rise has also increased massively. Between 1901 and 1971, the rise was 1.3 [0.6 to 2.1] mm per year, from 1971 to 2006 it was 1.9 [0.8 to 2.9] mm per year and from 2006 to 2018 already 3.7 [3.2 to 4.2] mm per year. IPCC, *Summary for Policymakers*, 2021 (n 59); J. Hinkel et al. 2022 (n 34), paras 2.1.2 und 2.2.2.

64 According to Hinkel et al., 68 percent of the Pari island complex lies below the present 100-year extreme water level of 1.07 m; J. Hinkel et al. 2022 (n 34)p. 17.

make Pari particularly exposed to sea-level rise and therefore in scientific terms a 'high-risk area'[65], as even a small rise in mean sea level implies major changes in flood risk.[66] Consequently, they say, Pari is very concretely and particularly affected by the impacts of global climate change.

According to the inhabitants of the island, these risks have already materialised as floodings have been occurring with increasing frequency and severity for about three years.[67] A study by German climate scientists assessing the climate impact on Pari confirms their observations: Tidal flooding has recently reached water levels of over 90 cm, in addition to the human-made sea level rise of 16-26 cm.[68] The study then links the specific damages to climate change induced sea-level rise, stating that it is *almost certain* that human-made global warming and the associated sea-level rise have already led to climate change-related impacts and damages on Pari.[69] They offer further very specific calculations on how extreme events, as the floodings in 2021 would have looked like without human induced sea level rise. For example, the house of the plaintiff Arif Pujanto, which was flooded by about 20 cm in December 2021, would not have been flooded or only flooded by 4 cm without climate change. Accordingly, they conclude, 80-100% of the damage of the 4/5 December 2021 flood event to Arif Pujanto's building can be attributed to anthropogenic sea level rise.[70]

Regarding alleged impending *future damages* claimed by the plaintiffs, the scientists assert with *high confidence* that mean sea level will continue to rise for the next centuries to millennia due to human-induced climate change, with the extent of future sea level rise largely dependent on how much the earth warms. The rise in average sea level will lead to an increase in extreme water levels and thus to more frequent and more intense floods.[71] The study concludes further, that therefore it is *almost certain* that man-made global warming and the associated sea level rise will lead to future climate change-related impacts and damages on Pari. However due to high uncertainty about future greenhouse gas

65 *Ibid*, p. 18.

66 A. Karegar Makan, H. Dixon Timothy, R. Malservisi, J. Kusche and S. E. Engelhart, *Nuisance Flooding and Relative Sea-Level Rise: the Importance of Present-Day Land Motion*, Sci Rep. 7, 11197 (2017), p. 1; IPCC, *Climate Change 202*, (n 60).

67 Testimonies of the plaintiffs presented in the claim and WALHI (ed), *The Impacts of Climate Change on the Island of Pari*, Indonesia, December 2022. See further F. Gaper, *Warga Pulau Pari Terdampak Banjir Rob, Holcim Digugat*, in KBR Indonesia, 21.9.2022; P. Jeung, *Four Indonesians take Swiss cement giant to court over climate*, Al Jazeera, 1.2.2023; M. Müller, *Ein Paradies zerrt Holcim vor Gericht,* Neue Zürcher Zeitung, 2.2.2023.

68 J. Hinkel et al. 2022 (n 34), p. 18.

69 *Ibid*, p. 30.

70 *Ibid*, p. 32.

71 A. Karegar Makan et. al., 2017 (n 66), p. 1; IPCC, *Climate Change 2021*, (n 60) at 1786; See further S. Vitousek, P. L. Barnard, C. H. Fletcher, N. Frazer, L. Erikson and C. D. Storlazzi, *Doubling of coastal flooding frequency within decades due to sea-level rise*, Scientific Reports 7, 1399 (2017).

emissions they refrain from giving an answer to how habitable Pari Island will be in the future. Despite these uncertainties, they are able to calculate the risk of future damages on housing referring to a model building on the island. They conclude that for such buildings, future damages in the range of 52% to 99.9% can be attributed to anthropogenic sea level rise.[72]

In addition to the specific material damages, the scientists hold that local biodiversity and environmental stability on the island will also decrease in the future. The coral reefs, which have been degraded by climate change, will be less and less able to protect the island as sea level rises, because unlike healthy reefs, they can no longer grow with sea level rise. Degraded coral reefs further produce less sediment, which increases coastal erosion, which in turn increases the risk of flooding, as eroding coasts provide less protection against waves.[73] As a consequence, many coral reef islands, such as Pari, will become uninhabitable by 2050 due to this circumstance if no far-reaching adaptation measures are taken.

3.1.3. The Carbon Footprint of the Global Cement and Concrete Industry

The global cement industry produces approximately 4 billion tonnes (Gt) of cement per year. A report published by the Swiss NGO HEKS in January 2023 calculated that this amounts to a global production of approximately 130 tonnes of cement per second.[74] This vast quantity of cement contributes significantly to global CO2 emissions as cement production is very CO2-intensive.[75] *Olagunju* and *Olanrewaju* calculated that 911 g of CO2 is emitted for every 1000 g of cement produced.[76] That means that nearly every ton of cement also causes a ton of CO2 emissions. Contradicting pledges to become net zero, since 2015, the cement and concrete industry has increased its average emission intensity as well as its global absolute emissions.[77] By 2022, the cement industry as a whole emitted an estimated total of up to 8% of global CO2 emissions.[78]

---

72 J. Hinkel et al. 2022 (n 34) p. 32.

73 *Ibid*, p. 20.

74 *Holcim's Climate Strategy: Too little – too late*, HEKS/EPER (ed.), January 2023, p. 7; R. M. Andrew, Global CO2 emissions from cement production, 1928–2018, Earth System Science Data, 2019, p. 2.

75 Approximately two thirds of the CO2 emissions during production are caused by the calcination of limestone, in which heat is used to decompose limestone (CaCO3) into Calcium oxide, commonly referred to as burnt lime or quicklime. The other third of cement production's CO2 emissions are caused by the carbon fuels (mainly coal) used for heating up the materials to 1,400 °C.

76 B. Olagunju B. and O. Olanrewaju, *Life Cycle Assessment of Ordinary Portland Cement (OPC) Using both Problem Oriented (Midpoint) Approach and Damage Oriented Approach (Endpoint)*, in A. Petrillo and F. De Felice, *Product Life Cycle*, 2021.

77 See International Energy Agency, *Subsector Cement*, retrieved 20.3.2023.

78 R. M. Andrew, *Global CO2 emissions from cement production, 1928–2018*, Earth System Science Data, Vol. 11/4 (2019), p. 1675-1710, p. 2.

Alternatives to cement and concrete are available on the global construction market. Housing and infrastructure could, at least to some extent, be built with less emission intensive materials, such as ground limestone and calcined clays and greenhouse gas emissions could be further reduced using new technologies.[79]

3.1.4. The Defendant

The defendant targeted with the claim of the four Indonesian islanders is Holcim Ltd., a public limited company with its headquarters registered in the canton of Zug, Switzerland.[80] Holcim Ltd. is the world's largest cement manufacturer and has subsidiaries in 70 countries. According to its Annual Report 2021, the Group operates 266 cement and grinding plants around the world and is active in four business lines focused mainly on cement and concrete production. However the group has recently changed its strategy to widen its portfolio to all kinds of building solutions.[81] Holcim publishes its total Scope 1, 2 and 3 emissions in its annual Sustainability Performance Report, which includes all its consolidated subsidiaries.[82] It has pledged to be net-zero by 2050 and has set relative reduction targets in relation to every ton of cement produced.[83] The company has not set any absolute reduction pathways.[84]

According to a report by attribution scientist *Richard Heede*, Holcim and its predecessor Lafarge have produced 7.26 billion tonnes (Gt) of cement from 1950 to 2021.This amounts to 6.5% of global cement production over the same time period (7.26 Gt of 112 Gt). *Heede* then modelled an estimation of the company's overall scope 1, 2 and 3 emissions from the whole production (e.g. calcining, fuel combustion, power generation, aggregates and ready mix, purchased electricity), amounting to 7.15 GtCO2 from 1950 to 2021.[85] This number accounts for 0.48 percent of all global "industrial emissions" (as fossil

79 See IPCC, Climate Change 2022, *Assessment Report 6 Working Group III, Mitigating Climate Change. Chapter 11 Industry*, p. 7; A. Favier, C. De Wolf, K. Scrivener and G. Habert, *A sustainable future for the European Cement and Concrete Industry. Technology assessment for full decarbonisation of the industry by 2050*, p. 6.

80 The group was created after the merger of the companies Holcim Ltd and Lafarge in 2015.

81 Holcim, *Strategy 2025 – Accelerating Green Growth*, Press release on Capital Markets Day, 18.11.2021.

82 See all the reports available on Holcim, *Sustainability Reports*, retrieved 20.03.2023. For the majority of the subsidiaries listed in the consolidated report, the defendant holds a 100 percent stake.

83 Holcim, *Climate Report 2022*. See further Holcim, *Holcim unterzeichnet Net-Zero Pledge*, Press release, 28.09.2020; Holcim, *Sustainability Performance Report 2021*.

84 For a detailed analysis see *Holcim's Climate Strategy: Too little – too late*, HEKS/EPER (ed.), January 2023.

85 Of this total, scope 1 operational emissions account for 5.33 GtCO2 (74.6%), scope 2 emissions 0.40 GtCO2 (5.5%), and scope 3 indirect emissions 1.42 GtCO2 (19.8%). R. Heede, *Carbon History of Holcim Ltd: Carbon dioxide emissions 1950–2021*, Climate Accountability Institute, 7.07.2022, p. 20-23 with further references.

fuel & cement emissions are called) from 1950 to 2021, or 0.42 percent of all global industrial emissions from 1751 to 2021.[86]

3.2. Holistic approach

The legal prayer of the plaintiffs includes a holistic set of claims underpinned by a novel interpretation of Swiss civil law. They ask the court i) to adjudge them compensation for financial and non-financial damages (NELD) they have already suffered as well as for future impending damages; ii) to oblige the defendant to undertake mitigation measures; and iii) to order the defendant to contribute to the costs of local adaptation measures. These claims are based on different legal norms of Swiss civil law, all linked to the violation of the personality rights of the plaintiffs.[87]

In order to understand their legal argumentation, a brief introduction to the relevant legal provisions seems helpful: The legal concept of the protection of personality rights codified in the Swiss Civil Code (CC) is usually known to courts in cases of media reporting when an individual or a legal entity claims that one's reputation or right to privacy have been violated by media reporting. Article 28 of the CC states that "(a)ny person whose personality rights are unlawfully infringed may petition the court for protection against all those causing the infringement." An infringement is unlawful if it is not justified by the consent of the person whose rights are violated or by an overriding private or public interest, or by the law.[88] Yet, while not widely known or applied in practice, the protection of personality rights has a much wider scope than the protection from invasive journalism. Essentially, it is the realisation of the horizontal effect of human rights, or under Swiss law, constitutional rights.

The Swiss Federal Constitution states that authorities shall ensure that fundamental rights, insofar as they are suitable for this purpose, also become effective among private parties.[89] This rule obliges the authorities – and thus also the legislator and courts – to realise fundamental rights in private legal relationships.[90] The authorities applying the law are obliged to interpret general clauses and indeterminate legal concepts of statutory law in conformity with fundamental rights and to allow the normative content of fundamental rights to flow into the

86 R. Heede, *Carbon History of Holcim Ltd: Carbon dioxide emissions 1950–2021*, Climate Accountability Institute, 7.07.2022, p. 24. These calculations do not include other anthropogenic sources of greenhouse gases, such as non-CO2 gases (nitrous oxide, various methane sources, F-gases), and non-energy CO2, such as from land use, deforestation, agriculture, animal husbandry, etc.

87 See articles 28 forth following the Swiss civil code, available in English.

88 Para. 2 of article 28 of the Swiss Civil Code.

89 Article 35 para. 3 of the Federal Constitution of the Swiss Confederation of 18 April 1999, available in English.

90 B. Waldmann, *Article 35*, in B. Waldmann, E. M. Belser, A. Epiney (eds), *Basler Kommentar Bundesverfassung*, Basel 2015, N 60 and 67 f.

exercise of discretion. In this exercise, not only the individual rights enshrined in the Swiss Federal Constitution, but also in the European Convention of Human Rights (ECHR) and the human rights covenants of the United Nations, which Switzerland ratified on 18 June 1992 are to be considered.

These legal instruments are authoritative for the Federal Court and the other authorities applying the law.[91] This results in the principles of interpreting federal laws in conformity with the Federal Constitution as well as interpreting the Federal Constitution and other national law in conformity with international law. The authorities applying the law in Switzerland must therefore be guided by the Federal Constitution, the ECHR and the United Nations human rights covenants when interpreting the personality rights under article 28 CC.[92]

Accordingly, the term 'personality' albeit a uniform legal concept, consists of numerous facets which should be interpreted by legal notions ascribed to a person.[93] The legislature has deliberately refrained from enumerating these facets in detail. The literature lists, for instance, the following recognized sub-areas of personality rights, which are not exhaustive:

Physical areas of protection: sexual freedom;	a) the right to life, physical integrity, b) personal freedom, especially free dom of movement; c) the right to body and death (bodily self-determination).
Psychological areas of protection:	a) the right to relationships with loved ones (family, friends); b) the right to respect for loved ones; c) Emotional life (mental integrity).
Social spheres of protection:	a) the right to names and other means of identification; b) the right to one's own image, voice and words and the right to informational self-determination (data protection);

91 See article Art. 190 of the Federal Constitution of the Swiss Confederation of 18 April 1999, available in English.

92 See *Asmania et al. v Holcim*, 2023, (n 56) p. 103-111 and (n 15).

93 See for an overview A. Meili, *Article 28*, in T. Geiser, Th. Geiser, Ch. Fountoulakis (eds), *Basler Kommentar Schweizerisches Zivilgesetzbuch I*, Basel 2022, N 17 and 37 with further references.

> c) the right to respect for intimacy and privacy;
> d) the protection of economic advancement.[94]

In case of a violation of these facets of anyone's personality, the affected person may petition the court for protection against all those causing the infringement. The claimant may ask the court i) prohibit a threatened infringement, ii) to order that an existing infringement ceases, or iii) to make a declaration that an infringement is unlawful if it continues to have an offensive effect.

If an aggrieved party further claims to have suffered a financial damage due to the violation of his or her personality rights, and wants to request a financial *compensation*, the law refers them to the Swiss Code of Obligations (CO), which offers in article 41 a general clause for ex-contractual tort claims (in Switzerland called 'law of delic').[95] If an aggrieved party claims to have suffered mental harm from a violation of personality rights, they can request a *just satisfaction* (another form of financial compensation in Swiss law, in German "Genugtuung", in French "réparation morale"), based on article 49 CO.

In order to be held liable for a financial compensation under article 41 CO, the following conditions need to be fulfilled: damage, causation ('natural' and 'adequate' causality) as well as illegality and attributable misconduct (fault or negligence). The requirement of illegality is only fulfilled if a so-called 'absolute right' is violated, as it is property or physical integrity. Yet, pure economic losses cannot be claimed under this provision, as financial assets do not count as an 'absolute right' and therefore do not fulfil this requirement. The law further states different rules for assessing damage and compensation or just satisfaction. For instance, that the person claiming the damages has the burden of proof, or the so-called rule against unjustified enrichment, meaning that no one can be awarded a higher sum than the actual damage that occurred (which prohibits punitive damages).[96] Yet, in cases where the exact value of the damage cannot be determined, the court shall estimate the value at its discretion. The relative statute of limitations for compensation or just satisfaction is three years from the date on which the person suffering damage became aware of the loss, damage or injury and of the

94 A. Meili, *Article 28*, in T. Geiser, Th. Geiser, Ch. Fountoulakis (eds), *Basler Kommentar Schweizerisches Zivilgesetzbuch I*, Basel 2022, N 17 and 31; C. Kirchschläger, Articles 28/28a, in W. Fischer, Th. Luterbacher (eds), *Kommentar zu den schweizerischen Haftpflichtbestimmungen*, Zurich 2016, N 9 ff.

95 Article 41 of the Swiss Code of Obligations: "Any person who unlawfully causes loss or damage to another, whether wilfully or negligently, is obliged to provide compensation." Further, specific tort rules are e.g. available for product liability, consumer credits or the sale of travel packages.

96 Articles 43 to 47 Swiss Code of Obligations.

identity of the person liable for it. The absolute statute of limitations is ten years after the date on which the harmful conduct took place.[97]

3.2.1. Violation of Personality Rights

Based on the notion of personality rights, all plaintiffs argue that their right to economic advancement has been affected as they have lost income due to the two major floods in 2021: The floods not only prevented them from fishing but also forced tourists to cancel their trips to Pari. Local media reported on the floods which scared off tourists for two months. The community on the island could not rent out homestays, could not sell groceries and daily tourist gear to visitors, no boat and snorkelling trips took place. Furthermore, the water well of one of the plaintiffs was flooded with salt water and could not be used for a certain period, which caused him extra spending for water supply for the whole family.[98] These considerable and repeated losses from both economic sectors, fishing and tourism, significantly affected their economic existence and advancement, as protected under article 28 CC.

All of them are seriously concerned and suffer from the fact that further floods, which are to be expected in more frequency and intensity, will produce similar impairments in the years to come. Based on the experience from the last three years and especially from 2021, they further fear that fishing, fish farming and especially the tourist activities cannot continue to be operated in the form they have been in the long term. All plaintiffs further bring forward that they are all fearing for the future and especially their safety and physical integrity and that of their children. The more frequent and severe the flooding becomes, the more likely it is to be expected that their own children will suffer such significant consequences and damage that even before the island is largely flooded, dignified living and working on Pari may no longer be possible. It is to be expected that, according to general life expectancy, the children of three of the plaintiffs will live to see the year 2100, in which the island of Pari could be largely submerged and uninhabitable.

The island community is making massive efforts to promote the planting of mangroves. However, for dense mangrove vegetation off the coast, far more plants would be needed. Moreover, it takes several years to grow them. A (preferably) solid level of protection against high waves and erosion is therefore far from being achieved at present.[99] The people of Pari island claim to feel powerless as they alone have no means to avert these consequences, which are very likely to occur and which will be all the more serious if globally effective climate mitigation measures and protective measures for the island and its population are not taken immediately.

---

97 Article 60 Swiss Code of Obligations.

98 *Asmania et al. v Holcim*, 2023, (n 56), p. 43.

99 *Asmania et al. v Holcim*, 2023, (n 56), p. 36-56.

The violations alleged by the applicants are of a different nature. One of the plaintiffs, whose house was already regularly flooded, fears for his and his family's physical integrity, their water and food supply, and the increasing damage to his house to the point of it becoming uninhabitable. Another plaintiff alleges that the progressive destruction of the environment on the island causes him great concern, especially in his role as a community leader responsible for the well-being of the island's population. Other violations argued by the plaintiffs highlight the changes in the environment that put the cultural, social and communal life of the collective of islanders at risk. Overall, these numerous impacts of climate change on their life, the life of their families, the ecosystem and on the community of the island's population as a collective is significantly affecting their rights to physical integrity, to personal freedom, to private and family life, to mental integrity and to economic advancement.[100]

Consequently, the plaintiffs argue that their personality rights have been violated by the excessive[101] greenhouse gas emissions of Holcim and its subsidiaries in the past and continue to be violated now and in the future without their consent and without overruling private or public interests. Although the associated violation of the plaintiffs' rights cannot be remedied by the defendant alone, nor can it be remedied entirely, it can at least be mitigated by consistently refraining from excessive emissions, and in addition by flood protection measures around the island. The violation of personality rights lays therefore the ground for the request for mitigation measures. It is furthermore the basis the request of the plaintiffs for just satisfaction for mental harm based on article 49 CO, as explained above.[102]

Similar to the argument in *Luciano Lliuya v. RWE,* to ascertain the violation of personality rights it is only required that a person *contributes* to the violation.[103] Mere contribution already leads to an infringement, even if the person acting is not aware of it or cannot be aware of it. This means that the injured party can take action against anyone who, objectively speaking – from near or far – played

100 They specifically refer to articles 10, 13 and 27 of the Swiss Federal Constitution and Art. 2 and 8 of the ECHR; See *Asmania et al. v Holcim*, 2023, (n 56), p. 36-56.

101 Excessive greenhouse gas emissions are described as those which, according to the current state of the best available scientific knowledge, are not compatible with the goal of limiting global warming to a maximum of 1.5 degrees Celsius (with 50% probability). Because, according to the current state of scientific knowledge, it is not compatible with the goal of limiting global warming to a maximum of 1.5 degrees Celsius to emit greenhouse gases which, in their aggregated amount, exceed the necessary absolute and relative reduction of 43% (scopes 1, 2 and 3) by 2030 and of 69% by 2040 compared to 2019.

102 All four plaintiffs ask for a compensation of IDR 15'427'813 excluding interest of 5 percent p.a. since 11 July 2022 (CHF 1'000 excluding interest of 5 percent p.a. since 11 July 2022 respectively) based on article 28*a* para. 3 CC in relation with article 49 CO.

103 See further B. Dörr., *Art. 28*, in: A. Büchler and D. Jakob (eds), *Kurzkommentar Schweizerisches Zivilgesetzbuch*, Basel 2018, N 13; A. Büchler, *Art. 28*, in J. Kren Kostkiewicz, S. Wolf, M. Amstutz and R. Fankhauser (eds), *OFK Schweizerisches Zivilgesetzbuch*, Zurich 2021, N 13.

a role in the creation or in the dissemination of the infringement, even if his role is only of secondary importance.[104] This jurisprudence stems largely from case law of different media outlets, all invasively reporting on private matters of an individual. The affected individual can ask the court to oblige all of these media outlets to stop reporting and remove personality infringing articles. For the case of the four inhabitants of Pari, it is well established that Holcim emitted greenhouse gases, as the company acknowledges in its own reports, and that this significantly contributed to global warming. Therefore, it will be hardly disputable for Holcim to *have contributed* to global warming,[105] and consequently to its impacts on the island, as proven by scientific studies on the specific causality aspect of the claim, as described under 3.3.3.

3.2.2. Compensation for damages

In addition to the request for mitigation measures and just satisfaction for mental harm, three of the four plaintiffs ask for compensation of financial damages they have suffered.[106] Among these damages are the costs for the reparation of house walls, a partially destroyed fishing boat and the destruction of fish stock in a fish farm. Notably, the plaintiffs ask for a compensation of 0.42 percent of the sum of all damages, since Holcim is responsible for a share of 0.42 percent of all industrial CO2 emission and should thus be legally accountable for this share.[107]

As described above, this is a classical tort claim under Swiss law, requiring a damage, a causal relationship, illegality and fault or negligence. As in the international literature,[108] a number of Swiss scholars have argued that article 41 CO could not be applied in the case of climate change, other authors and the plaintiffs in the Holcim case take a more optimistic vision of the matter.[109]

This is due to the fact that, in line with Swiss case law, in order to meet the evidence threshold for 'natural causality'[110] the cause of the damage does not need

104 *Asmania et al. v Holcim*, 2023, (n 56), p. 101; BGE 141 III 513, E. 5.3.1.

105 See e.g. Holcim, *Climate Report 2022*; further Holcim, *Sustainability Performance Report 2021*; and *Holcim's Climate Strategy: Too little – too late*, HEKS/EPER (ed.), January 2023.

106 *Asmania et al. v Holcim*, 2023, (n 56), p. 34 ff.

107 *Ibid.* p. 116 f.

108 See M. Hinteregger, 2022 (n 19) at 383; D. A. Kysar, 2015 (n 17).

109 Cautiously optimistic due to new attribution science outcomes A. Hösli and R. H. Weber, *Klimaklagen gegen Unternehmen*, in Jusletter 25.05.2020, p. 7; further A. Hösli, *Shell-Urteil – der Klimawandel im Gerichtssaal*, Neue Zürcher Zeitung, 12.07.2021; A. Nussbaumer-Laghzaoui, *La Suisse tient son premier procès climatique en responsabilité civile*, La Semaine Judiciaire, 2022/8, p. 657-659.

110 According to Swiss jurisprudence, a natural causal connection exists if the conduct causing the damage forms a necessary condition (*conditio sine qua non*) for the damage that has occurred, i.e. it could not be disregarded without the success that has occurred also ceasing to exist. See, e.g. BGE 142 IV 237 1.5.1.

to be exclusive.[111] The standard of proof for natural causality under Swiss law is 'predominantly probable'. This makes it possible to attribute responsibility for a given damage even in the presence of multiple polluters. The jurisprudence of the Swiss Federal Court established that a probability is predominant if there are such weighty reasons for the correctness of the factual assertion from an objective point of view that other conceivable possibilities cannot reasonably be considered to a decisive degree.[112] The plaintiffs rely on two landmark decisions dealing with liability for environmental pollution (one of them on the harvest of apricots in the canton of Wallis), in which the Federal Supreme Court has recognised contributory factors as a relevant cause of damage and the existence of a causal link between environmental damage and the resulting harm.[113] In light of the well documented scientific impacts of climate change on sea level rise and more specifically on Pari Island, the plaintiffs argue that this criterion is also fulfilled in their case.

As for the requirement of 'adequate causality,[114] the plaintiffs argue that a contribution or many contributions by third-parties in the sense that the defendant is not the sole polluter of greenhouse gas emissions does not constitute a reason for interruption of causality. A damage giving rise to liability can be attributable to several causes, i.e. several emitters. Hence, additional causes do not lead to an interruption of the adequate causal connection, but rather a competition of adequate causes arises.[115] At this point, the horizontal impacts of climate litigation takes effect: The plaintiffs refer to the jurisprudence of the Federal Constitutional Court of Germany in *Neubauer et al. vs Germany*[116], the first instance judgement in the Shell case in the Netherlands[117] and the deci-

111 So-called 'Äquivalenztheorie'; see e.g. Swiss Federal Court, BGer 6B_183/2010 of 23.04.2010 E. 3; Swiss Federal Court, BGer 4A_307/2013 of 6.01.2014.

112 Swiss Federal Court, BGE 133 III 153, 162; Swiss Federal Court, BGE 132 III 715, 720; further also Swiss Federal Court, 130 III 321, 325; Swiss Federal Court, 133 III 81, 89.

113 Swiss Federal Court, BGE 109 II 304; Swiss Federal Court, BGE 116 II 480, JdT 1993 I 19. For comments on the judgments see B. Chappuis, *Le dommage environnemental*, in CEDIDAC (ed.), *Les entreprises et le droit de l'environnement: défis, enjeux, opportunités*, Lausanne 2009, p. 13 – 14; A. Nussbaumer-Laghzaoui, *Responsabilité environnementale et causalité – L'enseignement des abricots valaisans*, in F. Werro, P. Pichonnaz (eds), *La RC en arrêts et une nouveauté législative de taille*, Bern 2022.

114 The adequate causal connection is to be affirmed if the conduct was suitable, according to the usual course of events and the experiences of life, to bring about or at least to favour a success such as the one that occurred. See Swiss Federal Court, BGer 6B_132/2016 of 16.8.2016, with further references to Swiss Federal Court, BGE 138 IV 57, E. 4.1.3; Swiss Federal Court, BGE 135 IV 56, E. 2.1; Swiss Federal Court, BGE 133 IV 158, E. 6.1.

115 M. Kessler, *Art. 41*, in C. Widmer Lüchinger and D. Oser (eds), Basler Kommentar Obligationenrecht I, N 22.

116 German Constitutional Court, *Neubauer et al. vs Germany*, Beschluss des Ersten Senats, BvR 2656/18, 78/20, 96/20, 288/20, 24.3.2021.

117 District Court Den Haag, *Milieudefensie et al. vs Royal Dutch Shell PLC*, C/09/571932/HA ZA 19-379, 26.05.2021, 2.3.2, B.

sion of Oberlandesgericht Hamm in the case *Luciano Lliuya v. RWE*[118], who all rejected so-called "drop-in-the-ocean" arguments. Such an approach was also taken in one of the two cases mentioned above by the Swiss Federal Court when dealing with impacts on the harvest of apricots in the canton of Wallis. In said case, the court found that circumstantial evidence indicated that fluorine emissions at least contributed to the damage to apricot crops, that a contrary assumption could not be substantiated in any case, and that this was sufficient for causality.[119] Thus, several partial causes – e.g. the interaction of several polluters – should not lead to an exclusion of the defendant's liability, especially in the present climate-relevant context.

As for the requirement of illegality the plaintiffs argue that the harming act is considered unlawful if it interferes with an 'absolute right' such as life, freedom or property and that it is irrelevant whether an infringing act is prohibited by public law regulations (e.g. emission standards or compensation schemes). They see no grounds for an apparent legal justification like self-defence or necessity and refer to the legal obligation that any justification for the occurred harm should further be proven by the defendant.[120]

3.2.3. Compensation for Future Damages (Adaptation Measures)

Based on the same legal arguments, all four plaintiffs further list both individual and collective adaptation measures and ask the defendant to pay for 0.42 percent of the costs. Individually, they ask for the compensation of a share of the costs of installing water filtration systems for each household to secure access to clean water and for raising their houses or rebuilding them at another higher place, in order to prevent future damages and increasing risks to their health and security. Collectively, they ask for a share of the costs for coastal protection measures for the whole island, namely the planting of two million new mangrove seedlings and the installation of breakwaters over 5.2 kilometres (so-called bronjongs).[121]

3.3. Challenges in the Swiss legal forum

As listed in the beginning, civil proceedings might be challenged by jurisdiction-specific hurdles which hinder plaintiffs from the Global South to access courts in transnational cases. This is also the case for the Swiss forum. As a non-member state of the European Union, some plaintiff-friendly procedural rules are not applicable. Furthermore, the case law states a rather strict regime for the burden and level of substantiation of civil claims, as will be described in the following paragraphs.

---

118 Oberlandesgericht Hamm, *Lliuya vs RWE*, I-5U 15/17, Beschluss 1.02.2018, p. 4.
119 Swiss Federal Court, BGE 109 II 304.
120 *Asmania et al. v Holcim*, 2023, (n 56), p. 117 f.
121 *Asmania et al. v Holcim*, 2023, (n 56), p. 97.

3.3.1. Non-applicability of Rome II

Switzerland is not a member of the European Union. As such it has not ratified the Regulation 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).[122] This leads to the complication that the plaintiffs do not have the choice of applicable law, as provided for in article 7 of Rome II, according to which the person seeking compensation for an environmental damage can choose to base her claim on the law of the country in which the event giving rise to the damage occurred. In Swiss law for international tort cases, the general rule applies that the law of the state is applicable in which the tortious act was committed.[123] Only in exceptional cases where the damage does not occur in the state in which the tortious act was committed and the defendant could expect the success to occur in that state, the law at the place of damage is applicable.[124] The plaintiffs argue that the harmful act originated in Switzerland, where Holcim Company's policy is decided, which means that the place of action is in Switzerland and that therefore Swiss law applies.[125] Yet it is not clear whether the court will follow that interpretation.

3.3.2. High hurdles of substantiation

The plaintiffs filed a request for legal aid. Under Swiss law, such a request should be granted if a plaintiff does not have sufficient financial resources and his or her claim does not seem devoid of any chances of success.[126] The four plaintiffs live in very modest conditions on a small island in the Pacific Ocean. Their income certainly falls under the generally required financial income level to be granted legal aid in Swiss judicial proceedings.[127] However, the devil might lie in the detail that the Swiss law requires a rather high standard of substantiation of facts in civil proceedings. As the plaintiffs take part in an informal economy on the island, they might lack detailed receipts and official transcripts for daily transactions. The plaintiffs are also exempt from paying taxes and therefore do not have a tax declaration they could hand in to the court, as it is

122 *Regulation 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)*.

123 Lugano Treaty, ratified by Switzerland on 20.10.2010 in relation with Article 133, para. 2, sentence 1 of the Federal Act on Private International Law.

124 Article 133, para. 2, sentence 2 of the Federal Act on Private International Law.

125 *Asmania et al. v Holcim*, 2023, (n 56), p. 12-14.

126 See article 117 of Swiss Civil Procedure Code, based on Article 29 para. 3 of the Federal Swiss Constitution.

127 The required legal poverty exists if the person concerned is not in a position to meet the costs of the proceedings without having to draw on resources that are necessary to cover the basic needs of him or her and his or her family. The assessment of financial means is to be based on the minimum subsistence level under Swiss debt collection law. See for several e.g. BGE 128 I 225 E. 2.5.1; BGE 130 I 180 E. 2.2.

usually required for accessing legal aid. Yet in a recent decision in another case, a court in Basel granted legal aid to six plaintiffs from India who also had to rely on alternative evidence to prove their financial situation in a case against the Swiss multinational Syngenta.[128] It is to be seen whether the court in Zug will follow the same approach. Certainly, it will be interesting to see how the courts in Switzerland set the bar of access to justice for plaintiffs from the Global South.

3.3.3. Lost in translation among different disciplines

Every causal step of the chain of causation in the case *Asmania et al. v Holcim* is based on scientific evidence stemming from climate science. The individual contribution of the defendant to greenhouse gas emissions and its relation to overall global and industrial emissions are based on studies by *Richard Heede*, a US attribution scientist.[129] The consequences of greenhouse gas emissions in the atmosphere and the various effects of this process, specifically on sea level rise and small islands, are largely based on the findings of the IPCC.[130] The specific effects of climate change induced sea level rise on Pari Island and the causal link to the alleged damages is based on a study authored by the team of Global Climate Forum lead by German scientist *Jochen Hinkel,* a leading author of the IPCC reports.[131]

The scientific results are clear. Especially the causal relationship of every emitted ton of carbon dioxide emissions to an acceleration of global warming and the consequent accelerated rise of sea level are remarkably well established in natural sciences.[132] Yet, as Swiss courts have shown in the past, academic language describing scientific (un)certainties does not translate easily into legal interpretation.[133] Different authors have therefore argued that climate scientists need to adapt their labelling of certainties to mirror legal standards so that their results can be better used in courtrooms.[134] Since both disciplines use very different terminologies that might lead to mal-interpretations, this would certainly

128 See Zivilgericht Basel-Stadt vom 13. Juni 2022, Az. K1.2021.21 VOD, Az. K1.2021.22 VOD; Az. K1.2021.23 VOD.

129 R. Heede, *Carbon History of Holcim Ltd: Carbon dioxide emissions 1950–2021*, Climate Accountability Institute, 7.07.2022; R. Heede, *Carbon Majors: Accounting for carbon and methane emissions 1854 2010*, Methods & Results Report, Climate Mitigation Services 2014.

130 First and foremost: IPCC, *Climate Change 2021*, (n 60); IPCC, Climate Change 2022, (n 79)

131 J. Hinkel et al. 2022 (n 34).

132 See above, IPCC, *Summary for Policymakers*, 2021 (n 59); IPCC, *Climate Change 2021*, (n 60); IPCC, Climate Change 2022, (n 79); A. Karegar Makan et. al., 2017 (n 66); and S. Vitousek et. al., 2017, (n 71)

133 See for instance the findings of the Swiss Federal Court in the case of the *Klimaseniorinnen* (BGE 156 I 145) relating to climate change induced heat waves, which shocked many scientists since they did not reflect at all the current state of science.

134 E. A. Lloyd, N. Oreskes, S. I. Seneviratne and E. J. Larson, *Climate scientists set the bar of proof too high*, in *Climatic Change*, 2021/165, p. 1-10.

be useful. Yet, courts should also better explore and understand existing methodologies of attribution science so that obstacles to causation could better be addressed.[135] Legal assessments of the most pressing issues of our time which severely affect so many areas of life must consider state of the art in science. In this regard, exchange among the legal discipline and climate scientists should be encouraged, both in legal training and education as well as through oral hearings of climate scientists as expert witnesses in court cases.

4. The value of transnational climate litigation

For the purpose of this section 'transnational climate litigation' against corporations is understood as cases that seek to hold parent companies liable in the jurisdictions in which they are headquartered for climate related harms that have occurred in foreign states. Unlike in other constellations, the global impacts of climate change make it possible to argue a connection to the damage even when a company does not operate – directly or through its subsidiaries – in the plaintiffs' country. So far only the two cases mentioned in this article, i.e. *Lliuya v RWE* and *Asmania et al. v Holcim*, fit this definition of transnational litigation.

Bringing redress claims by communities or individuals from the Global South affected by climate change before European courts represents a political and legal action grounded in a legitimate call for climate justice. As affirmed by the UN Special Rapporteur on Climate Change, Ian Fry, in his latest thematic report on the promotion and protection of human rights in the context of climate change, "there is an enormous injustice being manifested by developed economies against the poorest and least able to cope."[136] The climate crisis, fuelled primarily by wealthy states and large multinational corporations, is exacerbating pre-existing social and economic inequalities, thus worsening the situation of those least responsible for climate change and who have the fewest resources to adapt. Along these lines, climate change "provides a vivid illustration of intersectional disadvantage arising from unjust and inequitable distribution of harms".[137] Transnational climate litigation could represent an opportunity for a fair adjudication of liability for climate-related damages in a global context.

There is a diversity of definitions for climate justice emerging from the academic community, international NGOs or grassroots movement perspectives.[138] Nevertheless, there are key areas where they overlap. One of them is

135 R. F. Stuart-Smith et al. 2021, (n 29).

136 I. FRY, *A/77/226 Thematic Report on the Promotion and Protection of Human Rights in the Context of Climate Change,* United Nations, 26.07.2022.

137 W. Bonython, 2021, (n 38), p. 454.

138 D. Schlosberg & L.B. Collins, *From environmental to climate justice: climate change and the discourse of environmental justice,* in *Wiley Interdisciplinary Reviews: Climate Change*, 2014, vol. 5, no 3, p. 359-374.

the argument of a historical responsibility approach, according to which those parties who contributed the most to climate change "should now bear the primary responsibility for the results of their actions, and should pay the costs caused by these past transgressions".[139] A second aspect of confluence is the understanding that the impacts of climate change undermine people's fundamental rights. In this context, climate justice means "providing for those rights to which – as society – we have already agreed".[140] On the other hand, as stated by Schlosberg, D., & Collins, L. B, the approach of grassroots movements to climate justice differs from other perspectives as it "focuses on local impacts and experience, inequitable vulnerabilities, the importance of community voice, and demands for community sovereignty and functioning."[141]

When local communities and grassroots movements, as in the case of the Pari islanders, are directly involved in transnational climate litigation initiatives, the law can be used as a tool not only to obtain the redress to which they are entitled by law, but also to give voice to their demands and their local experience of climate change impacts in a political and legal arena that would otherwise be restricted to them.

Global governance of climate change, especially in relation to economic and non-economic L&D involves a thorough understanding of "global systems with complex local linkages", which requires a transnational dialogue where the voices of those most affected are protagonists. Against this background, rethinking civil law in the context of climate change, informed by the view and demands of the most affected, can contribute to a genuine awareness of the political, social, and economic struggles underlying a given legal case.[142]A transnational understanding of the nature, significance, and extent of L&D is incomplete if it fails to encompass the experiences of communities on the frontline of the crisis.

An interpretation of tort law along these lines would imply easing the challenges that affected communities and individuals face when seeking judicial redress for climate related harm, such as high costs of litigation and rigid legal rules that lag behind the current development in the scientific realm. The understanding of the proper form and function of tort law cannot be detached from the raw realities of the contemporary problems of humanity and the differentiated impacts of these problems on different members of society. In this sense, judges are key actors in the struggle for climate justice as they have the

139 *Ibid,* at 7.

140 *Ibidem.*

141 *Ibid,* at 1.

142 See for such an approach: M. Saage-Maass, *Legal Interventions and Transnational Alliances in the Ali Enterprises Case: Struggles for Workers' Rights in Global Supply Chains, in* M. Saage-Maass et al., *Transnational Legal Activism in Global Value Chains: The Ali Enterprises Factory Fire and the Struggle for Justice,* Springer Nature, 2021, p. 25-58.

possibility and duty to apply the law in a way that adequately responds to the injustices underpinning climate change and its impacts.

Since the jurisprudence of human rights bodies and constitutional courts seems to develop at a faster pace than different pending civil law proceedings, it might be promising to search for avenues in different jurisdictions which allow the language and interpretation of human rights to flow into civil law, as used in the case of *Asmania et al. v Holcim*. Even though some judicial authorities might be reluctant to refer to case law from other jurisdictions, it can provide inspiration on how to overcome traditional legal concepts in the context of climate change. As a consequence, the horizontal effects of climate litigation might work their magic.

It is in this light that the case of *Asmania et al. v. Holcim,* might break stagnant legal paradigms, as it introduces a rigorous interpretation of Swiss tort law that aligns with the transnational nature of climate change, the principle of common but differentiated responsibilities and the most recent scientific developments on the past and future impacts of climate change, particularly on small islands and coastal areas.

Some reflections on the consistency of the European Union Carbon Border Adjustment Mechanisms with the General Agreement on Tariffs and Trade

Rachele Magnaghi
University of Milan
ORCID: https://orcid.org/0009-0008-7632-1894
DOI: 10.54103/milanoup.151.c196

In their fight against climate change, States have repeatedly declared that reducing greenhouse gas (GHG) emissions is a priority with "global reach". However, since the entry into force of the 1992 United Nations Framework Convention on Climate Change, States have opted for an individualistic and differentiated approach, particularly with regard to climate mitigation. As a result, climate change agreements provide only procedural obligations and lead States to choose how to determine and how to achieve substantial obligations. Against this backdrop, in 2021 the European Commission proposed the adoption of a particularly controversial unilateral trade-related climate measure: the Carbon Border Adjustment Mechanism (CBAM), with the dual intent of combating carbon leakage and levelling the playing field. Given its expected restrictive impact on trade flows in the sectors concerned, the CBAM was from the outset considered by several WTO members to be contrary to WTO law. The purpose of this paper is to analyse the compatibility of the CBAM with the non-discrimination and trade liberalisation commitments undertaken by the EU in the WTO, by reconstructing what could be the outcome of a potential dispute in the light of previous WTO case law.

Keywords: Climate Change; EU Carbon Border Adjustment Mechanism; General Agreement on Tariffs and Trade; Non-Discrimination; General Exceptions

1. The backdrop

Climate change is one of the most troubling crisis affecting our world today[1] and it represents a major obstacle to the achievement of the Sustainable Development Goals (SDGs).[2] The latest events of 2022, such as the persistent heatwaves affecting parts of Europe and the catastrophic flooding in Pakistan, confirmed the need for a stronger (re)action against climate change and particularly greenhouse gases (GHGs) emissions.

In line with the objectives of the Paris Agreement on Climate Change (PA),[3] the European Union (EU) has decided to take the lead in environmental action and to turn the continent into the first climate-neutral area by 2050.[4] In this respect, the EU pledged to reduce emissions by at least 55% by 2030 compared to 1990 levels.[5] In December 2019, the EU launched the Green Deal initiative.[6] Approved in 2020 by the European Parliament, the Green Deal was designed from the United Nations 2030 Agenda for Sustainable Development. It, therefore, consists of a growth strategy with the objective "to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy, where there are no net emissions of GHGs in 2050 and where economic growth is decoupled from resource use."[7] The strategy covers all economic sectors and encompasses initiatives focused on cutting GHGs emissions, investing in research and innovation, and preserving the European environment.[8]

Against this backdrop, on 14 July 2021, the European Commission adopted an ambitious package of legislative proposals known as "Fit for 55".[9] It is not by chance that the package aims to make the EU's climate, energy, land use,

---

1 *Statement by the Secretary-General at the conclusion of COP27 in Sharm el-Sheikh*, in *United Nation Statements*, 19.11.2022.

2 Transforming Our World: The 2030 Agenda for Sustainable Development, A/RES/70/1, United Nations, 25.09.2015, (Agenda 2030), Sustainable Development Goal 13; Intergovernmental Panel on Climate Change, *Climate Change 2022 – Impacts, Adaptation and Vulnerability: Summary for Policymakers,* WGII Sixth Assessment Report, 28.02.2022.

3 Paris Agreement to the United Nations Framework Convention on Climate Change, U.N.T.S. 3156, 12.12.2015, (Paris Agreement 2015), Art. 2(1)(a).

4 European Council meeting conclusions, EUCO 29/19, 12.12.2019; *Update of the NDC of the European Union and its Member States*, Submission by Germany and the European Commission on behalf of the European Union and its Member States, 17.12.2020; Regulation (EU) 2021/1119 of the European Parliament and of the Council, OJEU, L 243/1, 09.07.2021.

5 Ibid.

6 Communication from the European Commission: The European Green Deal, (COM(2019) 640 final), 11.12.2019.

7 Ibid, p. 2.

8 Ibid, p. 18.

9 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Fit for 55", (COM(2021)550 final), 14.07.2021.

transport, and taxation policies "fit for reducing net GHGs emissions by at least 55% by 2030 in respect of 1990 levels."[10] Practically, the "Fit for 55" package points at reforming all existing EU climate and energy strategy instruments and introducing new tools to bridge the gap between existing policies and revised overall targets.[11]

Among the legislative proposals presented by the Commission, one of them is significantly troublesome: the Carbon Border Adjustment Mechanism (CBAM).[12] Indeed, the CBAM has proven to be questionable not only from the point of view of the World Trade Organization (WTO) law but also with respect to principles of international environmental law.

Despite much criticism and difficulties, on 13 December 2022, the EU Council and the European Parliament reached a provisional political agreement on the measure.[13] Nonetheless, at the time of the writing, the two EU institutions still have to formally approve the agreement before the new Regulation can come into force.[14] The newcomer Regulation will then become effective 20 days after its publication in the EU Official Journal.[15]

The up-to-date agreed features of the CBAM are a combination of the EU Commission Proposal, the EU Council General Approach of 15 March 2022,[16] and the amendments advanced by the EU Parliament on 22 June 2022.[17]

The purpose of this paper is to provide some food for thought regarding the newly conceived mechanism. In this regard, opposition and concern about the legality of the measure under trade rules have been expressed by several WTO

10 Ibid.

11 *Fit for 55*, in *European Council website*, last reviewed on 23.03.2023.

12 Proposal for a Regulation of the European Parliament and of the Council establishing a Carbon Border Adjustment Mechanism by the European Commission, (COM(2021) 564 final 2021/0214 (COD)), (CBAM Proposal), 14.07.2021.

13 Provisional Agreement resulting from Interinstitutional Negotiations, Proposal for a regulation of the European Parliament and of the Council, (COM(2021)0564 – C9-0328/2021 – 2021/0214(COD)), (Provisional Agreement), 08.02.2023.

14 Please note that this paper was drafted prior to the adoption of the final text of the Regulation establishing a carbon border adjustment mechanism by the EU Council and is hence based on the text of the Provisional Agreement. The adoption by the EU Council occurred on 20.04.2023, for more information visit 'Fit for 55': Council adopts key pieces of legislation delivering on 2030 climate targets, *European Council Press Releases*, 25.04.2023. The final text of the Regulation was adopted with some minor changes to the Provisional Agreement and is available on the European Council website as "Regulation establishing a Carbon Border Adjustment Mechanism". The Regulation will now be signed by the EU Council and Parliament and published in the Official Journal of the EU before entering into force.

15 Provisional Agreement, Art. 36.

16 Draft regulation of the European Parliament and of the Council – General approach, (2021/0214(COD), (General Approach), 15.03.2022.

17 Amendments adopted by the European Parliament, (COM(2021)0564 – C9-0328/2021 – 2021/0214(COD)), (CBAM Amendments), 22.06.2022.

Member States (WTO Members or Members), inter alia, Brazil, South Africa, India, and China.[18] It is therefore clear that if the CBAM will be fully implemented by the EU, there is a high risk that the measure will be challenged under the WTO dispute settlement mechanism for violation of WTO law. Against this backdrop, this study aims to offer an analysis of some of the most critical aspects of the CBAM from the point of view of the 1994 General Agreement on Tariffs and Trade (GATT),[19] limiting the scrutiny to the application of the rules as interpreted in previous cases by the WTO dispute settlement organs.

1.1. The European Carbon Border Adjustment Mechanism

The EU CBAM consists of a Border Carbon Adjustment (BCA) mechanism, namely a trade measure conceived to equalize carbon pricing on foreign goods with carbon policies imposed on domestic production.[20] Hence, it will impose a cost on imported products proportional to the carbon price differential between the carbon price applied internally to "like" domestic products and the carbon price enforced in the country of origin of the imported products.[21]

1.1.1. The EU CBAM: some relevant features and its functioning

According to the EU, the CBAM will prevent the risk of carbon leakage and support the EU increased ambition on climate mitigation while ensuring WTO compatibility.[22] Carbon leakage refers to a situation where companies based in a country where ambitious environmental regulations to limit GHGs emissions are enforced offshore their production to States with laxer environmental legislations, thus frustrating the environmental efforts undertaken in their country of "origin", besides distorting competition. In this respect, the EU Commissions has deemed it essential to create a "leveled playing field" for the relevant sectors to ensure a well-functioning internal market when the EU increases its climate ambition.[23] It is no wonder that the legal grounds invoked

18 D. Dybka, *Status of the Border Carbon Adjustments' international developments*, in *European Roundtable on Climate Change and Sustainable Transition*, 01.06.2021; Ministry of Ecology and Environm ent of the People's Republic of China, *Joint Statement issued at the BRICS High-level Meeting on Climate Change*, 24.05.2022; South African Government, *Joint Statement issued at the conclusion of the 30th BASIC Ministerial Meeting on Climate Change hosted by India on 8th April 2021*, 2021; S. Morgan, *Russia warns EU against carbon border tax plan, citing WTO rules*, in *Climate Home News*, 2020; M. Xu, D. Stanway, *China says EU's planned carbon border tax violates trade principles*, in *Reuters*, 26.07.2021.

19 General Agreement on Tariffs and Trade 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, U.N.T.S. 187, 15.04.1994, (GATT 1994).

20 I. Ozai, *Designing an Equitable Border Carbon Adjustment Mechanism*, in *Canadian Tax Journal*, vol. 70.1, 2022, pp. 1-33; Provisional Agreement, Art. 1(1).

21 It consists of the domestic price of a product minus the price in the country of origin of the imported product.

22 Provisional Agreement, [8, 13], Art. 1(1).

23 CBAM Proposal, p. 49.

for the adoption of the CBAM are Articles 191 and 192(1) of the Treaty on the Functioning of the European Union (TFEU),[24] which confer on the EU a shared competence in the area of environmental protection, including the fight against climate change. However, it is also true that the EU Commission has explicitly stated that the measure was designed also with competition regulation in mind.[25] It is precisely this "two-faced Janus" nature of the measure that makes it subject to strong accusations of protectionism.

Under the political agreement reached in December 2022, the CBAM would enter into force in its interim phase as of 1 October 2023.[26] Due to its announced purpose to prevent carbon leakage, the CBAM will cover sectors that are highly exposed to this phenomenon.[27] Over its transitional period, the CBAM will cover imports of iron and steel, cement, fertilisers, aluminium, electricity, and hydrogen,[28] together with selected precursors and a limited number of downstream products,[29] whose production is carbon intensive.[30] Upon expiration of the transitional period, the material scope will be reviewed to assess the feasibility of including additional products, sectors and subsectors at risk of carbon leakage from 2026 on,[31] with the aim to include, by 2030, all sectors covered by EU Emission-Trading System (EU ETS or ETS).[32] In any case, the Commission will regularly evaluate the application of the CBAM Regulation and report to the EU Parliament and the Council.[33]

With regard to the origin of the imported goods,[34] the CBAM will apply to all products specifically listed in Annex I to the Regulation, originated in a third country,[35] when these goods, or processed products from these goods are imported into the EU customs territory.[36] Only goods originating from the countries and territories expressly listed in Annex II of the Commission

24 Treaty on the Functioning of the European Union, OJEU, C 326/47, 26.06.2012, (TFUE); Ibid., p. 2.

25 CBAM Proposal, p. 49.

26 Provisional Agreement, Art. 36.

27 Ibid., [34].

28 Ibid., Annex I. These are the five sectors proposed in the CBAM Proposal and General Approach, [30], together with hydrogen which was suggested, among others, by the EU Parliament in the CBAM Amendments, [30].

29 Yet, the coverage of chemicals and polymers as urged in CBAM Amendments will not be included, at least during the interim period.

30 Provisional Agreement, [30, 34, 35].

31 Ibid., [11a].

32 Ibid., [52b]; Directive 2003/87/EC of the European Parliament and of the Council, OJEU, L 275/32, (Directive 2003/87/EC), 25.10.2003.

33 Provisional Agreement, [52].

34 Importation in this text indicates the release for free circulation provided in Regulation (EU) No 952/2013 of the European Parliament and of the Council, OJEU, L 269/1, 09.10.2013, Art. 201.

35 Provisional Agreement, Art. 3(6).

36 Ibid., Art. 2.

Proposal will fall outside the scope of the CBAM.[37] These will be Iceland, Liechtenstein, Norway, and Switzerland,[38] together with the territories of Büsingen, Heligoland, Livigno, Ceuta, and Melilla[39] that are, so far, third countries or territories fully integrated into, or linked, to the EU ETS.[40]

Concerning its practical functioning, the CBAM will require EU importers to buy certificates (CBAM certificates) corresponding to the carbon price that would have been paid, had the goods been produced within the EU or under the EU ETS. As a matter of fact, the price of such certificates will be based on the average weekly auction price of EU ETS allowances expressed in €/ tonne of CO2 emitted.[41] In principle, from its full implementation, importers will have to register, individually or through a representative, with the competent authorities from which they will have the possibility to purchase the CBAM certificates.[42] Once authorized, EU importers will have the exclusive right to import Annex I goods into the Union territory.[43] However, they will have to declare by the 31 May of each year (i) the total quantity of each type of goods imported during the calendar year preceding the declaration; (ii) the total embedded emissions; and (iii) the total number of CBAM certificates corresponding to the total embedded emissions, to be surrendered, after the reduction due on the account of the carbon price paid in a country of origin and the adjustment necessary of the extent to which EU ETS allowances are allocated free of charge. Consequently, they will have to surrender the CBAM certificates they have purchased in advance to cover the amount of embedded emissions declared.[44] Throughout the transitional period from 1 October 2023 to 31 December 2025, importers will have to report every quarter their import of the selected products, detailing direct and indirect emissions embedded therein, as well as any carbon price effectively paid abroad, without making any financial payments or adjustments.[45] It shall be underscored that according to

37 Ibid., [15].

38 As of January 2020, Switzerland has become the first country to link its domestic carbon trading system with the EU ETS, providing an example for possible future integrations. J. Store, *Linking of Switzerland to the EU emissions trading system – entry into force on 1 January 2020,* in *European Council Press Releases*, 09.12.2019.

39 Provisional Agreement, Annex II.

40 Ibid., [14,15].

41 Ibid., [21].

42 Ibid., Arts. 5, 10, 11, 20, 22.

43 Ibid., Art. 4.

44 Ibid., Art. 6.

45 Ibid., [38b, 50]. The main purpose of this interim period is to serve as a "pilot" and learning period for all stakeholders and to gather useful information on embedded emissions to refine the methodology for the definitive period. This is in line with what was done for the EU ETS, before its effective implementation.

the provisional agreement, both direct and indirect emissions[46] will be covered from the very interim phase.[47]

1.1.2. The CBAM and EU ETS relationship in a nutshell

As mentioned above, the functioning of the CBAM will be strictly connected with the EU ETS. The latter is a market-based mechanism and consists of a "cap-and-trade" system. It came into force in 2005 and since then has been implemented in different phases. The system is now in its fourth phase of implementation (2021-2030).[48]

The EU ETS sets a cap on the total amount of certain GHGs[49] that can be emitted in the EU by the 10.000 installations in the energy and manufacturing sectors,[50] as well as by aircraft operators operating between the EU countries and Iceland, Liechtenstein, and Norway.[51] These latter are countries party to the European Economic Area (EEA) established in 1994 with the States parties to the European Free Trade Association. In this context, the cap is reduced over time so that total emissions decrease.[52]

Within the cap, operators buy "allowances",[53] namely rights to emit GHGs into the atmosphere, from the competent national authorities. The price of the allowances released into the market is determined weekly by supply and demand. As a matter of fact, auctioning is the default method for allocating emission allowances to companies participating in the EU ETS.[54] Observe that this aspect is relevant in the case of the CBAM since the price of the latter will depend on the weekly average of the EU ETS price.

At the end of each year, an operator must surrender allowances per tonne of carbon dioxide equivalent emissions, to fully cover its emissions.[55] Failure to comply with this obligation results in heavy fines being imposed on the operator.[56] Under the EU ETS, installations that reduce their emissions can keep the

46 Ibid., Art. 3(28).

47 Ibid., [17]. As suggested in Recital [17] of the CBAM Amendments, the immediate coverage of both type of emissions was deemed critical to ensure coherence between the CBAM and the EU ETS and, thus, to comply with WTO principles. On the contrary, the EU Commission and Council had recommended postponing the coverage of indirect emissions until after the end of a transition period.

48 *EU Emissions Trading System (EU ETS)*, in *European Commission website*, visited on 28.02.2023.

49 Those are CO2, nitrous oxide, and perfluorocarbons.

50 As regards CO2 specifically, the sectors covered by the EU ETS are electricity and heat generation, energy-intensive industry sectors, including oil refineries, steel works, and production of iron, aluminium, metals, cement, lime, glass, ceramics, pulp, paper, cardboard, acids and bulk organic chemicals, aviation within the European Economic Area.

51 Directive 2003/87/EC.

52 Ibid., Art. 9.

53 Ibid., Art. 3(a).

54 Ibid., Arts. 10-10c.

55 Ibid., Arts. 2, 3(a), 6 (2)(e), 12(3).

56 Ibid., Art. 16.

spare allowances to cover their future needs or sell them to another operator short of allowances. Since 2019, a Market Stability Reserve stabilises the market by removing surplus allowances from it.[57] The limit on the total number of allowances available ensures that they have a value. The price signal provides an incentive to reduce emissions and promotes investment in innovative, low-carbon technologies, while allowance trading provides the flexibility to reduce emissions where it costs less to do so. Nonetheless, the EU ETS provides also allocation of "free allowances" for specific sectors, to safeguard the competitiveness of the regulated industries and to avoid carbon leakage.[58] Industrial sectors receive free allowances according to emission efficiency benchmarks and depending on the sectoral risk of carbon leakage.[59] Precisely in this context, the CBAM will come into play. The existing mechanisms adopted by the EU to address the risk of carbon leakage in sectors or sub-sectors at risk of carbon leakage are the transitional free allocation of EU ETS allowances together with financial measures to compensate for indirect emission costs incurred from GHGs emission costs passed on in electricity prices.[60] The CBAM will seek "to replace these existing mechanisms by addressing the risk of carbon leakage in a different way, namely by ensuring equivalent carbon pricing for imports and domestic products."[61] To ensure a gradual transition from the current system of free allowances to the CBAM, "the CBAM should be progressively phased in while free allowances in sectors covered by the CBAM are phased out."[62] Therefore, it is not by chance that the phasing-in of the CBAM in the period 2026-2034 will take place in parallel with the phasing-out of free allowances allocation under the EU ETS and, in principle, the CBAM will apply to all sectors covered by the ETS. Hence, it is evident that the CBAM is strongly tied to the EU ETS, indeed the former "complements" the latter and, to some extent, it "replaces" it in the sense outlined above.

1.2. Some of the challenging aspects

The CBAM is a unilateral trade measure implemented to both tackle climate change and ensure equal competition conditions between EU and foreign producers of some identified products at risk of carbon leakage. Given its trade nature and trade-environmental purpose, the measure has a twofold soul. Thus,

57 Ibid., Art. 10; Decision (EU) 2015/1814 of the European Parliament and of the Council, OJEU, L 264/1, 09.10.2015.

58 On free allowances see Commission Delegated Regulation (EU) 2019/331, OJEU, L 59/8, 27.02.2019; C. Marcantonini, J. Teixido-Figueras, S. F. Verde, X. Labandeira, *Free allowance allocation in the EU ETS*, in *Energy & Climate*, vol. 2017/02, 2017.

59 C. Marcantonini, J. Teixido-Figueras, S. F. Verde, X. Labandeira, n. 58.

60 Directive 2003/87/EC, Arts. 10a(6), 10b. See Provisional Agreement, [10].

61 Ibid., [11].

62 Ibid.

its legality should be assessed under both international trade and environmental law. To a certain extent, the 1992 United Nation Framework Convention on Climate Change acknowledges that unilateral environmental measures having trade effects on other WTO Members are still governed by WTO rules.[63] Article 3(5) explicitly provides for the possibility to undertake unilateral trade actions having direct or indirect effects on trade as long as the measures in question "do not constitute arbitrary or unjustifiable discrimination or a disguised restriction on international trade."[64] On the other hand, Deputy Director-General of the WTO Jean-Marie Paugam recently confirmed that the multilateral trade rules do not preclude the implementation of an ambitious environmental policy by any WTO Member, on condition that the measures adopted "are not discriminatory or do not disguise primarily competitive or protectionist motives."[65]

Unfortunately, right from the start, the CBAM has been criticized under both systems of law. Inter alia, some States have claimed violations of the non-discrimination principle under WTO law as well as the principle under international environmental law of the Common but Differentiated Responsibility and Respective Capability, in light of Different National Circumstances (CBDRRC-NC). However, due to the vastness of the subject matter, it will be provided here only a flavour of some of the issues arising under the GATT, without touching upon the legality of the measure under other WTO Agreements and the PA.

Precisely, amidst the questionable characteristics of the CBAM under the GATT, the fact that only some third countries[66] will be exempted from the CBAM and its complex administrative obligations, has raised much controversy in relation to the rule of Most-Favoured Nation (MFN) on three stages. Firstly, WTO Members that adopt explicit carbon pricing mechanisms, which are not linked to the EU ETS, will be subject to the CBAM unlike Members affiliated to the EU ETS. Secondly, countries that do not implement an explicit carbon pricing mechanism linked to or similar to the one set for within the EU, but equally adopt different measures i.e. regulatory measures, to address carbon leakage and climate change, will not be exempted from the application of the CBAM, unlike Members affiliated to the EU ETS. Thirdly, the aforementioned two categories of countries will be subject to the CBAM as well as countries

63 R. Howse, A. Eliason, *Domestic and international Strategies to address climate change: an overview of the WTO legal issues*, in T. Cottier, O. Nartova, SZ. Bigdeli, (eds.), *International trade regulation and the mitigation of climate change: World Trade Forum*, Cambridge University Press, 2009, p. 52.

64 United Nations Framework Convention on Climate Change, U.N.T.S. 107, 09.05.1992, Art. 3(5).

65 J.-M. Paugam, Deputy Director-General of the WTO, *DDG Paugam: WTO rules no barrier to ambitious environmental policies*, in *WTO news*, 16.09.2021.

66 Provisional Agreement, Art. 2(3). These are the countries that are explicitly listed in Annex II to the CBAM Regulation that participate to the EU ETS, or have systems linked to it. To date, they are only Members of the EEA.

that do not take any sort of climate policy measures aimed at GHGs emissions reduction.

Another challenging aspect of the CBAM regards its compliance with the GATT National Treatment (NT) obligation. Indeed, from 1 January 2016 until 2034,[67] the EU producers of the sectors covered by the CBAM will benefit from free allowances under EU ETS triggering a "discriminatory treatment" between domestic and foreign "like" products.

It is interesting to notice that, besides complaining about WTO law violations, on several occasions, and especially during WTO Committees Meetings, Members have equally complained about the violation of principles of international environmental law as enshrined in the PA, in particular the principle of CBDRRC-NC. Unlike violations of WTO law, for which the WTO dispute settlement mechanism is certainly competent, it is doubtful and controversial whether the same mechanism could adjudicate violations of principles of international environmental law.[68] In any case, the WTO dispute settlement mechanism can take international environmental law rules into account whether these latter are either enshrined in the WTO system or relevant to the interpretation of WTO law.[69]

2. The CBAM legal assessment under the GATT

Before focusing on the rules allegedly violated by the CBAM, a preliminary remark is necessary. The qualification of the measure at stake as a border tariff or internal regulation, rather than a border restriction is far from being clear. In fact, the CBAM comprises elements characterising all the aforementioned types of measures and this makes a clear-cut qualification difficult. This aspect, however, is crucial to understanding which rules will apply in the analysis of the legality of the CBAM under the GATT. In this section, an attempt will be made to provide a general framework to further elaborate later on some relevant aspects in the following sub-sections. That premised, under the GATT, the CBAM would most likely be challenged in respect of two provisions that are the expression of the non-discrimination principle, namely Articles I and III of the GATT. On one hand, Article I also known as the MFN clause prohibits discrimination among "like products" originating in or destined for different

67 These are respectively the dates for the phasing-in and full implementation of the CBAM.

68 Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, U.N.T.S. 401, 15.04.1994, (DSU), Art. 1(1).

69 Ibid., Art. 3(2); Vienna Convention on the Law of Treaties, 23.05.1969, U.N.T.S. 1155, Art. 31; Appellate Body, WT/DS2/AB/R, *United States-Standards for Reformulated and Conventional Gasoline*, (Appellate Body, US-Gasoline), 29.04.1996, p. 17.

countries.[70] It is worthwhile premising here that Article I is applicable to both price-based border measures under Article II GATT, and price-based domestic measures under Article III GATT.[71] On the other hand, Article III or the NT clause aims to avoid protectionism in the application of internal taxes and regulatory measures. As expressed in Article III(1), the general purpose of the provision is to ensure that internal measures are not applied to imported or domestic products "so as to afford protection to domestic production."[72] In addition to the aforementioned rules, Article II GATT entitled "Schedules of Concessions" prevents WTO Members from according to the commerce of the other Contracting Parties treatment no less favourable than that provided for in the appropriate Part of the proper Schedule annexed to the WTO Agreement.

Finally, Article XI GATT prohibits, inter alia, quantitative import restrictions.

As laid out above, the CBAM provides blurred features that make a net qualification of the measure challenging.[73] The fact that the CBAM applies to "goods imported into the customs territory of the Union from third countries"[74] suggests that the obligation to pay the carbon price[75] "on importation" arises independently of its distribution in the domestic market and, therefore, that the measure could be qualified as *import tariff* at the border according to Article II(1) GATT.[76]

However, since on an annual basis authorized declarants must submit a CBAM declaration containing the total quantity of imported goods embedded emissions, and the CBAM certificates shall be surrendered consequently,[77] the obligations triggered by the CBAM could be considered occurring *within* the EU's territory.[78] Thus, one might infer that the CBAM would consist in an "*internal tax or other internal charge of any kind*"[79] in the meaning of Article III(2) GATT.

---

70 Appellate Body, WT/DS139/AB/R, *Canada-Certain Measures Affecting the Automotive Industry*, (Appellate Body, Canada-Autos), 31.05.2000, [84].

71 GATT 1994, Art. I. P. Low, G. Marceau, J. Reinaud, *Interface between the Trade and Climate Change Regimes: Scoping the Issues*, in *J. World Trade*, vol. 46, 2012, p. 485, ff.

72 Panel, WT/DS8/R, *Japan-Taxes on Alcoholic Beverages*, (Panel, Japan-Alcoholic Beverages II), 11.07.1996, [5.10].

73 Due to the complexity of the matter, we will limit ourselves here to simplifying the issue, in order to allow us to move forward with the analysis under the WTO case law. For a more in-depth analysis, see P. Low, G. Marceau, J. Reinaud, n. 71.

74 Provisional Agreement, [14], Art. 2.

75 By purchasing and surrendering the CBAM certificates.

76 (Emphasis added). Nevertheless, tariffs are usually designed to collect revenue for governments or to give a price advantage to a domestic product over an imported one. See P. Low, G. Marceau, J. Reinaud, n. 71.

77 Provisional Agreement, Art. 6(2).

78 (Emphasis added).

79 Ibid.

At the same time, the CBAM "ensure[s] that imported products are subject to a regulatory system that applies carbon costs equivalent to the ones borne under the EU ETS, resulting in an equivalent carbon pricing for imports and domestic products."[80] This aspect might suggest that it would be more appropriate to consider the CBAM under Article II(2)(a) GATT a "charge equivalent to an internal tax imposed consistently with the provisions of Article III(2) in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part", triggering the application of Article III(2). In light of this interpretation, however, a question would arise regarding whether the EU ETS can be considered a tax.[81] If the answer were negative, by reading the text of the provision literally, an adjustment at the border would no longer be possible.

Nonetheless, if we consider the obligations of the CBAM occurring *within* the EU's territory, at least to a certain extent, it will remain open whether the measure can be qualified as an *"internal* law, regulation or requirement"[82] subject to Article III(4) GATT.[83]

Furthermore, if the CBAM would not qualify under Articles II and III, notice that it could be assessed under Article XI GATT. Article XI(1) does not refer to laws or regulations but more broadly to measures. Accordingly, "any measure instituted or maintained by a Contracting Party which restricts the exportation or sale for export of products" is covered by this provision, "irrespective of the legal status of the measure."[84] In the case at hand, due to the characteristics of the CBAM, especially the fact that it imposes administrative and financial burdens on CBAM declarants, the measure could be challenged as a *de facto* restriction provided that complaining parties are able to "establish a causal link between the contested CBAM and the low level of exports and persuasively explain precisely how the measure at issue causes or contributes to the low level of exports."[85] Indeed, the scope of the term "restriction" has been interpreted by the WTO dispute settlement organs as "a limitation on actions, a limiting

80 Provisional Agreement, (13).

81 In C-366/10/EC, *Air Transport Association of America and others*, [147], the European Court of Justice explicitly concluded: "by reason of its particular features, [the EU ETS] constitutes a market-based measure and not a duty, tax, fee, or charge."

82 (Emphasis added).

83 (Emphasis added). See sub-section 2.2.2. See also N. L. Dobson, *(Re) framing Responsibility? Assessing the Division of Burdens Under the EU Carbon Border Adjustment Mechanism* in *Utrecht Law Review 18*, no. 2, 2022, p. 168.

84 Panel, L/6309 – 35S/116, *Japan-Trade in Semi-conductors*, 04.05.1988, [106].

85 Panel, WT/DS155/R, *Argentina-Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, (Panel, Argentina-Hides and Leather), 19.12.200, [11.20-11.55].

condition or regulation."[86] Thus, according to the WTO case law, a restriction may consist merely in a "condition" having a limiting effect on importation.[87]

Due to the technicality and magnitude of the subject matter, the subsequent sections will offer an overview limited to the main issues arising under Articles I, II, and III GATT. In fact, these are the provisions that are most likely to be challenged before a panel and analysed first by the latter.[88]

2.1. Legal assessment under Article II GATT

Article II(1) GATT provides that each WTO Member "(a) […] shall accord to the commerce of the other [WTO Members] treatment *no less favourable* than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement" and that imported products "(b) shall […] be exempt from ordinary customs duties *in excess of those set forth and provided therein*. Such products *shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement* […]."[89]

In the case at stake, for each product covered by the CBAM the EU has bound itself to a maximum rate of import duties or tariffs under its Schedule of Commitments annexed to the GATT. In light of the issue on qualification outlined above, if the CBAM is considered an import tariff, it will be found to exceed the EU's tariff binding on the targeted products. Indeed, in *Argentina-Textiles and Apparel* the Appellate Body found that "the application of customs duties in excess of those provided for in a Member's Schedule inconsistent with the first sentence of Article II(1)(b), constitutes 'less favourable' treatment under the provisions of Article II(1)(a)."[90] Nevertheless, Article II(2)(a) allows Contracting Parties to impose at any time, on the importation of any product an adjustment, namely "a charge equivalent to an internal tax imposed consistently with the provisions of Article III(2)" in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part. In this regard, the Appellate Body observed that "Article II(2)(a), subject to the conditions stated therein, exempts

86 Panel, WT/DS90/R, *India-Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, 06.04.1999, [5.128].

87 Panel, WT/DS175/R, *India-Measures Affecting the Automotive Sector*, 21.12.2001, (Panel, India-Autos), [7.269-7.270].

88 J. Bacchus, *Legal Issues with the European Carbon Border Adjustment Mechanism*, in *Cato Institute*, 09.09.2021; I. Espa, *Reconciling the climate/industrial interplay of CBAMs: what role for the WTO?*, in *American Journal of International Law*, vol. 116, 2022, pp. 208-212.

89 (Emphasis added).

90 Appellate Body, WT/DS56/AB/R, *Argentina-Measures Affecting Imports of Footwear, Textiles, Apparel and other Items*, 27.03.1998, [47]; See also Panel, WT/DS269/R, *European Communities-Customs Classification of Frozen Boneless Chicken Cuts*, 30.05.2005, [7.65]; Panel, WT/DS377/R, *European Communities and its Member States-Tariff Treatment of Certain Information Technology Products*, 16.08.2010, [7.747].

a charge from the coverage of Article II(1)(b)."[91] Consequently, Article II(2)(a) serves as a bridge between Articles II(2) and III GATT. The main difference between the two provisions lies in the fact that, while Article II deals with duties or charges "*imposed or in connection with importation*", namely applied at the border to imported products, Article III(2) concerns *internal taxes or charges*[92] and, thus, allows the imposition of taxes and regulations on both imported and domestic products.

In *China-Measures Affecting Imports of Automobile Parts*, the Panel elaborated the criteria to distinguish a border measure, in the form of a tariff governed by Article II and an internal tax governed by Article III. The Panel found that if the obligation to pay a charge accrues due to an internal event, such as the distribution, sale, use, or transportation of the imported product, then it is an internal charge governed by Article III. Conversely, if the charge is imposed "on importation" and independently from its distribution in the domestic market, it shall be considered a border measure subject to Article II.[93] Therefore, if the CBAM is considered a fiscal measure under Article II(2)(a) GATT, its legality shall be assessed according to Article III(2) that imposes stricter obligations. If instead, the CBAM is considered a regulatory measure of a non-fiscal nature, it will be examined under GATT Article III(4) which provides the WTO Member a greater degree of flexibility in the design of the measure.

As already observed the CBAM includes elements of both a fiscal and regulatory nature. For this reason, it will be provided an overview of the analysis of its legality under both GATT provisions.

To sum up, under Article II, if the CBAM qualifies as a mere duty or charge "imposed or in connection with importation", it will result applied "in excess" of those imposed on the date of the GATT and therefore in violation of Article II. On the contrary, if the CBAM is assumed to be "a charge equivalent to an internal tax imposed consistently with the provisions of Article III(2) in respect of the like domestic product […]" it could be justified according to Article II(2)(a). In this regard, the relationship between the CBAM and the EU ETS, as examined earlier, acquires relevance. However, the fact that the sectors covered by the ETS and the CBAM will not exactly overlap, at least until 2030, and that

91 Appellate Body, WT/DS360/AB/R, *India-Additional and Extra-Additional Duties on Imports from the United States*, 30.10.2008, [153], while it was assessing whether certain border charges were inconsistent with Art. II(1)(b) or if they were correlated with internal taxes and sheltered by Art. II(2)(a).

92 Panel, L/5863, *Canada-Measures Affecting the Sale of Gold Coins*, 17.09.1985, [4.15, 4.17, 4.18], (emphasis added).

93 Panel, WT/DS342/R, *China-Measures Affecting Automobile Parts* (Panel, China-Autoparts), 18.07.2008, [7.205]; Appellate Body, WT/DS363/AB/R, *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, (Appellate Body, China-Audiovisual Services), 21.12.2009, [163]. See also P. Low, G. Marceau, J. Reinaud, n. 71.

EU producers will still benefit from free allowances under the ETS, certainly until 2034, raises further problems as to the justifiability of the measure under paragraph 2(a).

In conclusion, the question of the legality of the CBAM under Article II is still open, as the possibility to justify the measure according to Article XX GATT is still available in case of a breach of Article II.

2.2. Legitimacy under Article III GATT

Article III(1) establishes a general principle as a guide to understanding and interpreting the specific national treatment obligations contained in Article III(2) and in the other paragraphs of Article III.[94] Indeed, the objective of Article III is "to avoid protectionism in the application of internal tax and regulatory measures,"[95] and "to ensure equality of competitive conditions between imported and like domestic products."[96] In brief, it guarantees that Members will not undermine through internal measures their commitments on custom duties and chargers under Article II.[97]

In light of this purpose, Article III contemplates different hypothesis.[98] Article III(2) refers to "internal taxes or other internal charges" and provides that Members shall not apply on imported goods direct or indirect internal taxes or other charges *in excess to those imposed*, directly or indirectly, on domestic "like" products or between imported goods and "a directly competitive or substitutable product." Article III(4) tackles instead internal regulations and laws by requiring Members to accord imported products a treatment no less favourable than that accorded to "like products" of national origin. In the next sub-sections, the CBAM will be examined precisely under these two obligations.

2.2.1. Article III(2): the CBAM an "internal tax or other internal charge of any kind"

Regarding the terms "internal tax or other internal charge of any kind" it was found that measures providing for the imposition of charges and creating a liability, as such, fall under the scope of Article III(2).[99] In this regard, the fact that in cases of non-compliance to the obligations set in the Regulation on the CBAM, violators "shall be held liable for the payment of a penalty"[100] acquires importance. Furthermore, Article III(2) requires the "charge" to be imposed on

94 GATT 1994, Art. III(1); Appellate Body, Japan-Alcoholic Beverages II, pp. 17-18.

95 Appellate Body, Japan-Alcoholic Beverages II, p. 16.

96 Appellate Body, WT/DS31/AB/R, *Canada-Certain Measures Concerning Periodicals*, 30.06.1997, p. 18.

97 Panel, Japan-Alcoholic Beverages II, [6.13].

98 For the purpose of our analysis paragraphs 1 (general provision), 2 and 4 of the provision acquire relevance.

99 Panel, Argentina-Hides and Leather, [11.143-11.144].

100 Provisional Agreement, Arts. 26-27.

goods that have already been imported and the obligation to pay to be triggered by an "internal factor."[101] The "internal factor" is intended as occurring after the importation of the product of one Member into the territory of another Member,[102] and may consist of the product then being used internally. This latter aspect can be crucial in the case of the CBAM.

The Appellate Body has also underscored that the motivation for imposing the tax is not relevant to the application of Article III(2).[103]Accordingly, whether the CBAM is considered to fulfil these requirements, it will be covered by Article III(2).

A further clarification shall be made between the first and the second sentence of paragraph 2. The first phrase indeed refers to "like products" whereas the second, by referring to "directly competitive or substitutable products", provides for "a separate and distinctive consideration of the protective aspect of a measure in examining its application to a broader category of products."[104]

In addressing the relationship between these two sentences, the Appellate Body found that to determine if a violation of Article III(2) has occurred two questions shall be answered, namely if (i) the imported and domestic products are "like" products, and if (ii) the imported products are taxed in excess of the domestic products. The Appellate Body then held that there is a violation of Article III(2) first sentence if the answers to both questions are affirmative. Whereas if the answer to the first question is negative, the measures at stake shall be examined under Article III(2), second sentence.[105]

Advancing with the analysis, it has be observed that the term "like product" can assume different connotations, especially regarding paragraphs in Article III,[106] and therefore "likeness" has to be examined on a case-by-case basis.[107]

As employed in Article III(2), first sentence, the term "like" must be construed narrowly.[108] According to WTO case law, "likeness" shall be assessed, inter alia, by looking at four general criteria: "(i) the properties, nature, and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and

101 For instance because the product was re-sold internally or because the product was used internally.

102 Panel, China-Autoparts, [7.132].

103 Panel, Argentina-Hides and Leather; Appellate Body, Canada-Periodicals; Panel, L/6175, *United States-Taxes on Petroleum and Certain Imported Substances*, 17.06.1987, [3.2.5].

104 Appellate Body, Japan-Alcoholic Beverages II, p. 19.

105 Appellate Body, Canada-Periodicals, pp. 22-23.

106 Appellate Body, Japan-Alcoholic Beverages II, p. 25.

107 *Border Tax Adjustments*, Report of the Working Party adopted on 2 December 1970, GATT Doc L/3464, (*1970 Border Tax Adjustments*), 20.11.1970, [18]; Appellate Body, Japan-Alcoholic Beverages II, p. 21.

108 Appellate Body, Japan-Alcoholic Beverages II, p. 20; Appellate Body, Canada-Periodicals, p. 21.

habits – more comprehensively termed consumers' perceptions and behaviour – in respect of the products; and (iv) the tariff classification of the products."[109]

Notice that, in the present case, the assessment of "likeness" shall be conducted in light of one fundamental issue: whether two products can be differentiated or considered "alike" based on criteria relating to GHGs emissions.[110]

Regarding the first precondition, it shall be established if the GHGs emitted during the production process, either directly by the producer or indirectly by a producer of input e.g. electricity generation of the CBAM products,[111] have an impact on the properties, nature, and quality of the products, to the extent that these products cannot be considered "like" to the EU ETS products.[112] These GHGs emissions can be considered as a non-product-related process and production methods (NPR-PPMs), i.e. a characteristic of the production process which has no impact of the physical characteristics of a good.[113] However, whether NPR-PPMs affect the properties, nature, and quality of the products has yet to be clarified by the WTO dispute settlement mechanism. Since in this contribution the assessment of the CBAM is conducted based on pre-existing WTO case law, this aspect will not be dealt with in detail here. However, it is worth observing that if the NPR-PPMs are not considered as affecting "property, nature, or quality" *strictu sensu* for the determination of "likeness" between the goods imported from third countries not subject to the EU ETS and the products covered by the EU ETS, these goods will be deemed "like". To clarify, steel produced by less carbon-intensive production methods will be considered "like" to steel generated by carbon-intensive production methods because if

109 Panel, WT/DS392/R, *United States-Certain Measures Affecting Imports of Poultry from China*, 29.09.2010, [7.424-7.427, 7.429]; *1970 Border Tax Adjustments*, [18]; Appellate Body, Japan-Alcoholic Beverages II, p. 20; Panel, WT/DS64/R, *Indonesia-Certain Measures Affecting the Automobile Industry*, 02.07.1998, [14.109]; Panel, WT/DS403/R, *Philippines-Distilled Spirits,* 15.08.2011, [7.31-7.37, 7.124-7.127].

110 P. Low, G. Marceau, J. Reinaud, n. 71.

111 Henceforth, "CBAM products" will refer to the products produced in third countries (that are not covered by or linked to the EU ETS), as listed in Annex I of the Regulation on the CBAM. Thus the products that will be subject to the CBAM. According to the Provisional Agreement these will be, at least until January 2026, iron and steel, cement, fertilisers, aluminium, electricity, and hydrogen, together with selected precursors and a limited number of downstream products.

112 Hereinafter, with "EU ETS products" it will be intended the same products as listed in Annex I of the CBAM Regulation (iron and steel, cement, fertilisers, aluminium, electricity, and hydrogen, together with selected precursors and a limited number of downstream products at least until January 2026), produced under the EU ETS or an ETS linked to the EU ETS.

113 E. Vranes, *Carbon taxes, PPMs and the GATT*, in Panagiotis Delimatsis (ed.), *Research Handbook on Climate Change and Trade Law*, Edward Elgar Publishing, 2016, p. 79; T. Cottier, T. Payosova (eds.), *Common concern and the legitimacy of the WTO in dealing with climate change*; in Panagiotis Delimatsis (ed.), *Research Handbook on Climate Change and Trade Law*, Edward Elgar Publishing, 2016.

NPR-PPMs are not meant to affect the property, nature, or quality. Indeed, these latter will have the same physical features. Remark that in *EC-Asbestos*, the Appellate Body suggested that NPR-PPMs may become relevant in the likeness determination, but only if they affect the competitive relationship between two products.[114] As it will be seen, NPR-PPMs could be considered in the analysis of consumer preferences, or might be reflected in market studies. However, most often market determination will lead to the conclusion that products embodying different NPR-PPMs are competitive and, thus, like products.[115]

Proceeding with the examination of the criterion of the end-uses of the products, in the case of CBAM covered products, it would be possible to conclude for the "likeness" of the CBAM products and EU ETS products. This is because it would be hard to argue that the two physically identical products will have different end-uses because their production processes are distinct.

Another undisputed element that is in favour of concluding for "likeness" of the two products is the tariff classification. The latter will be indeed the same for the products, as the products will have the same physical traits.

With respect to consumers' tastes and habits of the products, the assessment becomes more controversial. As mentioned, the Appellate Body suggested that it is theoretically possible for two products, physically identical but produced with different NPR-PPMs, to be deemed as "unlike" if consumers perceive the products as alternatives, and thus, not in a competitive relationship in the marketplace.[116] However, it should be noted that the CBAM will essentially target raw materials and consumers in that context usually are not interested in distinguishing between products with different NPR-PPMs.[117] These latter are often price-sensitive consumers who are not willing to pay a higher price for "sustainable" NPR-PPMs products. On the contrary, they are interested in buying the cheaper product.[118]

At this stage, if at the end of the analysis, the products are considered "like", the measure will have to be assessed according to the requirements of the first sentence. Therefore, it will have to be determined if the imported products are taxed "in excess of" the domestic products. In this regard, a panel clarified that "a determination of whether an infringement of Article III(2), first sentence

114 P. Low, G. Marceau, J. Reinaud, n. 71.

115 Appellate Body, WT/DS135/AB/R, *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products*, (Appellate Body, EC-Asbestos), 12.03.2001, [101].

116 Ibid. However, the Appellate Body did not rely on econometric studies or quantitative data to analyse consumer behaviour. Rather, it offered a qualitative assessment and thus, it provided its subjective judgment on how consumers perceived the two products.

117 These are for example, construction companies and product manufacturers.

118 D. Sifonios, *Environmental process and production methods (PPMs) in WTO law*, Springer, 2018, p. 150; S. Saigal, *Navigating the Global Economy towards Net-Zero within the Confines of WTO Law and Jurisprudence: A Critical Analysis of the European Union's Carbon Border Adjustment Mechanism and its Implications on International Trade*, in *European Union Law Working Papers No. 63*, 2022, p. 32.

exists must be made on the basis of an overall assessment of the *actual tax burdens* imposed on imported products, on the one hand, and like domestic products, on the other hand."[119] The idea that the phasing-in of the CBAM will be matched by a phasing-out of the ETS free allowances has not yet been worked out in detail. Consequently, it is likely that for a certain period, at least until 2034, both systems will have to co-exist with differentiated tax burdens. Existing free allowances would provide double protection for domestic EU products and put imports at a competitive disadvantage.[120] Hence, this would lead to the imposition of an "excessive tax burden on imported products" compared to "like" EU ETS products that will be covered by free allowances. In addition, the structure of the CBAM may violate this provision also to the extent that the price of the CBAM certificates is going to be calculated weekly based on the average closing prices of EU ETS allowances on the common auction platform, to minimise administrative complexity.[121] This can lead to minimal price variations compared to the EU ETS pricing mechanism for domestic producers, which is instead calculated daily. On a narrow interpretation of the first sentence of Article III(2), the CBAM will therefore be considered incompatible with the NT obligation.[122]

In view of the above considerations and on the basis of existing case law, it can be concluded that, more plausibly, a panel will consider the CBAM products and the EU ETS products as "like". For the purposes of this analysis, it shall be mentioned that if the product were considered "unlike" the measure would be assessed according to the second sentence. No such assessment will be made in this paper. However, observe that the second sentence of paragraph 2 provides "for a separate and distinctive consideration of the protective aspect of a measure in examining its application to a broader category of products that are not 'like products' […]."[123] Depending on their nature and especially on the competitive conditions in the relevant market, the products may well fall in the broader category of "directly competitive or substitutable products". This group enters within the domain of Article III(2), second sentence,[124] which imposes a less stringent non-discrimination obligation. Indeed, "directly competitive and substitutable" products must be "similarly taxed" in order to not afford protection to domestic production.[125] Consequently, if this were the case, fluctuations between the prices of the CBAM certificates and the carbon

119 Panel, Argentina-Hides and Leather, [11.182-11.184], (emphasis added).
120 J. Bacchus, n. 88.
121 Provisional Agreement, Art. 21(1).
122 S. Saigal, n. 118, p. 56.
123 Appellate Body, Japan-Alcoholic Beverages II, pp. 19-21.
124 Ibid., p. 25.
125 GATT 1994, Art. III(2), Note "Ad Art. III".

pricing mechanism under the EU ETS would not be necessarily in violation of Article III(2) GATT, second sentence.[126]

2.2.2. Article III(4): the CBAM an "internal law, regulation or requirement"

As affirmed by the Appellate Body, a violation of Article III(4) must be determined under three conditions: (i) the imported and domestic products at issue are "like products"; (ii) the measure at issue is a "law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use"; and (iii) the imported products are accorded less favourable treatment than that accorded to like domestic products.[127]

Also in paragraph 4 the assessment of "likeness" shall be conducted following the criteria examined above.[128] Consequently, if the first requirement is assumed satisfied we can proceed with the analysis.

The terms "law" and "regulation" refer to "legally enforceable rules of conduct under the domestic legal system of the WTO Member concerned and do not include general objectives."[129] The meaning of the term "requirement" is outlined on the basis of two different situations, namely (i) obligations which an enterprise is legally bound to respect and (ii) those which an enterprise voluntary accepts in order to obtain an advantage from the government."[130] Since, the Regulation on the CBAM will be adopted according to Article 288 TFUE and, thus, it will consist in a legal act applying directly at the national level, it can be considered as a law in the meaning of Article III(4).

The term "affecting" has a broad scope and it refers to measures that concern imported goods. It covers not only measures that directly regulate or govern the sale of domestic and imported "like" products, but also any laws or regulations which might adversely modify the conditions of competition between domestic and imported products, including measures creating incentives or disincentives with respect to the sale, offering for sale, purchase, and use of an imported product.[131] The implementation of the CBAM is certainly going to affect the internal sale of the CBAM products as it will impose several obligations on exporters within the EU. In fact, in the event of non-compliance, CBAM declarants shall face criminal and administrative sanctions.[132]

---

126 S. Saigal, n. 118, p. 60.

127 Appellate Body, WT/DS169/AB/R, *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, 11.12.2000, [133].

128 Appellate Body, EC-Asbestos, [101-103].

129 Panel, WT/DS456/R, *India-Certain Measures Relating to Solar Cells and Solar Modules*, 24.02.2016, [7.310].

130 Panel, India-Autos, [7.190-7.191].

131 Panel, WT/DS142/R, *Canada-Certain Measures Affecting the Automotive Industry*, (Panel, Canada-Autos), 11.02.2000, [10.80, 10.84-10.85]; Panel, WT/DS472/R, *Brazil-Certain Measures Concerning Taxation and Charges*, 30.08.2017, [7.65-7.66]; Panel, WT/DS276/R, *Canada-Measures Relating to Exports of Wheat and Treatment of Imported Grain*, 06.04.2004, [6.267].

132 Provisional Agreement, Arts. 26, 27.

Lastly, the expression "less favourable treatment" conveys the general principle, set in Article III(1) that "internal regulations 'should not be applied […] so as to afford protection to domestic production'."[133] Adopting the CBAM while granting free allowances to EU producers under the EU ETS, for the same sectors,[134] may result in the adoption of a protectionist measure, in violation of Article III(4). "Treatment no less favourable" in paragraph 4 calls indeed for "*effective equality of opportunities* for imported products".[135] In this regard, to assess the consistency of a measure with Article III(4), one must not only examine whether the measure grants formally equal treatment to imported products and "like" domestic products. Rather, it must be examined whether the measure grants treatment to imported products that is no less favourable than that granted to "like" domestic products.[136]

Any free allowance in the ETS that has not been completely eliminated before the implementation of the CBAM would put the measure at odds with this obligation.[137] Furthermore, the fact that the CBAM prevents importers from trading unused CBAM certificates and from reselling to the competent authority of any EU Member a quantity exceeding one-third of the total amount of CBAM certificates purchased, reflects the environmental ambition of the measure.[138] As these restrictions are not present under the EU ETS, they could lead to the stockpiling of EU ETS certificates at favourable prices without a safeguard to support authorised declarants.[139] Even if the CBAM partially resolves this gap by reducing the total number of CBAM certificates surrendered by an authorised declarant to reflect the allocation of free EU ETS allowances to domestic producers in the transitional period, the different treatment accorded to domestic producers under the EU ETS between 2026 and 2034 may amount to discrimination within the meaning of Article III(4) GATT.

A second issue that arises under Article III(4) is when an authorised declarant fails to comply with the requirements related to the verification of the total

133 Appellate Body, EC-Asbestos, [100].

134 A full overlap between EU ETS and CBAM sectors is planned to be achieved by 2030, while full implementation of the CBAM and full phased-out of free allowances under EU ETS are expected in 2034.

135 Panel, WT/DS2/R, *United States-Standards for Reformulated and Conventional Gasoline*, 29.01.1996, [6.10]; Panel, WT/DS44/R, *Japan-Measures Affecting Consumer Photographic Film and Paper*, 31.03.1998, [10.379], (emphasis added).

136 Panel, WT/DS302/R, *Dominican Republic-Measures Affecting the Importation and Internal Sale of Cigarettes,* 26.11.2004, [7.182].

137 D. Smith, *The Legality of the European Union's Carbon Border Adjustment Mechanism and the Limitations of World Trade Organization Rules on Effective Climate Action*, in *eGrove* University of Mississippi, 04.2022, pp. 21, 56.

138 Provisional Agreement, Arts. 22-24.

139 L. Cheon-Kee, *EU CBAM: Legal Issues and Implications for Korea,* in *Korea Institute for International Economic Policy Opinions Paper*, 2021, p. 5.

embedded emissions contained in the CBAM declaration.[140] In that case, the number of CBAM certificates that have to be surrendered will be determined using "default values"[141] prescribed by Annex III of the proposed Regulation.[142] These will have to be set at the "average emission intensity of each exporting country"[143] for all CBAM products, except electricity. In addition, the values will have to be increased by a mark-up to account for the administrative burden of calculating emissions, except for electricity. Although this is not *per se* discriminatory, the issue arises when there is no reliable data for the exporting country. In this scenario, the "default values" would be set as the emissions corresponding to the "average emission intensity of the worst-performing X percent of EU installations for that type of good."[144] In this regard, a panel may consider this treatment as less favourably, since the default system is based on the principle of negative inference, which does not exist under the EU ETS.[145] Hence, the requirement for an importer to hold a quantity of CBAM certificates that corresponds to at least 80% of the embedded emissions based on the default values,[146] calculated by reference to the EU's worst technologies, may lead to non-trivial price differences between imported and domestic "like" products. This discrepancy may trigger downstream producers in the EU internal market to favour goods produced in the EU and subject to the EU ETS over those imported and subject to the CBAM from countries with unverifiable export data and therefore treat them less favourably.[147]

To conclude, CBAM products, when compared to the EU ETS products, will most probably be considered "like" or at least "directly competitive or substitutable" within the meaning of Article III of the GATT. Accordingly, the CBAM shall ensure compliance with the NT provision. However, in case of violation, the possibility of justifying a violation of Article III would remain available under Article XX.

2.3. Legal analysis according to Article I GATT

Article I(1) GATT relates to "[…] *customs duties and charges of any kind imposed on or in connection with importation or exportation* […] *, and with respect to all matters referred to in Article III(2) and (4),* […]."[148] Therefore, it covers both provisions as

140 Provisional Agreement, (45), Arts. 7(2)(3).
141 Ibid., Arts. 7(2)(3).
142 Ibid., Annex III (4.1)(4.2).
143 Ibid., Annex III (4)(1).
144 Ibid. In the Provisional Agreement the percentage is not indicated, whereas in the CBAM Proposal, it was set at 10%.
145 L. Cheon-Kee, n. 139, p. 5.
146 Provisional Agreement, Art. 22(2).
147 L. Cheon-Kee, n. 139, pp. 5-6.
148 Gatt 1994, Art. I, (emphasis added).

analysed in the previous sections. Article I is a "cornerstone of the GATT"[149] and it covers both *de jure* and *de facto* discrimination. It "protects expectations of equal competitive opportunities for 'like' imported products from all [WTO] Members."[150]

The Appellate Body singled out four elements that shall be proven to establish a violation of the MFN obligation. Notably, a breach requires that "(i) the measure at issue falls within the scope of application of Article I(1); (ii) the imported products at issue are 'like' products within the meaning of Article I(1); (iii) the measure at issue confers an 'advantage, favour, privilege, or immunity' on a product originating in the territory of any country; and (iv) the advantage so accorded is not extended 'immediately' and 'unconditionally' to 'like' products originating in the territory of all Members."[151]

That said, the investigation shall start from the scope of the measure. In this regard, reference is made to the examination conducted earlier, echoing that beyond its qualification the CBAM will be covered anyway by Article I. Indeed, would the CBAM be considered an "internal regulatory or fiscal measure"[152] rather than a custom duty or charge of any kind, the Appellate Body observed that the reference to "all matters referred to in paragraphs 2 and 4 of Article III" suggests "a broad coverage and consideration of trade effects."[153]

Moving to the requirement of "likeness", the determination of the latter is crucial because if products are "unlike" then the CBAM could, in principle, discriminate. On the contrary, if the "likeness" is established the CBAM shall comply with the non-discrimination obligations expressed in both Article I and III. The same considerations made with regard to Article III apply in this context, so that "likeness" has to be assessed on a case-by-case basis.[154] Having already extensively discussed "likeness" in sub-section 2.2.1. the scrutiny made above is recalled here.

Once concluded that the products are "like", it becomes necessary to establish whether any advantage, favour, privilege, or immunity is granted by the EU to any third country. In other terms, Article I prohibits discrimination "among like products originating in or destined for different countries."[155] In this re-

149 Appellate Body, WT/DS246/AB/R, *European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries*, 07.04.2004, [101]; Appellate Body, WT/DS400/AB/R, *European Communities-Measures Prohibiting the Importation and Marketing of Seal Products*, (Appellate Body, EC-Seal Products), 22.05.2014, [5.86].

150 Ibid., [5.87].

151 Ibid., [5.86].

152 According to *1970 Border Tax Adjustments*, [4], fiscal measures are imposed on goods in the country (or customs union) of consumption at the point of import or export.

153 Appellate Body, China-Audiovisual Services, [305].

154 *1970 Border Tax Adjustments*, [18], as also recalled by the Appellate Body in Appellate Body, Japan-Alcoholic Beverages II; Appellate Body, Canada-Periodicals, pp. 20-21.

155 Appellate Body, Canada-Autos, [84];

gard, in EC-Bananas III the Panel considered that "advantages" in the sense of Article I(1) are those that create "more favourable import opportunities" or affect the commercial relationship between products of different origins.[156] The CBAM would exempt from the payment of the certificates and the administrative burdens only countries expressly listed in Annex II and this will result in an "advantage" for these latter in the meaning of Article I.

Article I(1) requires this advantage to "be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Contracting Parties."[157] The term "immediately" shall be interpreted according to its ordinary meaning "without delay, at once, instantly."[158] Conversely, the expression "unconditionally" has been commonly defined as "without conditions" and was interpreted accordingly by WTO panels.[159] Given these premises, it is self-evident that the CBAM will not respect such requirements.

Nonetheless, the Appellate Body clarified that "Article I(1) permits regulatory distinctions to be drawn between like imported products, *provided that such distinctions do not result in a detrimental impact on the competitive opportunities for like imported products* from any Member."[160] Regrettably, the additional cost imposed on the products imported from some Members and not others would lead to a distortion of competition with a detrimental impact on competitive opportunities.

To sum up, if the CBAM will exempt some countries on a country-specific basis, it will apply "differential treatment" to "like" products and therefore operate a *de jure* discrimination. The proposed Regulation indeed will be more restrictive for "like products" produced in third countries employing explicit or implicit carbon pricing systems other than the EU ETS or not adopting any system at all, compared to those countries implementing the EU ETS or a system linked to the latter.[161]

It is interesting to notice that the EU could face allegations also for *de facto* discriminatory treatment due to the administrative and practical complexities that will arise from the implementation of the CBAM.[162] In this regard, the CBAM may violate the MFN principle when determining what constitutes a "carbon price" paid in a country of origin outside the EU.[163] At first glance, by exempting only countries with the same domestic carbon pricing scheme

156 Panel, WT/DS27/R, *European Communities-Regime for the Importation, Sale and Distribution of Bananas,* (EC-Bananas III), 22.05.1997, [7.239]; Panel, Canada-Autos, [10.16].

157 GATT 1994, Art. I(1); Appellate Body, EC-Seal Products, [5.86].

158 R. Wolfrum, (ed.), PT. Stoll, (ed.), HP. Hestermeyer, (ed.), *WTO – Trade in Goods*, in *Max Planck Commentaries on World Trade Law*, vol. 5, Martinus Nijhoff Publishers, 2011, p. 1265.

159 Ibid.

160 Appellate Body, EC-Seal Products, [5.88], (emphasis added).

161 E. Vranes, n. 113, p. 97.

162 See S. Saigal, n. 118, p. 67.

163 Provisional Agreement, Art. 3(23): carbon price is defined as "the monetary amount paid in a third country, under a carbon emissions reduction scheme, either in the form of a tax, levy,

or a linked ETS, the Regulation apparently will confer selective advantages to some third countries. It risks indeed failing in recognising other effective policy instruments or other direct emission regulations, which may have a regulatory effect comparable to the EU ETS.[164] However, this may not be entirely true. If we consider that the payment of certificates is based on the amount of direct and indirect embedded emissions of the products in question, then if countries are able to adopt other effective policies to reduce emissions, this would be reflected in the amount of embedded emissions and consequently, the total certificates to be surrendered would be lower or even equal to zero. In addition, the EU has expressed its readiness to enter into negotiations with interested WTO Members, across economic and policy sectors, to understand how their regulatory schemes contribute to achieving shared environmental policy goals.[165]

Once made such assessment, a panel theoretically could conclude for the CBAM violation of Article I. Nevertheless, it shall be recalled that, if this were the case, the possibility to justify the CBAM under Article XX GATT would remain open.[166]

2.4. The CBAM justifiability in light of Article XX GATT

Whether the CBAM will violate one of the examined provisions of the GATT, it would still be possible to justify it in light of Article XX GATT. Since the *chapeau* requires that measures provisionally justified under one of the specific heads in (a-j) be applied so as not to constitute a disguised restriction on international trade or arbitrary or unjustifiable discrimination, in the following sub-sections, we will conduct this two-tier assessment.

2.4.1. The assessment under the specific heads

Article XX, entitled "General Exceptions", provides a justification for measures adopted by Members in order to protect a set of "valuable interests", other than commercial ones, that are at odds with the GATT.[167] Given the environmental protection purpose of the CBAM, letter b) and g) acquire particular relevance in our case. These provisions explicitly allow WTO Members to adopt measures, "necessary to protect human, animal or plant life or health" (letter b) and "relating to the conservation of exhaustible natural resources if

fee or emission allowances under a greenhouse gas emissions trading system, calculated on greenhouse gases covered by such a measure, and released during the production of goods."

164 L. Cheon-Kee, n. 139, p. 4. Other effective policy instruments may be Renewable Portfolio Standards (RPS) and Feed-In Tariffs (FITs).

165 C. Galiffa, Ig. Bercero, *How WTO-consistent tools can ensure the decarbonization of emission-intensive industrial sectors*, in *American Journal of International Law*, vol. 116, 2022, pp. 196-201; I. Espa, n. 88.

166 See section 3.

167 Appellate Body, US-Gasoline, p. 24.

such measures are made effective in conjunction with restrictions on domestic production or consumption" (letter g).[168]

Yet, for the sake of conciseness, here the assessment of the measure will be conducted exclusively under letter g). Indeed, it is very likely that the EU will primarily invoke as justification the head outlined in letter g) because the establishment of the "relating to" requirement entails a much lower burden of proof rather than the "necessity" requirement imposed by letter b).[169]

The text of Article XX(g) suggests a "holistic assessment of its component elements."[170] First, it is essential to examine if the measure concerns "the conservation of exhaustible natural resources." The Appellate Body emphasized the need to interpret dynamically instead of statically the term "exhaustible", "in the light of contemporary concerns of the community of nations about the protection and conservation of the environment."[171] In our case, the objective of the measure is the preservation of the atmosphere, so that it becomes necessary to assess if the latter can be considered as an exhaustible natural resource.

Given the finding of the Panel in US-Gasoline (not appealed), clean air shall be considered an "exhaustible natural resource."[172] Consequently, *a fortiori*, the atmosphere can be considered an exhaustible natural resource.

The use of the wording "relating to" the conservation of exhaustible natural resources suggests that Article XX(g) covers a wider range of measures. However, to be considered as "relating to" conservation within the meaning of Article XX(g), the measure shall be "*primarily aimed at"* the conservation of an exhaustible natural resource.[173] There must be "a close and genuine relationship of ends and means between that measure and the policy of natural resource conservation of the Member maintaining the measure."[174] In this regard, in US-Shrimp, the Appellate Body focused on the design of the measure noticing that the legislation adopted by the United States (US) was not disproportionately wide in its scope and reached in relation to the policy objective of protection

168 It is interesting to notice that also letter a) which refers to measures "necessary to protect public morals" could be taken into account in justifying the CBAM under Art. XX. However, unlike letters b) and g), it makes no express mention of environmental protection and, therefore, could result in a "weaker" defence in the case at hand. Panel, WT/DS285/R, *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, 20.04.2005, [6.461, 6.465]; D. Smith, n. 137, p. 24.

169 Appellate Body, US-Gasoline, p. 16.

170 Appellate Body, WT/DS431/AB/R, *China-Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, (Appellate Body, China-Rare Earths), 07.08.2014, [5.94].

171 Appellate Body, WT/DS58/AB/R, *United States-Import Prohibition of Certain Shrimp and Shrimp Products, (*Appellate Body, US-Shrimp), 12.10.1998, [141-142].

172 Panel, WT/DS2/R, *United States-Standards for Reformulated and Conventional Gasoline*, (Panel, US-Gasoline), 29.01.1996, [6.37]; Appellate Body, US-Gasoline, p. 11.

173 Panel, L/6268, *Canada-Measures Affecting Exports of unprocessed Herring and Salmon,* 22.03.1988, [4.6]. Appellate Body, US-Gasoline, p. 18, (emphasis added).

174 Appellate Body, US-Shrimp, [129, 140, 141].

and conservation of the exhaustible natural resource. It then held that the means were, in principle, reasonably related to the ends.[175] Following the same reasoning, if we focus on the structure of the CBAM, even though the measure pursues two different goals, namely the economic object of maintaining the competitiveness of European companies and the environmental aim to counteract carbon leakage, the latter does not appear disproportionate in scope to the political objective of protecting and preserving the atmosphere. Therefore, we can conclude for the existence of "a close and genuine relationship of ends and means."[176]

Turning to conservation, it stands for "the preservation of the environment, especially of natural resources."[177] In its general design and structure, the CBAM specifically imposes an equivalent cost on foreign exporters in order to counteract carbon leakage and limit GHGs emissions. Thus, it can be considered to ensure the conservation of the atmosphere.

Concerning the "made effective in conjunction with" condition, the latter is described as a "requirement of even-handedness in the imposition of restrictions."[178] The meaning of "'made effective' when used in connection with a measure – a governmental act or regulation – may be seen to refer to such measure being 'operative', as 'in force', or as having 'come into effect'. Similarly, the phrase 'in conjunction with' may be read quite plainly as 'together with' or 'jointly with'."[179] In this regard, the existence of a domestic measure, namely the EU ETS acquires relevance. When international trade is restricted, effective restrictions must be imposed equally on domestic production or consumption.[180] Notice, however, that the requirement of "even-handedness" embodied in Article XX(g) does not amount to a requirement of "identity of treatment."[181]

Given the premises made in section 1.2.2. by mirroring the EU ETS,[182] the CBAM can be considered to be made effective in conjunction with the EU ETS in the meaning of letter g). Accordingly, we might conclude that the CBAM can be provisionally justified under the head of the letter g).

2.4.2. The assessment under the chapeau

As already mentioned, to be considered justified, the measure shall also comply with the conditions set by the *chapeau* of Article XX.[183] Namely, the measure

175 Ibid.

176 Appellate Body, China-Rare Earths, [5.90].

177 Appellate Body, WT/DS398/AB/R, *China-Measures Related to the Exportation of Various Raw Materials*, 30.01.2012, [355].

178 Appellate Body, US-Gasoline, p. 20.

179 Ibid.

180 Appellate Body, China-Rare Earths, [5.132].

181 Appellate Body, US-Gasoline, p. 21.

182 Provisional Agreement, [17].

183 Appellate Body, US-Gasoline, p. 22, [11, ff.]; Appellate Body, US-Shrimp, [119-120].

shall not be adopted nor applied in a manner that would constitute a "means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail", or a "disguised restriction on international trade". Before entering into the substance of the matter, a preliminary remark is necessary. The Appellate Body found that the *chapeau* of Article XX embodies "the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX […] and the substantive rights of the other Members under the GATT 1994."[184] Accordingly, a line of "equilibrium" between Article XX GATT as a defence and the right of other WTO Members to market access or non-discrimination must be established.[185]

Concerning the first sentence of the *chapeau*, three elements must be verified: "(i) the application of the measure that must result in 'discrimination', thus, the difference in treatment concerning the application of a national measure;[186] (ii) the discrimination must be 'arbitrary or unjustifiable' in character; (iii) the discrimination must occur 'between countries where the same conditions prevail'."[187]

Regarding the application of the measure that must result in "discrimination", the issue concerning the relationship between the non-discrimination standard as enshrined in the *chapeau* and the non-discrimination obligations provided in Articles I and III arises. As pointed out by the Appellate Body, the principle of effective interpretation of treaties would require that the notion of non-discrimination under *chapeau* not to overlap with the notion of non-discrimination under GATT substantive provisions.[188] Nonetheless, the Appellate Body held that this does not imply that the "circumstances that bring about the discrimination that is to be examined under the *chapeau* cannot be the same as those that led to the finding of a violation of a substantive provision of the

184 Appellate Body, WT/DS2/AB/R, *United States-Standards for Reformulated and Conventional Gasoline*, (Appellate Body, US-Gasoline), 29.04.1996, [9]; Appellate Body, US-Shrimp, [156].

185 Appellate Body, US-Shrimp, [159]. For a more detailed analysis see G. Adinolfi, *Art. XX GATT-General Exceptions [Chapeau],* in COMMENTARIES ON WORLD TRADE LAW, 4, 2023, pp.139-156. Some scholars claim that this line is drawn by Art. XX as a whole, by both the *chapeau* and paragraphs (a-j). See L. Bartels, *The chapeau of the general exceptions in the WTO GATT and GATS agreements: a reconstruction*, in *American Journal of International Law 109*, no. 1, 2015, pp. 95-125.

186 Appellate Body, US-Gasoline, p. 23, the word "discrimination" in the *chapeau* covers both discrimination between products from different supplier countries and discrimination between domestic and imported products.

187 Appellate Body, US-Gasoline, pp. 28-29, this latter element has to be considered together with "arbitrary" and "unjustifiable". In this context the discrimination is different from discrimination in the treatment of products according to Art. I or III.

188 Appellate Body, US-Gasoline, p. 23.

GATT 1994."[189] For this reason, the considerations made in sub-section 2.2.2. on the different treatment accorded to domestic products are echoed here.

Turning to the "arbitrariness and unjustifiability" of such discrimination, in most cases, the two situations have been applied together by the WTO dispute settlement organs and no general criteria have been set out to differentiate them.[190] According to the Appellate Body, the analysis of whether discrimination is arbitrary or unjustifiable "must focus on the cause of the discrimination, or the rationale put forward to explain its existence and should be made in the light of the objective of the measure."[191] Accordingly, discrimination can be considered arbitrary or unjustifiable when the reasons given for the discrimination "bear no rational connection to the objective" or "would go against that objective."[192] In this specific case, the discrimination occurring between the three group of third countries, namely those adopting regulatory tools in order to limit GHGs emissions; those adopting market-based mechanisms which are not the EU ETS and, in any case, are not linked to the EU ETS; and those that are covered by the EU ETS, could be considered as "arbitrary or unjustifiable" since it does not bear any rational connection to the reduction of GHGs emissions.

Another problematic aspect arising under the profile of discrimination is that WTO Members may deem the CBAM as an attempt to force all WTO Members to adopt the same comprehensive regulatory regime as the one adopted by the EU and as a protectionist measure.[193] A similar discrimination was detected in US-Shrimp, by Appellate Body while analysing the justifiability of the ban adopted by the US on importation of shrimp and shrimp products under the introductory part of Article XX.[194] The aforementioned ban was adopted for the conservation of turtles and it applied to all shrimp and shrimp products fished with nets not approved by the US because they lacked sea turtle protection devices. In that case, the complaining countries where all developing countries with limited technical and technological capacity. It was in fact on this basis that the Appellate Body, while observing that the "intended and actual

189 Appellate Body, US-Gasoline, pp. 28-29; Appellate Body, EC-Seal Products, [5.298, 5.318]. For a detailed analysis of the *chapeau* of Art. XX see G. Adinolfi, n. 185.

190 G. Adinolfi, n. 185.

191 Appellate Body, WT/DS/332/AB/R, *Brazil-Measures Affecting Imports of Retreaded Tyres*, 03.12.2007, [226, 227, 246]; Appellate Body, WT/DS381/AB/RW, *United States-Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products,* 20.11.2015, [7.316];

192 Ibid.

193 *Brexit, EU's carbon border adjustment mechanism take centre stage at Market Access Committee*, in *WTO news*, 2020.

194 Appellate Body, US-Shrimp, [164-165], the Appellate Body found discrimination in the fact that the import of shrimps was prohibited only because they had been caught in waters of countries that were not certified by the US, although these countries used methods identical to those employed by the US.

coercive effect [of the measure] on other governments" to "adopt essentially the same policy", held that such a uniform standard cannot be permissible in international trade relations.

As a matter of fact, in US-Shrimp, the Appellate Body recognized the legitimacy of adopting measures that produce extraterritorial effects, to the extent that the specific characteristics of third states are taken into account. It affirmed indeed that discrimination in the meaning of Article XX exists, inter alia, "when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory programme for the conditions prevailing in those exporting countries."[195] Transposed in the case at stake, essentially the CBAM seems to require all other Members to adopt the same standard enforced domestically by the EU, namely the EU ETS. Moreover, the cost of CBAM certificates will be based on that of the EU ETS certificates and will therefore reflect EU-specific supply and demand conditions. Nonetheless, one may argue that it is not totally accurate to the extent that the price of CBAM certificates would be paid in respect of the emissions embedded, so that if a country adopts other measures to fight GHGs emissions, equally effective, it would consequently reduce or eliminate the emissions and obtain similar or the same results as countries adopting an ETS EU-based. On this basis, this case can be considered very different from the one of US-Shrimp.

In addition, the administrative complexity associated with the measure would be too burdensome and may give rise to unjustifiable discrimination, amounting to a disguised restriction on international trade, as it will be outlined later.[196] In this context, a clarification of the use of the CBAM revenues to support the climate policies of developing countries is paramount in providing decisive evidence of the measure's climate, and not protectionist, objective.[197] Interestingly, while in the EU Explanatory Memorandum the Commission indicated that the plan was to allocate most of these additional resources to the EU budget, including financing its COVID-recovery instrument "Next Generation EU", in the 2022 Provisional Agreement, the EU Council and the European Parliament agreed that besides providing developing countries and Least Developed Countries (LDCs) with technical assistance, in order to support the de-carbonisation of their manufacturing industries, the EU will introduce "a new own resource based on the revenues generated by the sale of CBAM." [198]

In relation to the wording "between countries where the same conditions prevail", the Appellate Body held that "in determining which 'conditions'

195 Appellate Body, US-Shrimp, [161, 164].

196 D. Sifonios, n. 118, p. 216.

197 Provisional Agreement, [54, 54b, 55].

198 CBAM Proposal, Explanatory Memorandum to (COM(2021)564), 15.07.2021, pp. 10-11. CBAM Proposal, Preamble, [47], where the Commission was silent about the destination of the CBAM's revenue, which was estimated to reach above EUR 2.1 billion by 2030.

prevailing in different countries are relevant in the context of the *chapeau*, the sub-paragraphs of Article XX, and in particular the sub-paragraph under which a measure has been provisionally justified, provide pertinent context and the substantive obligations under the GATT 1994 with which a violation has been found."[199] This being crucial to allow the *chapeau* to maintain the equilibrium between the obligations under the GATT 1994 and the exceptions provided under each paragraph of Article XX.[200]

This aspect shall be applied when assessing the discrimination occurring in respect of third countries on the three levels. Firstly, there is discrimination between third countries adopting policies limiting GHGs emissions other than explicit carbon pricing mechanisms, in particular the EU ETS, and those adopting the EU ETS or linked to it. Secondly, discrimination emerges also between third countries adopting an ETS that is not linked to the EU ETS and those embracing by the EU ETS. In these contexts, if the environmental policies are different but equally aimed at reducing GHGs emissions we can conclude for the existence of "the same conditions". Then, the discrimination shall be considered arbitral and unjustified between countries where the same conditions prevail.

On a third level, the analysis applies differently when discrimination is ascertained between third countries that do not adopt any environmental policy aimed at limiting GHGs emissions and those adopting the EU ETS or linked to it. In this case, it would be hard to argue that the "same conditions" are established and, thus, discrimination could be legitimate. Nonetheless, it shall be recalled that the Appellate Body clarified that discrimination under the *chapeau* can occur not only when countries, where the same conditions prevail, are treated differently but also when the same measure is applied to different countries despite the diversity in the conditions prevailing within each of them.[201] Notice that usually the countries not adopting such sophisticated environmental policies are developed countries and LDCs, which not by chance, are also granted a differentiated treatment under the international environmental system in light of their "different national circumstances".[202]

In our case, the obligation to calculate and verify the embedded GHGs emissions according to the Regulation, inter alia, will have unintended, geographically

199 Appellate Body, EC-Seal Products, [5.299-5.301]. Appellate Body, WT/DS477/AB/R, *Indonesia-Importation of Horticultural Products, Animals and Animal Products*, 09.11.2017, [5.99].

200 Ibid.

201 Appellate Body, US-Shrimp, [165].

202 See Paris Agreement 2015, Art. 2(2). These considerations will entail further analysis also under the Paris Agreement, however, this will not take place in this paper. For more information see L. Rajamani, *Differentiation in a 2015 Climate Agreement*, in *Center for Climate and Energy Solutions*, 2015, pp. 606-623; S. Maljean-Dubois, *The Paris Agreement: A New Step in the Gradual Evolution of Differential Treatment in the Climate Regime?*, in *Review of European, Comparative & International Environmental Law*, 2016, pp. 151-160.

disparate effects in developing countries compared to advanced economies. Indeed, developing countries that will not have the technical expertise to calculate and verify the carbon content of their export products will be adversely affected by the pejorative application of "default values".[203] Hence, to counter such discrimination, it will be paramount for the EU to provide support to these countries.[204]

Finally, regarding "disguised restriction", it shall be recalled that concealed restrictions do not exhaust the term "disguised restrictions."[205] The Appellate Body held that it "may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX." Hence, the very same considerations relevant in deciding whether the application of a particular measure amounts to "arbitrary or unjustifiable discrimination" can be taken into account also in determining the presence of a "disguised restriction" on international trade. This reflects the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.[206]

Moreover, it shall be recalled that in US-Shrimp, the Appellate Body interpreted the *chapeau* as to impose a duty to undertake cooperation activities and negotiate before the unilateral measure, having significant extraterritorial effects, is implemented at the international level.[207] If, by analogy, a panel were to find such an obligation also in the case of the CBAM, notice that the EU has manifested in several occasions, beyond the Regulation on the CBAM,[208] its interest and willingness to enter into negotiations with other WTO Members on strategies and programs that the latter can adopt to mitigate the administrative costs and burdens associated with verifying the embedded GHGs emissions in products covered by the Regulation.[209] Despite, the fulfilment of this requirement will depend on how negotiations and discussions will be conducted,[210] it

203 See sub-section 2.3.2.

204 Trade and Climate Change Information Brief No.6, *What Yardstick for Net-Zero? How WTO TBT Disciplines Can Contribute To Effective Policies on Carbon Emission Standards and Climate Change Mitigation,* in *WTO Publications*, 2022, p. 3.

205 Appellate Body, US-Gasoline, p. 24.

206 Appellate Body, US-Gasoline, p. 25.

207 United Nations Environment Programme and the World Trade Organisation (UNEP-WTO), *Trade and Climate Change*, in *WTO Publications*, 2009, p. 109; T. Cottier, T. Payosova, n. 113, p. 28.

208 Provisional Agreement, [53].

209 Ibid., Recital [54a] providing that: "The establishment of the CBAM calls for the development of bilateral, multilateral and international cooperation with third countries. For this purpose, a forum of countries *with carbon pricing instruments or other comparable instruments* ('Climate Club') should be set up, in order to promote the implementation of ambitious climate policies in all countries and pave the way for global carbon pricing framework. […]" (emphasis added).

210 Appellate Body, US-Shrimp, [172-173].

is certain that a failure to cooperate will establish the existence of unjustified discrimination.[211]

In conclusion, based on the pre-existing case law, the main problems in justifying the CBAM according to Article XX would arise with respect to the *chapeau* test. However, there is still open the possibility that a panel will depart from the precedents discussed in the paper and will consider the CBAM justified under Article XX.

3. Conclusive remarks

The analysis conducted so far has provided an overview of some of the legal issues that will arise with the adoption of the CBAM under the GATT. What will actually happen will depend on the details of the CBAM once fully implemented. Yet, one fact is that, as it stands, the measure will prompt several WTO Members to complain to a panel about alleged GATT violations[212] and, at that point, only the established Panel will be able to provide a definitive answer.

The increasing adoption of trade measures by WTO Members in order to achieve environmental targets seems to side with the effectiveness of the EU CBAM. Although the EU CBAM is the first major trade measure of this kind that will apparently come into force, similar border measures are being developed in other countries and more will come in the future as countries seek to reduce GHGs emissions. While an unsuccessful defence of the CBAM might discourage other WTO Members from adopting similar measures, a successful defence of the CBAM will not guarantee that other measures will be equally WTO-compliant, since, again, it all depends on the specifics of the measure. However, it has to be kept in mind that the stalemate of the Appellate Body and the long timeframe for dispute decisions could disproportionately extend the time frame of the decision.[213]

In order to conclude our assessment under GATT, following are some of the scenarios that could happen if a dispute were carried out before the WTO dispute settlement system. If the established Panel will conclude for the inconsistency of the CBAM with the GATT, pursuant to Article 19(1) DSU, the EU will have to bring its measure into conformity with WTO law.[214] Yet, the EU may decide alternatively (i) not to comply, as it has previously done in other

211 D. Smith, n. 137, p. 39.

212 D. Bergin et al., *Perception of the Planned EU Carbon Border Adjustment Mechanism in Asia Pacific-An Expert Survey*, Regional Project Energy Security and Climate Change Asia-Pacific (RECAP) 2021, pp. 15-21.

213 In the functioning WTO dispute settlement system major cases often took three years or more to pass through the system's various stages.

214 DSU, Arts. 19, 21, 22.

cases where it acted as defendant[215] and, therefore, bear the costs of "countermeasures" enacted by the complaining Members.[216] If the claimants before the Panel are parties in the Multi-Party Interim Appeal Arbitration Arrangement (MPIA),[217] (ii) the EU could resort to MPIA.[218] In this latter scenario, if the MPIA would also conclude for the violation of the GATT of the CBAM, again the EU will have in principle to bring the measure into conformity or bear countermeasures.[219]

In any case, hopefully soon enough, we will be able to see concretely what the practical consequences of the adoption of such a complex and elaborate trade measure as the CBAM will be.

215 Decision by the Arbitrator, WT/DS26/ARB, *European Communities-Measures Concerning Meat and Meat Products*, (EC-Hormones), Original Complaint by the United States – Recourse to Arbitration by the European Communities under Art. 22(6) of the DSU, 12.07.1999.

216 DSU, Arts. 3(7), 21(6), 22(1).

217 See R. Wolfe, P. C. Mavroidis, *WTO dispute settlement and the Appellate Body: Insider perceptions and Members' revealed preferences*, in *Journal of world trade 54*, no. 5, 2020.

218 DSU, Art. 25. At the time of writing, Australia, Colombia, Iceland, Nicaragua, Ukraine, Benin, Costa Rica, Japan, Norway, Uruguay, Brazil, Ecuador, Macao, China, Pakistan, Canada, the European Union, Mexico, Peru, China, Guatemala, Montenegro, Singapore, Chile, Hong Kong, China, New Zealand and Switzerland are part of the MPIA.

219 DSU, Arts. 21, 22, 25(3, 4).

Section III
International and domestic Criminal Law

The protection of the environment under the ICC Rome Statute: does the wheel really need to be reinvented?

Alessandro Faina[1]
Kosovo Specialist Chambers and Specialist Prosecutor's Office, The Hague
ORCID: https://orcid.org/0009-0000-7864-0268
DOI: 10.54103/milanoup.151.c197

The need to improve the available legal instruments to protect the environment has led to a whirlwind of proposals in the field of criminal law and litigation, both domestically and internationally. One of the most mediatized proposals at the international level has perhaps been the inclusion within the Rome Statute of the International Criminal Court ("ICC") of the crime of "ecocide", with a view at heightening the environment to the level of those most fundamental legal interests whose protection against the most egregious violations is demanded to the ICC.
Based on the suggested definition of the crime of "ecocide", this chapter explores whether the environment should be protected under international criminal law as an independent legal interest or as enshrined in the multifaceted concept of human dignity that the Rome Statute already aims to protect. In this regard, the author argues that humankind and environment are so substantially entwined that whatever harm to the latter cannot but result in a harm to the former too. The author therefore suggests that the Rome Statute already includes tools to protect the environment from the most egregious violations and could constitute an important instrument of last resort in environmental and climate litigation.

Keywords: Criminal Environmental Law (domestic/international); Criminalization; International Criminal Court; Ecocide.

1 The views expressed herein are those of the author and do not necessarily reflect the views of the Kosovo Specialist Chambers and Specialist Prosecutor's Office.

1. Introduction

Criminal lawyers across the world have by now become acquainted with the notions of (and distinctions between) domestic criminal law, *i.e.* the body of laws that govern criminal offences committed within a particular country or jurisdiction, and transnational criminal law, a branch of criminal law based on a transnational and cross-border approach to address criminal activities,[2] whose advancement has been favoured and – one might say – even imposed by the development of a global society.

The environment is one of those domains whose protection is demanded to both the domestic and the transnational dimensions of criminal law. The protection of the environment as provided (i) domestically, by criminal law provisions, and (ii) transnationally, by treaties and agreements enhancing the cooperation, in the fight for the environment, of different criminal justice systems throughout the world, is crucial to the success of such fight. It is safe to state that only when a large majority of courts and tribunals of a large majority of countries in the world will enforce without hesitation existing or yet-to-exist criminal law provisions aimed at safeguarding the environment, will the environment be seriously protected.[3] This being said, the present paper will not (primarily) focus on domestic and/or transnational approaches to environmental criminal law, but on the contribution that can be brought to the subject by international criminal law.

International criminal law is a branch of public international law based on the idea that certain crimes are so grave that they offend the international community as a whole and that perpetrators of such crimes must be held accountable.[4] Currently, the so-called core crimes under international criminal law are genocide, war crimes, crimes against humanity, and the crime of aggression. Those are also the crimes over which the International Criminal Court ("ICC"), the only permanent international institution seized with the mission to enforce international criminal law, has jurisdiction.[5] In fact, the ICC founding document, the Rome Statute, is said to have crystallised as customary international law the legal definition of the core international crimes as developed throughout the years by the jurisprudence of the *ad hoc* international(ised) criminal courts and tribunals.[6]

---

2 D. Stewart, *International Criminal Law in a Nutshell*, West Academic Publishing, St. Paul – MN, 2014, pp. 1-2.

3 P. Sands, J. Peel, A. Fabra (eds.), *Principles of International Environmental Law*, Cambridge University Press, Cambridge, 2018, pp. 3-20.

4 C. M. Bassiouni, 'International Crimes: The Ratione Materiae of International Criminal Law', in C. M. Bassiouni (ed.), *International Criminal Law. Vol. I: Sources, Subjects and Contents*, Martinus Nijhoff Publishers, Leiden, 2008, pp. 134-135.

5 ICC Rome Statute, Articles 5-8 *bis*.

6 R. Cryer, International Criminal Law *vs* State Sovereignty: Another Round?, *European Journal of International Law*, Volume 16, Issue 5, November 2005, pp. 979–1000; G. Werle and F. Jessberger,

While the present paper will later address certain conducts prohibited under the provisions criminalising crimes against humanity and war crimes, it is important to stress at the outset that one of the most fundamental features of the ICC – although perhaps not the most studied nor appreciated – is that its jurisdiction over international crimes is meant to be subsidiary to that of the States, in compliance with the principle of complementarity.[7] Provided that other jurisdictional and admissibility requirements are met,[8] the ICC has jurisdiction and can intervene only in those situations where it is demonstrated that a State is unable or unwilling to exercise its jurisdiction over a certain matter.[9] This leads to the important caveat that the ICC cannot and should not be seen as the world court in criminal matters nor as a tool to fight cross-border crimes whose international dimension might lead one to (wrongly?) assume that an international institution would be better placed to address. In sum, even though international criminal law can be defined as a branch of public international law, States bear the fundamental role to enforce it domestically by means of domestic and transnational law, and only when they fail to do so will the ICC intervene to avoid impunity.

With this in mind, the present paper will seek to offer: (i) an overview of the major proposals put forward at the international level with a view to the codification of environmental crimes and ecocide as an international crime; (ii) an analysis of the most recent and debated proposal to include the crime of ecocide in the ICC Rome Statute, that was put forward by the Stop Ecocide Foundation in 2021; and (iii) a suggestion on alternatives already available to protect the environment at the international level as well as the role that can be played in the matter by domestic and transnational law.

2. The Proposals for the Codification of the Crime of Ecocide

The need to improve the available legal instruments to adequately protect the environment has led to a whirlwind of proposals in the field of criminal law and litigation, both domestically and internationally. At the international level, the idea of criminalising ecocide can be traced back to the 1970s, when the United Nations began exploring the possibility of establishing an international court to

Principles of International Criminal Law, Oxford University Press, London, 2014, p. 61.

7 R. Cryer, H. Friman, D. Robinson, E. Wilmshurst, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2014, p. 154.

8 *See* ICC Rome Statute, Articles 11-13, 20.

9 ICC Rome Statute, Article 17; ICC, *Situation in the Democratic Republic of The Congo*, ICC-01/04, Appeals Chamber, Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I Entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", 13 July 2006, para. 30.

address environmental crimes.[10] However, the proposal did not gain significant traction at the time, and it was not until the late 20th century that the concept of ecocide began to gain renewed attention.

In 1991, the International Law Commission ("ILC") included in its draft of the Code of Crimes Against the Peace and Security of Mankind (the precursor to the ICC Rome Statute) Article 26, which read: "An individual who wilfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced […]".[11] In 1995, however, this provision was withdrawn by the ILC and did not appear in the 1996 draft Code.[12]

In the 21st century, one of the most notable proposals for the definition of the crime of "ecocide" as such came from Polly Higgins, an environmental lawyer, who in April 2010 suggested that the ILC include ecocide as a fifth international crime in the ICC Rome Statute, alongside genocide, crimes against humanity, war crimes, and the crime of aggression. The proposal defined ecocide as "the extensive damage, destruction or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished."[13]

Ms Higgins's proposal sparked new interest in the subject across civil society, and, in 2014, the group "End Ecocide on Earth" presented 170.000 signatures to the EU Parliament in support of a European Union law against ecocide.[14] Such initiative and the public debate that followed led to the most recent proposals for the definition of ecocide stemming from the activities of the Stop Ecocide Foundation, which, in 2017 and 2021, reiterated the suggestion that the crime of ecocide be included within the ICC Rome Statute, with a view at heightening the environment to the level of those fundamental legal interests whose protection against the most egregious violations is demanded to the ICC. The present paper focuses on the 2021 Stop Ecocide Foundation's proposal as it is the most recent proposal that has been put forward and has already been ground for fervent academic debates.

---

10 P. Higgins, *Eradicating Ecocide: Laws and Governance to Stop the Destruction of the Planet*, Shepheard Walwyn Publisher, London, 2011.

11 United Nations, *Document A/46/10: Report of the International Law Commission on the work of its forty-third session (29 April – 19 July 1991)*, in *Yearbook of the International Law Commission*, 1991, Vol. II(2), pp. 1-133, at p. 107.

12 *See* United Nations, *Document A/51/10: Report of the International Law Commission on the work of its forty-eighth session (6 May-26 July 1996)*, in *Yearbook of the International Law Commission*, 1996, Vol. II(2), pp. 1-144, at pp. 17-54.

13 P. Higgins, *Eradicating Ecocide: Exposing the Corporate and Political Practices Destroying the Planet and Proposing the Laws Needed to Eradicate Ecocide*, Shepheard Walwyn Publisher, London, 2010, p. 3.

14 A. Greene, *The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?*, in *Fordham Environmental Law Review*, 2019, Vol. 30, Issue 3, pp. 1-48, at p. 5.

2.1. The Stop Ecocide Foundation

The Stop Ecocide Foundation is a non-profit organization that aims to promote the criminalization of ecocide as an international crime. The Foundation was established in 2017 by a group of international lawyers and environmental activists, and is based in the Netherlands. The Stop Ecocide Foundation is involved in a range of activities aimed at raising awareness about the importance of protecting the environment. These include advocacy and lobbying efforts to promote the criminalization of ecocide at the national and international levels, as well as educational and outreach initiatives to engage the public on environmental issues. The Foundation also works to build partnerships with other organizations and stakeholders in the environmental movement, and has established a network of legal and environmental experts to provide guidance and support for its initiatives.[15]

In June 2021, the Foundation convened an Independent Expert Panel for the Legal Definition of Ecocide ("IEP"), which proposed a definition of ecocide as a crime under international law based on the principle of "wanton destruction," which refers to acts committed recklessly or with a disregard for the consequences.[16]

2.2. The 2021 Ecocide Proposal

The 2021 Ecocide Proposal for the addition of Article 8 *ter* ("Ecocide") to the ICC Rome Statute reads as follows:

1. For the purpose of this Statute, "ecocide" means unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.
2. For the purpose of paragraph 1:
    c. "Wanton" means with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated;
    d. "Severe" means damage which involves very serious adverse changes, disruption or harm to any element of the environment, including grave impacts on human life or natural, cultural or economic resources;
    e. "Widespread" means damage which extends beyond a limited geographic area, crosses state boundaries, or is suffered by an entire ecosystem or species or a large number of human beings;
    f. "Long-term" means damage which is irreversible or which cannot be redressed through natural recovery within a reasonable period of time;

15 For more information on the Stop Ecocide Foundation and its activities, *see* the official website of the Foundation.

16 Independent Expert Panel for the Legal Definition of Ecocide, *Commentary and Core Text* ("2021 Ecocide Proposal"), June 2021.

g. "Environment" means the earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space.[17]

A peculiarity of the 2021 Ecocide Proposal is that, in contrast to the other four international crimes which are anthropocentric in focus, the recommended definition of the crime of ecocide is entirely eco-centric in nature. It is not focused on humans and the well-being of humans but on the protection of the environment *per se*. This has been praised by many authors, but has also been the object of harsh criticisms. In the author's view, as extensively discussed below, while adopting an eco-centric approach to protect the environment might seem ontologically correct, it may nonetheless clash, *inter alia*, with the principle of legality as well as with the foundational purposes of international criminal law.

3. Analysis of the 2021 Ecocide Proposal

The following paragraphs will analyse the 2021 Ecocide Proposal and outline some praises and criticisms to the purported definition of ecocide, borrowing from the papers already published on the topic by authoritative scholars as well as on the author's personal views on the issue.

At the outset, it is worth noting that, although the 2021 Ecocide Proposal has been criticised for the reasons addressed below, it has had the undoubtful merit of sparking a fervent debate across civil society on the crucial issue of how to better protect our endangered ecosystem in the years to come. Indeed, the 2021 Ecocide Proposal has had far-reaching effects as it impacted the public opinion as a whole and did not remain confined to a small group of legal experts. It has been extensively discussed in the press – not only in the specialised one – and has received a media coverage commensurate with the importance of the topic it addresses. Considering that large segments of the population as well as of the public governance are not yet particularly sensitive to environmental issues, a proposal driving an intense public debate such as the 2021 Ecocide Proposal undoubtedly deserves to be praised for its successful efforts in awakening civil society's conscience on such a compelling topic as the protection of the environment.

Moreover, the 2021 Ecocide Proposal has shed a light on the fundamental role that can be played by law in general, and by international criminal law in particular, in providing protection to borderless environmental issues in a global society. If environmental experts and activists needed not be reminded of their crucial role in defending the eco-system, international criminal lawyers are now aware that society no longer only expects that they focus on genocide, war crimes and crimes against humanity, but also demands that they become involved in the protection of the environment as such and as a whole.

17 2021 Ecocide Proposal, p. 5.

It is also worth mentioning that, by suggesting the inclusion of the crime of ecocide within the ICC Rome Statute, the 2021 Ecocide Proposal rendered a good service to the ICC by confirming its identification as the primary forum for the protection of the most prominent legal interests of humankind, including the environment. In a decade where international criminal justice has suffered more than one setback and its legitimacy is widely questioned by governments and scholars, such a public demonstration of trust in the ICC system shows that the Court is far from being dismantled and can still play a pivotal role in the protection of fundamental legal interests worldwide.

Lastly, some authors have also praised the 2021 Ecocide Proposal on specific legal grounds, while others have already gone so far as to suggest proposed amendments to the proposal.[18]

Turning to the criticisms that have been moved against the 2021 Ecocide Proposal, some authors have pointed out that the proposed definition of ecocide bears little resemblance to the concept of "genocide" that inspired it, in that it does not focus on the protection of a group and requires a *mens rea* much lower – and much more confusing – than specific intent.[19] It has also been authoritatively noted that the proposed definition is not consistent in its self-proclaimed eco-centric approach, since it reintroduces an anthropocentric perspective by allowing for a cost-benefit analysis in case of lawful environmental damages, while ultimately leaving the definition of (and thus the protection from) unlawful acts to the domestic level.[20]

The author agrees that the suggested definition of ecocide is vague and of difficult concrete application, and is of the view that it raises further substantive, procedural and practical issues.

First, the 2021 Ecocide Proposal sets out a definition of the *actus reus* of the crime of ecocide that appears too broad and generic. By proposing that "'ecocide' means unlawful or wanton acts", the IEP suggests that any acts, when unlawful or wanton, can satisfy the objective element of ecocide. This approach raises two issues. On the one hand, as has been noted, absent a binding set of environmental regulations at the international level, the proposal extensively relies on national laws in the characterisation of an act as unlawful. Such an approach openly contradicts one of the driving factors invoked for the introduction of

18 G. Chiarini, *Ecocide and International Criminal Court Procedural Issues: Additional Amendments to the 'Stop Ecocide Foundation' Proposal*, in *CCJHR Working Paper Series No.15, 2021*, pp. 14-27.

19 K. J. Heller, *Skeptical Thoughts on the Proposed Crime of "Ecocide" (That Isn't)*, 23 June 2021, pp. 23, available at OpinioJuris.com (last accessed on 4 March 2023). *See also* M. Karnavas, *Ecocide: Environmental Crime of Crimes or Ill-Conceived Concept?*, 28 July 2021, pp. 7-10, available at OpinioJuris.com (last accessed on 4 March 2023).

20 K. Ambos, *Protecting the Environment through International Criminal Law?*, 29 June 2021, pp. 1-2, available at ejiltalk.org (last accessed on 30 January 2023). *See also* J. Heller, *Skeptical Thoughts on the Proposed Crime of "Ecocide" (That Isn't)*, 23 June 2021, p. 4, available at OpinioJuris.com (last accessed on 4 March 2023).

an international crime of ecocide, namely that domestic intervention is intrinsically incapable of offering the highest, uniform protection demanded by the environment in a global society. On the other hand, by allowing for lawful *but* wanton acts to satisfy the *actus reus* of the crime, the proposal contradicts its eco-centric vocation and potentially opens the objective element of ecocide to a myriad of unidentifiable human acts, to the great detriment of the principle of legality, which should always remain the guiding star of any criminal law legislators. The definition of wanton acts as any conduct committed "with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated" does not provide any guidance in the identification of the elements upon which such anthropocentric cost-benefit analysis is to be based. The unduly broad nature of the *actus reus* of ecocide is all the more appalling when confronted with the acts prohibited under War Crimes or Crimes Against Humanity, meticulously listed and described in Articles 6 and 7 of the ICC Rome Statute.

Moreover, in the author's view, the proposed definition contains a manifest conflation between *actus reus* and *mens rea* when it introduces the above-mentioned recklessness as a qualifier of the objective element of the proposed crime in all instances in which the perpetrator's conduct is not unlawful *per se*. The conflation is seemingly carried over in the proposed definition of the subjective element of the crime, whereby the "substantial likelihood of severe and either widespread or long-term damage to the environment" qualifies the knowledge of the perpetrator and thus pertains to the required *mens rea* of the crime instead of assisting in the delimitation of the objective element of the prohibited acts. In this regard, the choice of a "substantial likelihood" threshold for the *mens rea* requisite of the crime might arguably go to the detriment of another pillar of criminal law, *i.e.* the principle of guilt, which requires that any prohibited conduct be committed with intent or at least negligence for its perpetrator to be held criminally liable. Such a low *mens rea* might also clash with the overall "beyond reasonable doubt" ("BRD") standard for the assessment of the guilt or innocence of the accused, the leading threshold in criminal matters.

Turning to the procedural issues raised by the 2021 Ecocide Proposal, the proposed definition, if ever adopted by the ICC Assembly of States Parties ("ASP") and ratified by enough States, may arguably prove very difficult to be established in the course of a criminal trial. While there is no doubt that the broad *actus reus* ("unlawful or wanton acts") can be proven by ordinary evidentiary means, questions arise in relation to the proof of the *mens rea*. Proof beyond reasonable doubt would indeed be required of the perpetrator's knowledge that there is a "substantial likelihood of severe and either widespread or long-term damage to the environment being caused by [his or her] acts". It is highly unlikely that evidentiary means to prove such an elaborated *mens rea* come from the accused or can be inferred from his or her conduct, especially if

proof that the accused's lawful conduct is wanton is required too. Establishing the subjective element of ecocide will therefore require proof that the accused elected to keep a (unlawful *or* reckless) course of action even if, and with the knowledge that, such course of action could severely impact the environment in a geographical *or* temporal perspective. It is difficult to imagine that such a technical proposition can be established by means other than expert reports establishing that it was or should have been predictable for a lay person that a certain conduct could create the substantial likelihood of severe and either widespread or long-term damage to the environment. It is true that expert reports are not uncommon in criminal law, where they serve the fundamental purpose of providing judges with access to technical notions that they do not master but whose comprehension is nonetheless necessary for the judges to correctly apply the law to the case at stake. However, it is a well-established principle that experts should serve the purpose of assisting the judges with the understanding of technicalities that are somewhat collateral to the decision-making process on the elements of crime, which should always remain the judges' exclusive prerogative.[21] The ascertainment that there was a substantial likelihood that a certain conduct could create severe and either widespread or long-term damage to the environment does not seem limited to a technicality collateral to the decision-making process, considering that the establishment of the entire *mens rea* of the crime of ecocide eventually rests with the proof of such likelihood. Moreover, doubts arise as to which bodies would be authoritative enough to render reliable reports on controversial issues such as the nature, scope and duration of the potential impact of a human action on the environment. The risk inherent to the proposed definition of ecocide is to turn international criminal trials into fora for global scientific debates about the likelihood that an abstract conduct could cause harm to the environment, to the detriment of the right of the accused to be tried for his or her own culpable acts.[22]

Turning to the practical implications of the 2021 Ecocide Proposal, the eco-centric definition of ecocide proposed by the IEP might clash with its purported collocation amongst the most atrocious crimes that the ICC was created to address, which are intrinsically anthropocentric in nature. In this regard, it must be recalled that, along with stringent jurisdictional and admissibility requirements, there is also a very high gravity threshold to be satisfied for the ICC to be seized of a case. This means that there can be atrocious crimes whose victims cannot resort to the ICC because those crimes do not meet the gravity threshold. Moreover, the ICC does not have unlimited staffing and resources.

21 ICTY, *Prosecutor v. Popović et al.*, IT-05-88-A, Appeals Chamber, Judgement, 30 January 2015, para. 375.

22 *See also* E. T. Cusato, *Beyond Symbolism – Problems and Prospects with Prosecuting Environmental Destruction before the ICC*, in *Journal of International Criminal Justice,* 2017, Vol. 15, Issue 3, pp. 491-507, at pp. 501-503.

Trying purely environmental crimes regardless of their impact on victims and humankind could therefore result in the subtraction of limited resources to the prosecution at the international level of the most atrocious and grave crimes which instead bear a closer link with human sufferings. An issue of opportunity also arises: the ICC is highly criticized for its lengthy criminal proceedings and alleged politicized decision-making. Such features are probably not the most appropriate to tackle environmental crimes as promptly and expeditiously as they would require.

Lastly, it must be recalled that amendments of international crimes set forth in the Rome Statute require approval of the ASP and ratification by states, and will only be applicable to those offences committed after they have been fully implemented in the Rome Statute, in compliance with the principle of legality and its corollary *nullum crimen sine lege*. One might therefore question whether the diplomatic and legal efforts required to amend the Rome Statute, coupled with the risk that the proposed definition be (further) watered down throughout the process, are worth the benefits of including within the international core crimes a broadly formulated crime, of difficult concrete application, that is only applicable to offences that have not been committed yet.

4. Alternative Approaches

The criticisms that have been moved to the 2021 Ecocide Proposal in the preceding section of this paper do not seek to challenge the possibility, in and of itself, that the environment be protected at the international criminal level. To the contrary, the author agrees that the environment is as much in need of legal protection as the other legal interests protected under the Rome Statute. However, doubts might arise as to whether at the international criminal level the environment should be protected as an independent legal interest or as enshrined in the multifaceted concept of human dignity that the Rome Statute already aims to protect. The next paragraphs will put forward some alternative approaches that would allow for the environment to be protected at the international level without the need to amend the Rome Statute and create a brand-new international crime of ecocide, with all the difficulties and repercussions that this may entail.

As mentioned above, the ICC currently has jurisdiction over four international core crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.[23] While the crimes of genocide and aggression aim at protecting national, ethnic, racial or religious groups and states, respectively, and are therefore tailored in a way that renders them hardly applicable to the protection of

23 ICC Rome Statute, Articles 5-8*bis*.

the environment,[24] the provisions setting out crimes against humanity and war crimes, though primarily aimed at the protection of human beings in time of peace as well as in time of war, provide for the criminalisation of a range of conducts which may fall in the category of international environmental crimes too.

4.1. Crimes Against Humanity

Article 7(1) lists, in subsections (a), (b), (d), (h) and (k), amongst the acts whose commission in the context of a widespread or systematic attack against a civilian population constitutes Crimes Against Humanity, "[m]urder", "[e]xtermination",[25] "[d]eportation or forcible transfer of population",[26] "[p]ersecution",[27] and "[o]ther inhumane acts […] intentionally causing great suffering, or serious injury to body or to mental or physical health".

The required contextual element of crimes against humanity excludes from their scope of application all those acts causing severe environmental damage

24 *See* M. Gillett, *Prosecuting Environmental Harm before the International Criminal Court*, Cambridge University Press, London, 2022, pp. 76-77. It must however be noted that, in the ICC *Al Bashir* case, the Prosecutor sought the arrest of the defendant for genocide for having destroyed "all the target groups' means of survival, poison sources of water including communal wells, destroy water pumps, steal livestock and strip the towns and villages of household and community assets" (ICC, *Situation in Darfur*, ICC-02/05-157-AnxA, Office of the Prosecutor, Public Redacted Version of the Prosecutor's Application under Article 58, 14 July 2008, para. 14). Initially, the majority of Judges of Pre-Trial Chamber I dismissed the allegation because of the lack of "reasonable grounds to believe that such a contamination was a core feature of their attacks" (ICC, *The Prosecutor v. Al Bashir,* ICC-02/05-01/09-3, Pre-Trial Chamber, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 93). However, in a second decision on the application for a warrant of arrest, the Pre-Trial Chamber held that "the act of contamination of water pumps and forcible transfer, coupled by resettlement by member of other tribes, were committed in furtherance of a genocidal policy and that the conditions of life inflicted on the Fur, Masalit and Zaghawa groups were calculated to bring about the group's physical destruction of part of those ethnic groups" (ICC, *The Prosecutor v. Al Bashir,* ICC-02/05-01/09-94, Pre-Trial Chamber, Second Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 12 July 2010, para. 38). The Pre-Trial Chamber thus did find a nexus between the underlying environmental harm (water contamination) and the crime of genocide. *See* E. T. Cusato, *Beyond Symbolism – Problems and Prospects with Prosecuting Environmental Destruction before the* ICC, in *Journal of International Criminal Justice,* 2017, Vol. 15, Issue 3, pp. 491-507, at p. 499.

25 "Extermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population. ICC Rome Statute, Article 7(2)(b).

26 "Deportation or forcible transfer of population" means displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law. ICC Rome Statute, Article 7(2)(d).

27 "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity. ICC Rome Statute, Article 7(2)(g).

which are not coupled with a widespread or systematic attack against a civilian population. In this regard, recalling the jurisprudence of theInternational Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"),[28] the ICC has stated that the term "widespread" refers to the large-scale nature of the act involving a multiplicity of victims, while the term "systematic" requires the organized nature of the attack.[29] However, nothing prevents Article 7(1)(a), (b), (d), (h) or (k) from being used as the basis for investigating and prosecuting acts committed against the environment in times of peace, when they have such immediate and demonstrable repercussions over the civilian population so to qualify as a widespread or systematic attack against the latter. Some authors have indeed identified few key archetypes of environmental harm capable of causing widespread human suffering and injury possibly amounting to a widespread or systematic attack against a civilian population, including deforestation, contamination, and resource extraction, diversion or manipulation.[30] Several communications by non-governmental organisations have been addressed to the ICC Office of the Prosecutor on that basis. In particular, it is worth referring to the communications submitted pursuant to Article 15 of the Rome Statute by Global Diligence, in 2014, and Greenpeace, in 2022, on the commission of crimes against humanity in Cambodia and Brazil, respectively. The communication on Cambodia alleges, *inter alia*, that since 2002 hundreds of thousands of people within the indigenous minority were forcibly transferred and left in squalid conditions as a consequence of a policy of land grabbing and associated deforestation by senior members of the government and government-connected business leaders.[31] The communication alleging the commission of crimes against humanity in Brazil identifies the environmental destruction associated with the persecution of traditional and indigenous communities by public and private-sector actors since 2011 as possibly characterising the underlying crimes against humanity of murder, persecution and other inhumane acts under Article 7(1)(a), (h), and

28 ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Chamber I, Judgement, 2 September 1998, para. 648; ICTY, *Prosecutor v. Tadić*, IT-94-1-T, Trial Chamber II, Opinion and Judgement, 7 May 1997, para. 580.

29 ICC, *Situation in the Republic of Kenya*, ICC-01/09-19, Pre-Trial Chamber II, Decision Pursuant to Art. 15 of the Rome Statute on the Authorization of an Investigation, 31 March 2010, para. 95. *See also The Prosecutor v. Gbagbo*, ICC-02/11-01/11-656-Red, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 12 June 2014, para. 224.

30 L. Prosperi and J. Terrosi, *Embracing the 'Human Factor' – Is There New Impetus at the ICC for Conceiving and Prioritizing Intentional Environmental Harms as Crimes Against Humanity?*, in *Journal of International Criminal Justice,* 2017, Vol. 15, Issue 3, pp. 509-525, at pp. 512-514.

31 Global Diligence, Executive Summary – Communication under Article 15 of the Rome Statute of the International Criminal Court: the Commission of Crimes Against Humanity in Cambodia July 2002 to Present, October 2014, paras 3, 6-8, 13.

(k) of the Rome Statute.[32] These communications show that the Rome Statute provides valuable tools to counter conduct leading to environmental harm, and that civil society has not hesitated to resort to such tools.

It is true that the Rome Statute further requires that the commission of the underlying crimes be part of an attack perpetrated "pursuant to or in furtherance of a State or organisational policy" for such crimes to amount to crimes against humanity (the so-called organisational requirement).[33] It has been recently disputed that such a requirement may prevent the prosecution and punishment of crimes against humanity in any case in which the relevant conducts cannot be attributed to state-like organisations.[34] This would undoubtedly hinder the possibility to resort to crimes against humanity in the repression of environmental crimes committed by non-state actors, thus partly undermining the value of Article 7 of the Rome Statute in the repression of international environmental crimes. However, the ICC case-law has clarified that non-state actors or even private individuals exercising *de facto* power can constitute the entity behind the organisational policy, and that the policy itself does not need to be declared and may remain merely implicit.[35] According to the ICC, the term "organizational" can be interpreted as referring to the mere existence of a group of persons acting together for a certain period of time and within an established structure.[36] From this perspective, the definition of crimes against humanity under the Rome Statute crystallises the developments that occurred within customary international law, leading to the recognition that also individuals not linked to a state or its authorities can commit crimes against humanity.[37] What is relevant is not the state-like framework of the organisation or its formal nature or its level of organisation, but its potential capacity to commit a "widespread or systematic attack on a civilian population" and its "capability to perform acts

32 Greenpeace, Article 15 Communication to the Office of the Prosecutor of the International Criminal Court – Crimes Against Humanity in Brazil: 2011 to Present – Persecution of Rural Land Users and Defenders and Associated Environmental Destruction,9 November 2022, paras 2-4, 6374.

33 ICC Rome Statute, Article 7(2)(a).

34 G. Werle and F. Jessberger, *Principles of International Criminal Law*, Oxford University Press, London, 2014.

35 ICC, *The Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-717, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, para. 396; *The Prosecutor v. Jean-Pierre Bemba*, ICC-01/05-01/08-424, Pre-Trial Chamber II, Decision on the Confirmation of Charges, 15 June 2009, para. 81.

36 ICC, *Situation in the Republic of Kenya*, ICC-01/09-19, Pre-Trial Chamber II, Decision Pursuant to Art. 15 of the Rome Statute on the Authorization of an Investigation, 31 March 2010, para. 90.

37 *See* United Nations, *Draft Code of Crimes against the Peace and Security of Mankind with commentaries*, in *Yearbook of the International Law Commission*, 1996, Vol. II(2), pp. 17-56, at p. 47; *see also* ICTY, *Prosecutor v. Tadić*, IT-94-1-T, Trial Chamber II, Opinion and Judgement, 7 May 1997, para. 654.

which infringe on basic human values".[38] In any event, regarding the quality of the (non-state) entity or organisation, it has been noted that the latter must be in a position akin or similar to a state, and thus it must possess similar capacities of organisation and force.[39] Such capacities, depending on the case, could be attributed to legal corporations (especially multinational ones), and even to their administrative bodies or part of them.[40] As a consequence, the definition of crimes against humanity under the Rome Statute allows for their application to environmental crimes committed as part of a widespread or systematic attack against a civilian population not only by state-like organisations, but also by organised and resourceful non-state actors, thus potentially including large corporations amongst the subjects that can satisfy the contextual element and the organisational requirement.

As mentioned above, the specific acts which can be committed by means of environmental harm and which can amount to crimes against humanity, provided that the contextual and organisational requirements are met, include murder, extermination, deportation and forcible transfer of the population, persecution, and the residual category of other inhumane acts. While murder and extermination would require the Prosecutor to demonstrate that the accused's conduct resulting in an environmental harm caused the victim's death, and that the perpetrator intended to cause it by that means, many scenarios associated with the archetypical environmental harms mentioned above may have the potential, if committed with the required *mens rea*, to fall within the definition of enforced displacement or, when committed on discriminatory grounds, persecution.[41] Moreover, where the unlawful conduct leading to environmental harms does not fit one of the above mentioned acts, the residual category of "other inhumane acts" allows for the prosecution of those environmental crimes which have inflicted great suffering or serious injury to body or to mental or physical health, provided that the seriousness of the conduct and the perpetrator's intent are demonstrated.[42]

4.2. War Crimes

Turning to the protection of the environment in time of war, Article 8(2)(b)(iv) of the Rome Statute lists, amongst the serious violations of the laws and

38 ICC, *Situation in the Republic of Kenya*, ICC-01/09-19, Pre-Trial Chamber II, Decision Pursuant to Art. 15 of the Rome Statute on the Authorization of an Investigation, 31 March 2010, para. 90.

39 M. C. Bassiouni, *The Legislative History of the International Criminal Court*, Ardsley, NY: Transnational Publishers, 2005, p. 245.

40 F. Jessberger, *Corporate Involvement in Slavery and Criminal Responsibility under International Law*, in *Journal of International Criminal Justice*, 2016, Vol. 14, Issue 2, pp. 327-341, at pp. 334-335.

41 L. Prosperi and J. Terrosi, at pp. 517-518, 520, 522.

42 L. Prosperi and J. Terrosi, at pp. 523-524.

customs applicable in international armed conflict amounting to War Crimes, "intentionally launching an attack in the knowledge that such attack will cause […] widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated". Such provision allows for the prosecution of disproportionate environmental violations in time of war. Some authors have focused on the limits of Article 8(2)(b)(iv), including that it only applies to international armed conflict, contains a triple *mens rea* test and a proportionality clause which make judicial scrutiny almost impossible, and cannot be seen as purely eco-centric in its orientation.[43] While these criticisms do have some merit, it is worth noting that most of them have been or could be moved also against the 2021 Ecocide Proposal, which clearly borrowed from Article 8(2)(b)(iv) with respect to certain constitutive elements such as the *mens rea* and proportionality requirements. Differently from the 2021 Ecocide Proposal, Article 8(2)(b)(iv) at least sets out a precise objective element, *i.e.* a military attack, and adopts a cost-benefit analysis based on military – rather than socio-economic – considerations, in compliance with the principles of necessity, distinction and proportionality, fundamental pillars of international humanitarian law.

In addition, it is worth noting that Article 8 of the Rome Statute sets out several further prohibited acts whose commission may amount to war crimes. Despite the anthropocentric dimension inherent to a provision protecting civilians and combatants throughout hostilities, some conduct may become relevant as possible means to repress environmental harm,[44] including pillage,[45] destruction of property,[46] intentionally directing attacks against civilians and civilian objects,[47] intentionally using starvation of civilians as a method of warfare,[48] and using poisonous weapons,[49] or asphyxiating, poisonous or other gases, liquids, materials, or devices.[50]

***

43 *See e.g.* M. Gillett, at pp. 95, 104-114.

44 M. Gillett, at pp. 117-128.

45 ICC Rome Statute, Articles 8(2)(b)(xvi) (for international armed conflicts) and (e)(v) (for non-international armed conflicts).

46 ICC Rome Statute, Articles 8(2)(a)(iv), 8(2)(b)(xiii) (for international armed conflicts) and 8(2)(e)(xii) (for non-international armed conflicts).

47 ICC Rome Statute, Articles 8(2)(b)(i)-(iv) (for international armed conflicts) and 8(2)(e)(i)-(iv) (for non-international armed conflicts).

48 ICC Rome Statute, Article 8(2)(b)(xxv).

49 ICC Rome Statute, Articles 8(2)(b)(xvii) and 8(2)(e)(xiii) (applicable in an international and non-international armed conflict, respectively).

50 ICC Rome Statute, Articles 8(2)(b)(xviii) and 8(2)(e)(xiv) (applicable in an international and non-international armed conflict, respectively).

The alternative approaches to the 2021 Ecocide Proposal suggested in the preceding paragraphs rely on existing provisions of the Rome Statute and on the anthropocentric dimension permeating the latter. For this reason, they might not be as fascinating and symbolically charged as a brand-new eco-centric crime might appear, especially when mediatised as much as the 2021 Ecocide Proposal. Nonetheless, reliance on the existing crimes against humanity and war crimes to target large-scale environmental harm when domestic authorities are incapable or unwilling to do so, may perhaps bear the advantage of preserving the delicate balance between the need for protection of the most fundamental legal interests and the inherently limited resources that can be deployed at the international level to achieve this result.

While the creation of ecocide as an independent international crime, especially in the IEP's proposed definition, might jeopardise the existing gravity requirement to be satisfied for the ICC to exercise its jurisdiction over a case, resorting to crimes against humanity and war crimes to protect the environment would ensure that only the most atrocious acts committed by means of environmental harm, *i.e.* those which ultimately affect (also) the civilian population, are addressed by the ICC, in compliance with the Rome Statute's preambular statement that "during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity" and "the most serious crimes of concern to the international community as a whole must not go unpunished". It is true that, as a consequence of such approach, several acts that may be very harmful for the environment but do not amount to crimes against humanity or war crimes may not be prosecuted and tried at the ICC, while they could be pursuant to the definition of ecocide set out in the 2021 Ecocide Proposal. However, in the author's view, prosecuting environmental crimes at the ICC only insofar as they characterise as crimes against humanity and/or war crimes not only allows for the limited resources of the Court to be efficiently deployed to face situations directly affecting humankind, but also complies with the complementary role of the ICC *vis-à-vis* the States.

The role of domestic law and domestic jurisdictions in the fight against environmental harm cannot be overstated, and awareness should be raised that the widespread protection of the environment can only be achieved throughout a capillary action of law enforcement agencies across the world, rather than by vesting the ICC with the unrealistic role of world criminal court. In this perspective, considering that human actions affecting the environment might frequently result in cross-border harm, transnational criminal law may provide powerful instruments for the States to cooperate in the protection of the environment. As a matter of fact, agreements between neighbouring States or States facing similar environmental challenges may lead to important improvements in police as well as judiciary cooperation and may therefore assist in

enhancing the capabilities of domestic criminal systems to promptly detect and efficiently tackle serious environmental harm at the domestic or regional level. Such transnational approach may prove more effective than centralising the highest judicial response to environmental crimes within the ICC, whose lengthy and not always straightforward decision-making process might prevent the Court from being able to provide prompt answers to the raising demands for environmental protection.

The 2021 Ecocide Proposal might therefore not only prove of difficult application for the reasons set out above, but may arguably not provide for the most efficient and strategic tool to ensure that the environment be effectively protected worldwide. Based on the above considerations, the author expresses the view that the protection of the environment at the international criminal level must rely on humankind and the environment being so substantially entwined that whatever large-scale harm to the latter will eventually result in a harm to the former too, and as such should be prevented and punished. In this perspective, Articles 7 and 8 of the Rome Statute could constitute important instruments of last resort in environmental and climate litigation.

5. Conclusion

In conclusion, while there is no doubt that the protection of the environment is of paramount importance and that criminal justice certainly represents a fundamental legal tool to ensure such protection, it is the author's view that the criminal law dimension that best fits such role remains the domestic one, all the more if enhanced by treaties and agreements facilitating the cooperation between States in transnational criminal law matters. A "glocal" approach correctly implemented by States would allow for environmental crimes to be tackled in a diffuse rather than centralised fashion and appropriately addressed according to their different scale and gravity, thus safeguarding the environment in a capillary manner, which is arguably the only way to protect a widespread and variegated legal interest such as the environment. Only when the protection of the environment fails due to the inability or unwillingness of States to enforce it should international criminal law come to play, always keeping in mind that this branch of law was established to protect humankind from the most egregious crimes and violations it can suffer. When the protection of the environment at the international level is analysed under the complementarity principle, the existing remedies under the ICC Rome Statute are arguably sufficient to ensure that the most egregious violations of the environment, which will inevitably affect humankind as well, be prosecuted and punished both in time of peace and in time of war.

Must environmental criminal law always be dependent on administrative law? Assessing the opportunity for a limited number of offences being autonomous from administrative law

Andrea Di Landro
University of Central Sicily "Kore"
DOI: 10.54103/milanoup.151.c198

The chapter intends to analyse the pluses and minuses of traditional environmental criminal law's dependence on administrative law. The two possible forms of integration between criminal and administrative law, *i.e.*, the so-called 'purely accessory' and 'partially accessory' models, are evaluated from a comparative perspective, while also considering the European Directive 2008/99/European Community (EC) on the protection of the environment through criminal law, and the new proposal for a Directive, replacing the previous one, put forward by the European Commission in December 2021. Followed by a reflection on the different model of environmental criminal law, autonomous from administrative law (also called the 'purely criminal' model: a model that should be associated with the purely accessory one and the partially accessory one).

Keywords: models of the environmental criminal law; eco-crimes; environmental criminal law's dependence on administrative law; purely accessory model; autonomy of environmental criminal law from administrative law; European Directive 2008/99/EC on environmental crimes; European Commission proposal (2021) for a new 'Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC'

1. Pluses and Minuses of an "Integrated" (Criminal-Administrative) Model of Environmental Protection. An Introduction

A wide ranging and highly debated question in the sphere of environmental criminal law is which techniques of protection are most suitable, in relation to administrative discipline.[1]

For a long time, reference has been made to the concept of "accessory criminal law", or "administrative criminal law" (*Verwaltungstrafrecht*: the concept has been examined in depth by German legal scholars) [2], in the sense that criminal law in this field lives in close and constant interaction with administrative

1 See M. Catenacci, *La tutela penale dell'ambiente. Contributo all'analisi delle norme a struttura 'sanzionatoria'*, Cedam, Padua, 1996, p. 53; A. Fiorella, *Ambiente e diritto penale in Italia*, in C. Zanghì (ed.), *Protection of the Environment and Criminal Law*, Cacucci, Bari, 1993, p. 232; C. Ruga Riva, *Diritto penale dell'ambiente*, Giappichelli, Turin, 2013, p. 13 ff.; C. Ruga Riva, *Parte generale*, in M. Pelissero (ed.), *Reati contro l'ambiente e il territorio. Trattato teorico-pratico di diritto penale*, Utet, Turin 2013, paras 5 and 8.1; C. Bernasconi, *Il reato ambientale. Tipicità, antigiuridicità, offensività, colpevolezza*, ETS, Pisa, 2008, p. 21 ff.; V. Plantamura, *Diritto penale e tutela dell'ambiente*, Cacucci, Bari, 2007, p. 107 ff.; A. L. Vergine, *Ambiente nel diritto penale (tutela dell')*, in *Digesto Discipline Penalistiche*, *IX*, *Appendix*, Utet, Turin, 1995, p. 757 ff.; in European doctrine, see especially the essays of M. G. Faure and G. Heine, and in particular S. F. Mandiberg & M. G. Faure, *A Graduated Punishment Approach to Environmental Crimes: Beyond Vindication of Administrative Authority in the United States and Europe*, in *Colum. J. Envtl. L.*, 2009, vol. 34, p. 447, and in *Lewis & Clark Law School Legal Research Paper Series*, 2008-21; M. G. Faure & M. Visser, *How to Punish Environmental Pollution? Some Reflections on Various Models of Criminalization of Environmental Harm*, in *Eur. J. Crime Crim. L. & Crim. Just.*, 1995, vol. 34, p. 316 ff.; G. Heine, *Elaboration of Norms and the Protection of the Environment*, in *Duke Envtl. L. & Pol'y Forum*, 1992, vol. 2, p. 106 ff. The reflections of the present paper have as their starting point the description of some categories of ecocrimes made by the author in *European Energy and Environmental Law Review*, 2022, p. 272, and in *La cittadinanza europea*, *II/rubriche*, 2022, p. 29.

2 See G. Heine, *Verwaltungsakzessorietdt des Umweltstrafrechts*, in *Neue Juristische Wochenschrift*, 1990, vol. 39, p. 2425; G. Heine, *Zur Rolle des Strafrechtlichen Umweltschutzes*, in *Zeitschrift Fur Die Gesamte Strafrechtswissenschaften*, 1989, p. 722; G. Heine, *Aspekte des Umweltstrafrechts im internationalen Vergleich*, in *Goltdammer's Archiv Fur Strafrecht*, 1986, p. 88; W. Winkelbauer, *Zur Verwaltungsakzessorietat Des Umweltstrafrechts*, Duncker & Humblot, Berlin, 1985.

provisions, adopted at various levels of government: from administrative acts to state regulations, to regional ones, and ending with municipal ones.

The reasons for this traditional and consolidated model of administrative dependence of environmental criminal law are well known.[3]

The first reason (as regards in particular to Continental law systems) is of a historical nature. Environmental criminal law developed as complementary, *extra-codicem* legislation, whereby the permeation between criminal and administrative norms became physiologically more marked.

The second reason is of a criminal policy nature and is connected to the legal interests involved in environmental law. This area of law lives by its nature in the constant, decisive need to balance the protection of environmental assets (understood in a broad sense, also in reference, *e.g.*, to the landscape) with other interests, even constitutionally relevant, such as private economic initiative, employment, the national development policy, the right to housing (if you think of the construction sector), *etc.* Assuming that the prevalence of one interest over the others cannot be determined *a priori* and theoretically, the managing and solving of potential conflicts is left to authorities endowed with the technical qualifications necessary to carry out specific evaluations and checks;[4] according to an "integrated" criminal-administrative protection model, so called in contrast to a "pure criminal" protection technique, in which the conflict between opposing interests seems to be more easily resolved, in the sense of the prevalence of a given interest (the environment, the habitat, the landscape) over the others.[5]

With this in mind, the advantages of the integrated (administrative-criminal) model, instead of the "purely criminal" model of environmental protection, would be appreciated in terms of providing more effective prevention, before arriving at levels of repression; while also allowing a more flexible and timely management of the conflict between the various interests at stake in the area at issue, a management aimed at individual, concrete situations.[6]

In principle, the integrated administrative-criminal model also offers the advantage of guaranteeing an easier orientation for the operators. The administrative authority is considered, with respect to the judge, a subject with greater

3 See Bernasconi, *supra* n. 1, p. 21.

4 See M. G. Faure, *The Revolution in Environmental Crime in Europe*, in *Va. Envtl. L. J.*, 2017, vol. 35 p. 333 f.; Bernasconi, *supra* n. 1, p. 23.

5 For this modelling, see D. Pulitanò, *La formulazione delle fattispecie di reato: oggetti e tecniche*, in CRS (ed.), *Beni e tecniche della tutela penale*, Franco Angeli, Milan, 1987, p. 37; of a "compositional" nature of the protection technique in the environmental field speaks Bernasconi, *supra* n. 1, p. 22; cf. G. Fiandaca & U. Tessitore, *Diritto penale e tutela dell'ambiente*, in G. Neppi Modona et al. (eds), *Materiali per una riforma del sistema penale*, Franco Angeli, Milan, 1984, p. 36 ff.; G. Insolera, *Modello penalistico puro per la tutela dell'ambiente*, in *Dir. pen. proc.*, 1997, p. 737; S. Panagia, *La tutela dell'ambiente naturale nel diritto penale dell'impresa*, Cedam, Padua, 1993, p. 2 ff.

6 Fiandaca & Tessitore, *supra* n. 5, p. 54; Bernasconi, *supra* n. 1, p. 26.

cognitive resources, or in any case able to more easily draw on the technical-scientific information most relevant in this area.[7] And, above all, setting generally valid *ex ante* standards (*e.g.*, about emissions), that provides the operators with precise parameters with which to adapt their activities; with beneficial effects in terms of the certainty of precepts.

The disadvantages can instead be firstly grasped on the level of a proliferation of legal sources, especially in legal systems where constitutional provisions require that criminal matters only be governed by Parliament, as the criminal precept in environmental law is often integrated by non-state or subordinate sources of law. Think of the numerous references made by environmental crimes to ministerial decrees, containing threshold values, technical standards, or classifications of certain substances, *e.g.*, as by-product rather than waste.[8] Are they purely specific additions of a technical nature (allowed e.g., by the Italian Constitutional Court[9])? Or do such forms integration veil evaluations of a political nature regarding the balance of environmental and productive interests, evaluations that should rather be remitted to Parliament?[10]

---

7 In the most advanced international literature, see M. G. Faure, *Environmental Crimes*, in N. Garoupa (ed.), *Criminal Law and Economics*, 2009, p. 327; on the relationship between judge and legislator, in the field of environmental criminal law, cf. M. G. Faure, *The Implementation of the Environmental Crime Directives in Europe*, in J. Gerardu et al. (eds), *Ninth International Conference on Environmental Compliance and Enforcement (INECE)*, INECE, Washington, 2011, p. 365.

8 On this issue, see A. Di Landro, *Rifiuti, sottoprodotti e "fine del rifiuto" (*end of waste*): una storia ancora da (ri-)scrivere?*, in *Riv. trim. dir. pen. econ.*, 2014, vol. 27, p. 913 ff.

9 On the unfoundedness of a question of legitimacy pursuant to Art. 25 (2) of the Italian Constitution, in the field of drugs, see Constitutional Court, n. 333/1991, in, www.giurcost.org, 1991: "The discretion of the primary legislator was exercised at the time, between the various possible solutions, the legislator opted for the criterion of the average daily dose, as dividing line between criminally and non-criminally sanctioned detention. As the threshold of punishment is so defined, the type of offence is sufficiently described in its essential elements and, beyond this policy option, only a technical determination remains, based on notions of toxicology, pharmacology and health statistics, but not also a choice of criminal policy (so much so that the penal precept could exist autonomously, even without the integration of the ministerial decree […]). It is therefore this technical knowledge that fixes in sufficiently defined terms the coordinates of the integration submitted to the Minister of Health, which is therefore required to exercise only technical discretion: the updates indeed are possible only in the case of 'evolution of knowledge of the sector' (and not of tightening or loosening of the repression of the trafficking). With this in mind, the criterion indicated in *sub* c) of the first paragraph of art. 78 – according to which 'the maximum quantitative limits must be established in relation to the active ingredient for the average daily doses' – appears to bind, in a way sufficiently adequate to the current state of the aforementioned knowledge, the determination of the Minister of Health, to whom the law does not allow any evaluation in terms of prevention or repression, that is, aimed at integrating the choice of criminal policy that only primary legislation can operate".

10 On the problem of the proliferation of the legal sources, especially in the legal systems where constitutional provisions require that criminal matter only be governed by Parliament, and on the problem, in those legal systems, of distinguishing the "technical" and "political"

A possible way out of the problematic and thorny coexistence between principles of criminal law reserved to Parliament and secondary, not exclusively "technical" or regulatory sources, is to introduce relevant shares of democratic legitimacy through the formation process of secondary regulatory rules, on the basis of the general principle of participation for collaborative purposes in the environmental field (principle originating from International and European Law[11]).

The article aims to examine the advantages and disadvantages of the traditional model of the so-called "dependence" of environmental criminal law on administrative law. The two possible forms of integration between criminal and administrative law, *i.e.*, the "purely accessory" and "partially accessory" models, will be analysed from a comparative perspective, while also considering the European Directive 2008/99 on the protection of the environment through criminal law, and the new proposal for a Directive, replacing the previous one, put forward by the European Commission in December 2021. Followed by a reflection on the different model of environmental criminal law, autonomous from administrative law (also called the "purely criminal" model: a model that should be associated with the "purely accessory" and "partially accessory" ones). We will look where these three different types of eco-crimes can be found in legislations of EU Member States, EU, England and Wales; and a critical analysis will be carried out.

2. The Purely Accessory Model as the First Possible Form of Integration Between Criminal and Administrative Law: Examples from the German Law

At this point, it seems useful to introduce a bifurcation between two different integrated protection sub-models corresponding, respectively, to the so-called "purely accessory" (or "purely sanctioning") model on the one hand and the "partially accessory" (or "partially sanctioning") one on the other.

---

evaluations, the first ones that can be remitted to non-state or subordinate legal sources, the latter to be governed by the Parliament, see M. Catenacci, *I reati in materia di ambiente*, in A. Fiorella (ed.), *Questioni fondamentali della parte speciale del diritto penale*, Giappichelli, Turin, 2013, p. 368; F. Giunta, *Ideologie punitive e tecniche di normazione nel diritto penale dell'ambiente*, in *Riv. trim. dir. pen. econ.*, 2022, vol. 15, p. 852; A. Manna, *Struttura e funzione dell'illecito penale ambientale. Le caratteristiche della normativa sovranazionale*, in *Giur. mer.*, 2004, vol. 36, p. 2172; Ruga Riva, *Diritto penale dell'ambiente*, *supra* n. 1, p. 42 ff.; Plantamura, *supra* n. 1, p. 151 ff.

11 Provided for by Århus Convention (1998), on *Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, and by Directive 2003/35/EC, *Providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment*.

In "purely accessory" model, the criminal discipline represents the mere sanctioning appendix of precepts and procedures belonging to other fields of the legal system, in our case administrative law at both national and local level. A typical "formal" criminal law,[12] which consists in the punishment of mere "disobedience",[13] regardless of any connection to an event of damage or danger to environmental interests.[14]

It is the most criticized technique of environmental criminal law protection, precisely because of the excessive dependence on extra-criminal legal sources,[15] as regards:

(1) A protection of administrative functions, rather than environmental assets[16];
(2) A protection inherent to the very ineffective form of the environmental misdemeanor:[17] where it is difficult to accumulate evidence (minor crimes usually do not allow probative instruments like wiretapping), and easy to cancel out the crime (through statute barred and bail);
(3) A protection potentially in conflict with the principle of offensiveness, or harm to others: it risks punishing facts that are not conform to the norms, but are harmless;[18]
(4) An incomplete protection: it risks not punishing facts that are conform to the administrative norms, but are offensive to environmental interests.[19]

For legal systems in which criminal law is reserved solely to the Parliament, the purely accessory model is the one that is exposed to major objections: the integration of the criminal law by external, administrative sources, indeed, does not concern detailed aspects, but sometimes the most significant elements of the offence,[20] from a structural and/or value oriented point of view. The penal precept in these cases does not receive "its entire enunciation with the imposition

12 See F. Giunta, *Tutela dell'ambiente (diritto penale)*, in *Enc. dir., Annals, II, tome 2*, Giuffrè, Milan, 2008, p. 1154.

13 See P. Patrono, *I reati in materia di ambiente*, in *Riv. trim. dir. pen. econ.*, 2000, vol. 13, p. 680 ff.

14 See Bernasconi, *supra* n. 1, p. 29.

15 See Plantamura,*supra* n. 1, p. 146 ff.; for more recent criticisms of the "sanctioning model", see A. L. Vergine, *I nuovi delitti ambientali: a proposito del d.d.l. n. 1345/2014*, in *Amb. & Svil.*, 2014, vol. 24, p. 445; G. Amendola, *Il d.d.l. sui delitti ambientali oggi all'esame del Parlamento: spunti di riflessione*, report presented to the Italian Senate and published on *www.lexambiente.it*, 2014.

16 See Faure, *supra* n. 4, p. 329 f.; F. Giunta, *Il diritto penale dell'ambiente in Italia: tutela di beni o tutela di funzioni?*, in *Riv. it. dir. proc. pen.*, 1997, p. 1112.

17 See Ruga Riva, *Diritto penale dell'ambiente*, *supra* n. 1, p. 20 ff.

18 With reference to abstract endangerment crimes, see Mandiberg & Faure, *supra* n. 1, p. 8 ff., para. II A (draft); Faure & Visser, *supra* n. 1, p. 325; Patrono, *supra* n. 13; about the threshold limits in criminal law, F. D'Alessandro, *Pericolo astratto e limiti-soglia. Le promesse non mantenute del diritto penale*, Giuffrè, Milan, 2012, p. 255 ff.

19 See Mandiberg & Faure, *supra* n. 1, p. 8, para. II A; Faure & Visser, *supra* n. 1, p. 325; Patrono, *supra* n. 13, p. 679.

20 For a critique of abstract endangerment offences from the point of view of the principle of legality, see Faure & Visser, *supra* n. 1, p. 322 f.

of the ban"[21]: requirements, characteristics, content and limits of subordinate acts determined as essential for the type of offence are not indicated by the primary law. Think of the type of offence built on the overcoming of threshold limits (regarding discharges, the introduction of chemical substances, electromagnetic wave emission, *etc.*), centred on non-compliance with parameters intended to be specified or modified by the determinations of administrative bodies, or ministerial decrees, permeated with evaluations apparently more political than technical.

The purely accessory model of criminal protection of the environment, despite the limits just highlighted, is still widespread in many countries, in complementary *extra-codicem* legislations as well as in the codes.

We will analyse below some examples of ecocrimes purely accessory to administrative law, taken from German law. We will try to verify what has been said above in general, and will formulate some first conclusions as to whether environmental offences structured in terms purely ancillary to administrative law should be retained in modern criminal law systems.

2.1. Germany (some types of purely accessory offences)

The German Criminal Code in section 327 contemplates various conducts of unauthorized operation of facilities, and in particular in subsection I, punishes with imprisonment for a term not exceeding five years or a fine:

> "Whoever
> 1. Operates a nuclear facility, possesses an operational or decommissioned nuclear facility or in whole or in part dismantles such a facility or substantially modifies its operation or
> 2. Substantially modifies a plant in which nuclear fuels are used or its location without the required permit or contrary to an enforceable prohibition."
> And in subsection II with the slighter penalty of imprisonment for a term not exceeding three years, or a fine:
>
> "Whoever operates
> 1. A facility that requires a permit or any other facility within the meaning of the Emission Control Act (*Immissionsschutzgesetz*) whose operation has been prohibited in order to protect against hazards
> 2. A pipeline facility for the transportation of water-polluting substances within the meaning of the Environmental Impact Analysis Act (*Gesetz über die Umweltverträglichkeitsprüfung*) that requires a permit

21 According *e.g.*, to the teachings of the Italian Constitutional: Italian Constitutional Court, sentence no. 282/1990, *cit.*, as well as previously Italian Constitutional Court, no. 26/1966, in *Giur. cost.*, 1966, p. 255 ff.; and Italian Constitutional Court, n. 168/1971, *ibid.*, 1971, p. 1774, with note of A. Pace.

> 3. A waste disposal facility within the meaning of the Closed Substance Cycle Act (*Kreislaufwirtschaftsgesetz*) or
> 4. A sewage treatment facility under section 60(3) of the Federal Water Act (*Wasserhaushaltsgesetz*) without a permit or the planning approval required under the relevant statute or contrary to an enforceable prohibition based on the relevant legislation."

In the pure sanctioning model, the pivot of the crime structure is towards the unlawfulness of the conduct: unlawfulness that may arise from the violation of the conditions imposed by laws, regulations, statutes, or by the permit itself, as well as the absence of necessary permits or authorizations.

2.2. First Conclusions on Crimes Purely Accessory to Administrative Law

The analysis seems to confirm the critical aspects of the excessive dependence on extra-criminal legal sources, which is characteristic of crimes purely accessory to administrative law: they appear to protect administrative functions, rather than environmental assets; they risk punishing facts that are not conform to the administrative norms, but are harmless; and the protection they offer appears incomplete, as they risk not punishing facts that are conform to the administrative norms, but are offensive to environmental interests.

The presence of these critical aspects does not, however, seem to imply that offences of this kind should be completely removed from criminal law.[22] Although not directly aimed at the protection of environmental interests, these offences are intended to ensure the enforcement of administrative regulations and the cooperation of operators with public authorities and/or administrative agencies: these collective, administrative interests appear worthy of protection, mostly because they are instrumental in preventing conducts that are offensive to environmental interests.

In this framework, environmental interests are placed in the background, as the object of indirect or anticipated protection.

The anticipation of criminal protection through the abstract endangerment offences may be reasonable, due to the high rank of the "final" interest at stake (the environment and/or human health), to the presence of particularly "diffuse" and at the same time "standardized" situations of danger (frequently the result of complex technological processes linked to mass production), as well as to the difficulty in some cases of measuring (*e.g.*) the contribution of individual inputs on the state of the biosphere, which depends on many factors that can interact with individual conduct in terms that are difficult to concretely quantify. Environmental assets, by their nature, are generally damaged above all by cumulative or serial conducts, *i.e.*, by multiple conducts that are repeated

22 See Faure &Visser, *supra* n. 1, p. 328; Mandiberg & Faure, *supra* n. 1, p. 41 ff.

over time: proving in concrete terms the suitability of a single conduct to compromise environmental matrices is often arduous, if not impossible. The precautionary principle too, normatively recognized, as regards environmental policies, in Article 191 of the Treaty on the Functioning of the European Union, nowadays plays an important guiding function at a political-criminal level, contributing to the possible legitimization of anticipated forms of environmental criminal protection.

The preferable approach does not seem, therefore, to be a preconceived criticism of the anticipation of criminal protection implemented using abstract endangerment offences, but rather an approach aimed at verifying, case-by-case, the reasonableness of the single presumption (whether factual or scientific) of the dangerousness of the punished conduct, and the proportion between this conduct and the type and *quantum* of imposed punishment.

Purely accessory offences that respect these prerequisites and are structured in deference to the principle of legality (with particular reference to certainty and legal provision requiring criminal law reserved solely to the Parliament), are a useful first form of protection, to be combined with the other two forms that we will analyse below, *i.e.*, the "partially accessory" one and the "autonomous" one.

The requirement of the reasonableness of the presumption of dangerousness of the conduct, and that of the proportionality between the conduct incriminated and the penalty seem to be respected in the rules and regulations cited above in paragraph 2. In terms of respect for the principle of legality, it seems appropriate, however, to note that an offence such as that provided for in Article 279 (9) of the French Criminal Code, insofar as it refers to the violation of Article L. 541-31 of the French Environmental Code, which in turn refers to the methods of use of certain materials, elements or forms of energy regulated by decrees of the Council of State (*Conseil d'Etat*),[23] could be instead criticised, since it appears integrated by external administrative sources for the most significant elements of the offence, from a structural and/or value-oriented point of view. In norm such as this, it seems that the formal legislator too broadly determines the conditions for criminal liability, leaving all the power to determine the detailed conditions to other authorities.

23 Article L. 541-31 of French Environmental Code states: "Decrees in the Council of State may regulate the methods of use of certain materials, elements or forms of energy in order to facilitate their recovery or that of the materials or elements associated with them in certain manufacturing processes.
The regulations may concern in particular the prohibition of certain treatments, mixtures or associations with other materials or the obligation to comply with certain manufacturing methods".

3. The Partially Accessory Model as the Second Possible Form of Integration Between Criminal and Administrative Law; the EU Law

The so-called partially accessory protection model creates less friction with the principle of harm, the principle of effectiveness, as well as with the legal provisions requiring, in some legal systems, that certain matters only be governed by Parliament.

In the partially accessory model, the conduct must not only violate extra-criminal provisions, but also produce an event of damage or danger.[24]

An intermediate paradigm, which is "halfway" to the "autonomous" criminal law model. The element of causation of the damage or danger is typical of "classic" criminal law, but this model is not autonomous from administrative law, since the violation of extra-criminal legislation remains an essential modality of the offence to the protected interest.

The residual accessory component preserves the principle of unity of the legal system: a behaviour permitted by administrative law cannot be sanctioned by criminal law.[25]

As in the model seen above, the note of unlawfulness connoting the conduct can take the form of the absence of the necessary permissions or authorizations, or the violation of the conditions established by law, regulations, statutes, or by the authorization itself.

3.1 EU Law (Directive 2008/99/EC on Environmental Crime)

The partially accessory model is also utilized in the well-known Directive 2008/99/EC of the European Parliament and in the Council on the protection of the environment through criminal law, in the Article 3 – Offences: "Member States shall ensure that the following conduct constitutes a criminal offence, *when unlawful* and committed intentionally or with at least serious negligence" (emphasis added).

Article 2(a) of the Directive dictates the definition of "unlawful":

> "For the purpose of this Directive:
> (a) 'Unlawful' means infringing:
> (i) The legislation adopted pursuant to the EC Treaty and listed in Annex A; or

24 See Bernasconi, *supra* n. 1, p. 29 f. and 114 ff.; Plantamura, *supra* n. 1, p. 160 ff.; M. Caterini, *L'ambiente "penalizzato". Storia e prospettive dell'antagonismo tra esigenze preventive e reale offensività*, in K. Aquilina & P. Iaquinta (eds.), *Il sistema ambiente, tra etica, diritto ed economia*, Cedam, Milan, 2013, p. 141.

25 Compare M. Maiwald, *Il diritto dell'ambiente nella Repubblica federale tedesca*, in M. Catenacci & G. Marconi (eds.), *Temi di diritto penale dell'economia e dell'ambiente*, Giappichelli, Turin, 2009, p. 325.

(ii) With regard to activities covered by the Euratom Treaty, the legislation adopted pursuant to the Euratom Treaty and listed in Annex B; or
(iii) A law, an administrative regulation of a Member State or a decision taken by a competent authority of a Member State that gives effect to the Community legislation referred to in (i) or (ii).

Article 3 of the same Directive also detail the extensive list of nine offences. Four of these expressly provide for the element of damage or danger to health or the environment, particularly in the following points:

"(a) The discharge, emission or introduction of a quantity of materials or ionizing radiation into air, soil or water, *which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants*" (emphasis added);[26]
"(b) The collection, transport, recovery or disposal of waste, including the supervision of such operations and the aftercare of disposal sites, and including action taken as a dealer or a broker (waste management), *which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants*" (emphasis added);[27]
"(d) The operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used and *which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants*" (emphasis added);[28]
"(e) The production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants" (emphasis added).[29]

---

26 Faure, *supra* n. 4, p. 346, clarifies how the aforementioned subparagraph (a) appears, in its first part, to provide for a concrete endangerment crime; while, in its second part, it can result in a serious harm crime. On the provisions of Directive 2008/99/EC on environmental crime, see also G. M. Vagliasindi, *The EU Environmental Crime Directive*, in A. Farmer, M. Faure & G. M. Vagliasindi (eds.), *Environmental Crime in Europe*, Hart Publishing, Oxford, 2017, p. 31 ff.; and G. M. Vagliasindi, *The European Harmonisation in the Sector of Protection of the Environment Through Criminal Law: The Results Achieved and Further Needs for Intervention*, in *New J. Eur. Crim. L.*, 2012, vol. 3, p. 323 ff. Other provisions of the Directive 2008/99/EC, not quoted here, appear instead to belong to the category of abstract endangerment offences: see the provisions of subparagraph "(g) trading in specimens of protected wild fauna or flora species or parts or derivatives thereof, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species"; and subpara. i (in so far as regards production of ozone-depleting substances).

27 This provision associates, with a conduct in itself of abstract danger in the field of waste management, a profile of concrete danger, or damage: see Faure, *supra* n. 4, p. 346 f.

28 Here too, the requirement of concrete danger or harm is added to a conduct that would in itself constitute an abstract endangerment offence: in these terms, see Faure, *supra* n. 4, p. 347.

29 *Ibid.*

The association of a requirement of special unlawfulness, in a function that limits the ability to punish, to profiles of damage or danger to the health, or even the life, of a certain number of persons, or of significant damage to environmental matrices, is therefore present at European level.

On this point, some preliminary remarks:

Firstly, the Directive provides a very concise formulation of the offences, within which different protection perspectives, from the danger to individual environmental matrices to damage to several human lives, are lumped together without distinction.

More analytical and less conditioned by the ancillary component of administrative law seems to be the previous model of criminalization followed by the Convention on the Protection of the Environment through Criminal law of the Council of Europe (1998),[30] where in Article 2(1), types of offences marked by the clause of special unlawfulness (unlawful: see sub-paragraphs b, c, d and e) were placed side by side with offences of an autonomous nature, without such a clause, such as the hypothesis of:

> the discharge, emission or introduction of a quantity of substances or ionizing radiation into air, soil or water which:
> – Causes death or serious injury to any person, or
> – Creates a significant risk of causing death or serious injury to any person (sub-paragraph a).

The second and more general point is that the European rules act as a minimum level of protection, and only in relation to the attainment of those minimum objectives do they impose constraints on the Member States, while leaving Member States free to adopt higher standards of protection.

30 Convention not entered into force. On this Conventions, which forms the basis of approximation attempts of environmental criminal law of EU Member States, and on the path towards the adoption of approximation instruments, see G. M. Vagliasindi, *Directive 2008/99/EC on Environmental Crime and Directive 2009/123/EC on Ship-Source Pollution* in *www.efface.eu,* 2015 p. 6 ff.; and J. L. Collantes, *The Convention on the Protection of the Environment Through Criminal Law: Legislative Obligations for the States*, in *https://huespedes.cica.es.* On the influence exerted, on this Convention, by the Max Planck Institute Project "*Umweltschutz durch Strafrecht?*" (environmental protection through criminal law?), that paid special attention to the relationship between environmental criminal law, administrative and civil law, and suggested the abandonment of the close relationship between administrative and criminal law, see Faure, *supra* n. 4, p. 342 ff.

3.2. A Reflection on the Partially Accessory Model, between EU and Member States Legislations

Having said that, considering the above-mentioned provisions of the Directive, the following question arises spontaneously: Can discharges or emissions potentially causing death or serious injury to several persons not be unlawful, and therefore not punishable?

This question would appear to be answered in the affirmative, according to the wording of the Directive 2008/99/EC, which lays down two different cumulative conditions for punishability: the first of a formal nature (special unlawfulness); the second of a substantive (damage or danger) nature.

A set up of protection deemed agreeable by authoritative doctrine, considering the principle of the separation of powers.[31]

The choice of what is deemed a tolerable level of pollution is political, and therefore falls to legislative powers. According to this reconstruction, the non-punishability even of acts that are seriously damaging to public safety (like disasters), if they are caused by authorized production activities, within the limits of threshold values and sector regulations, is appropriate.

On this point, however, there appears to be a clear contrast with the prevailing doctrine[32] and with most followed exponents of the *engagè* judiciary[33]: The legislative solution of not punishing a disaster caused, for example, by the use of a substance not subject to regulatory requirements and limits, or due to a deficiency in a plant that is not covered by regulations, or, in any event, the solution of making punishment contingent upon noncompliance with administrative rules or deeds is inappropriate, in light of the primary legal interests at stake, such as life and human health.

In looking to trace it back to basic legal principles, a contrast emerges between the principle of the separation of powers, on the one hand, and the

31 See C. Ruga Riva, *I nuovi ecoreati. Commento alla legge 22 maggio 2015 n. 68*, Giappichelli, Turin, 2015, p. 5 ff., p. 29 ff.; C. Ruga Riva, *Il caso ILVA: profili penali*, in *www.lexambiente.it*, 2014, para. 4.

32 See Heine, *Elaborations of Norms*, *supra* n. 1, p. 110 f.; G. Heine & C. Ringelmann, *Towards an European Environmental Criminal Law – Problems and Recommendations,* in *Studia Iuridica Auctoritate Universitatis Pecs Publicata*, 2005, vol. 138, p. 45; Faure & Visser, *supra* n. 1, p. 332 f.; Mandiberg & Faure, *supra* n. 1, p. 29 ff.; Faure, *supra* n. 4, p. 337 ff.; A. Manna, *La legge sui c. d. eco-reati: riflessioni generali critiche di carattere introduttivo*, in A. Cadoppi, S. Canestrari, A. Manna & M. Papa (eds.), *Trattato di Diritto Penale. Parte Generale e Speciale. Riforme 2008–2015*, Utet, Turin, 2015, p. 980 ff.; Patrono, *supra* n. 13, p. 12; Vergine, *supra* n. 15, p. 445.

33 See G. Amendola, *La Confindustria e il disastro ambientale abusivo*, in *www.questionegiustizia.it*, 2015; G. Amendola, *Non c'è da vergognarsi se si sostiene che nel settore ambientale la responsabilità penale degli industriali dovrebbe essere più limitata di quella "normale"*, in *www.lexambiente.it*, 2015; Amendola, *supra* n. 15; M. Santoloci, *In Italia ci si ammala e si muore di 'parametri'. I disastri ambientali a norma di legge (da evitare con la nuova legge sui delitti ambientali)*, in *www. dirittoambiente.net*, 2015.

principle of protecting human health, together with the environment, on the other hand.

This contrast is not easily resolved.

In reference to the less serious crimes of pollution, and therefore the protection of the environment without implications for human safety, the search for a point of equilibrium between conflicting interests (production, employment, *etc.*), as well as the preference to entrust the search for this equilibrium, *ex ante*, to the lawmaker, rather than to the judicial power *ex post facto*, seems to be justifiable.[34] It seems therefore also justifiable to structure the various types of offences in a partially accessory sense with a special unlawfulness clause.

But to admit that the same is true about more serious crimes, like disasters, in so far as they also protect the value of human health, and thus to admit balance, with a possible loss, enshrined in legislation, of this primary interest in relation to other values, as much as it may be considered by somebody as unavoidable, in terms of *real-politik* (perhaps an outlook that is a slightly cynical), does indeed seem "painful", both for the jurist and layman.

One can attempt to introduce limitations to this power of balancing opposing interests (which certainly lie within the competence of political bodies), in cases where the outcome of this balance is manifestly unfavourable to primary rights.

Legislation determining the prevalence of interests that are opposed to human health assets may result from a knowledge *deficit* on the part of political bodies, which can be seen *ex post facto* by the subsequent evolution of scientific knowledge, or already due *ex ante* to the failure to keep up to date with currently available scientific evidence.

In both the first and the second case, where obsolete standards are not autonomously updated at the administrative or political level, remedies that can be easily accomplished seem to be the judicial review of the legality of administrative acts, or the review of the constitutional legitimacy of laws, albeit while remaining aware of their limitations.

These remedies seem scarcely feasible in case of gaps in the legislation, or where there are no rules imposing restrictions on the operator, with possible penal repercussions. Examples of this would be damages caused by substances not subject to limits or regulations, or by deficiencies in a plant that are not covered by specific regulatory; think also of threshold values that have not yet been transposed into legislation, but are regulated, for example, only by professional associations.

---

34 For reasons related above all to the *lex certa* principle, and *ex ante* clarity of the criminalized behaviours: on this point, see FAURE, *supra* n. 4, p. 333, where it is also noted how, in assessing the non-socially tolerable levels of pollution, "administrative authorities may be far better qualified (given their experience and thus their information advantage) than the judge".

It must be said that the partially accessory model of environmental protection, like all other models, has inevitable criticalities.

Although it represents a positive development in many respects compared to the purely sanctioning model, the partially accessory model does not make it possible to overcome one of the characteristic problems of the so-called integrated protection paradigms, namely the incompleteness of the protection itself. Considering the persistent dependence of these models on administrative law, there will continue to be facts which are offensive for the interests at stake, but which do not conform to the type of offence, and therefore remain unpunishable.[35]

These are the risks associated with the so called "fragmentary nature" of criminal law, as pointed out by Binding more than a century ago and in terms as graphic as they are topical:

> "the legislator lets actions play out before his feet, and then he picks up these actions with a lazy hand, to elevate them to criminal offences because of their intolerability. In the beginning, he perceives only the coarsest forms of manifestation. *He does not perceive, or does not know how to grasp what is more sophisticated and rarer, even when it exists. This often has a more serious illicit content than what has already been sanctioned*"[36] (emphasis added).

The limits of a model of environmental protection that relies heavily on the role of public authority in setting standards has also recently been highlighted by authoritative administrative doctrine: The so called integrated (administrative-criminal), or accessory model of protection presupposes an exhaustive knowledge, on the part of the public authority, of the situations subject to regulation; whereas the necessary information for the setting of standards is often held by the private sector.[37]

---

35 In addition to the authors quoted in footnote 32, see Patrono, *supra* n. 13, p. 679; Plantamura, *supra* n. 1, p. 163; the most heated criticism is by Santoloci, *supra* n. 33: "It has been clear for a long time that in Italy one falls ill and dies of parameters. There are environmental disasters permitted by law. This is the real black hole of our current legal and regulatory legal system, and it is the keystone that has long been pleasantly discovered and exploited by those who want to operate (in the small, medium and large/criminal) illegally in all environmental sectors […]. In our country we have radicalized and totalized the whole environmental legal/regulatory system, basing it solely and exclusively on tables and parameters, avoiding foreseeing also and contextually the possibility of identifying environmental disasters, and along with the consequent damage to public health, regardless of this formal bottleneck. […] Therefore, in this context, what (formally and on paper) is 'polluting' today, may not be so tomorrow, and vice versa. To make an environmental/health damage disappear in our country, it has always been enough to change the numbers of the parameters".

36 K. Binding, *Lehrbuch des Gemeinen Deutschen Strafrechts. Besonderer Teil*, von Wilhelm Engelmann, Leipzig, 1902, 20.

37 See F. Fracchia, *Introduzione allo studio del diritto all'ambiente. Principi, concetti e istituti*, ES, Naples, 2015, 29 ff.

The tendency towards rigidity in the so-called integrated or accessory model makes the protection system less rapid in adapting to emerging environmental problems, while requiring long and complex processes of political-legislative mediation and administrative implementation.[38]

The functionality of the accessory model of criminal protection appears to be directly proportional, in essence, to the qualitative level of administrative regulation.

Where a positive regulation determines the loss of health assets with respect to interests theoretically inferior on a constitutional level, in the partially accessory model the judge's action tend to be subordinate to the legislator's choice (without prejudice to possible recourse to the Constitutional Court).

The requirement of special unlawfulness, characteristic of the partially accessory model of protection, poses fewer problems when incorporated in cases which are "neutral" from the point of view of material disvalue, such as Article 3 (c) of Directive 2008/99/EC:

> "The shipment of waste, where this activity falls within the scope of Article 2(35) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (1) and is undertaken in a nonnegligible quantity, whether executed in a single shipment or in several shipments which appear to be linked."

The use of the partially accessory model, with its special unlawfulness profiles, seems inevitable to criminalize behaviours which seems abstractly feasible also in a legal way, such as the hypotheses referred to in: sub-paragraph g): "Trading in specimens of protected wild fauna or flora species or parts or derivatives thereof"; sub-paragraph i): "The production, importation, exportation, placing on the market or use of ozonedepleting substances"; and finally, sub-paragraph f): "The killing, destruction, possession or taking of specimens of protected wild fauna or flora species".

The integrated, administrative-criminal, model of protection appears inevitable in a large part of environmental criminal law: despite the potential problems of incomplete protection, due to the possible presence of acts that are in fact offensive, but not conform to the type of offence, the composite nature of the interests that characterizes environmental criminal law does not seem to allow us to renounce (at least for less serious criminal offences) coordination with the administrative system, as the first line of protection for the environment.

The problem of incomplete protection could only be solved by "emancipating" environmental criminal law from administrative law, *i.e.*, by resorting to a so-called "pure" criminal model, with offences that are "autonomous"

38 *Ibid.*, p. 30.

to the criminal system: in these crimes, independent from administrative law, the description of the typical fact is entirely contained in the incriminating provision, and focuses on the cause of damage or concrete danger to the protected interest, without reference to the acts of the public administration, or in general to sub-legislative sources.[39]

But this criminal policy option is not without its difficulties (see *infra*, paragraph 4).

3.3. A recent proposal by the European Commission (2021) for a new "Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC". Critical Analysis

On 15 December 2021, the European Commission put forward a "Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC".

The Explanatory Memorandum of the proposal expounds the reasons for and the objectives of this proposal:

> "1. Improve the effectiveness of investigations and prosecution by updating the scope of the Directive.
> 2. Improve the effectiveness of investigations and prosecutions by clarifying or eliminating vague terms used in the definitions of environmental crime.
> 3. Ensure effective, dissuasive and proportionate sanction types and levels for environmental crime.
> 4. Foster cross-border investigation and prosecution.
> 5. Prove informed decision-making on environmental crime through improved collection and dissemination of statistical data.
> 6. Improve the operational effectiveness of national enforcement chains to foster investigations, prosecutions and sanctioning."[40]

In the context of the "Impact assessment" of the proposal, with particular reference to the first objective mentioned above, the Commission expressly takes into consideration the option of "defining environmental crime in the Directive without the requirement of a breach of relevant EU sectoral legislation", but finally prefers not to move away from the previous model of the accessory nature of criminal protection, a model capable of

39 On this model of protection, see Catenacci, *supra* n. 1, p. 258; Bernasconi, *supra* n. 1, p. 29; Plantamura, *supra* n. 1, p. 166 ff.

40 European Commission, *Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment Through Criminal Law and Replacing Directive 2008/99/EC*, Brussels, 15 Dec. 2021, COM (2021) 851 final, 2021/0422 (COD), p. 1.

guaranteeing a greater level of "legal clarity concerning which breaches of sectoral legislation constitute environmental crime".

Then, in evaluating the proposal's impact on the various public and private subjects operating within the EU, immediately after the Member States and the public authorities, the Commission takes into consideration the EU businesses, with the following specification, of a reassuring tenor for the latter: "As environmental crime will continue to be linked to a breach of administrative laws, there is limited risk that businesses could be sanctioned for environmental activity that is permitted under administrative law, with the exception of specific and well-defined situations mentioned in the Directive".

Thus, the concept of permit defence is introduced, with some limited exceptions, later articulated in detail.

Moving on to the analysis of the normative text proposed for the new Directive, in Article 3, on the matter of "*Offences*", the Commission re-presents the well-known unlawfulness clause (already present in Directive 2008/99/ EC, currently in force), whereby "Member States shall ensure that the following conduct constitutes a criminal offence *when it is unlawful* […]" (emphasis added).

In Article 2, about "*Definitions*", the notion of "unlawful" is modified:

> "For the purpose of this Directive, the following definitions apply:
> (1) 'unlawful' means a conduct infringing one of the following:
> (a) Union legislation, which irrespective of its legal basis contributes to the pursuit of the objectives of Union policy of protecting the environment as set out in the Treaty on the Functioning of the European Union;
> (b) a law, an administrative regulation of a Member State or a decision taken by a competent authority of a Member State that gives effect to the Union legislation referred to in point (a).
> The conduct shall be deemed unlawful even if carried out under an authorisation by a competent authority in a Member State when the authorisation was obtained fraudulently or by corruption, extortion or coercion.

Point (a) above is intended to replace points (i) and (ii) of Directive 2008/99/EC,[41] which referred instead to lists of legislations contained in Annexes A and B of the 2008 Directive. The proposed new formulation appears appreciable in that it is more elastic and constructed in more general terms than that of the 2008 Directive, which currently poses the problem of updating the list of legislation in the two Annexes.

41 See *supra,* para. 3.1.

Subsection (b) reproduces *verbatim* what was provided for in the 2008 Directive (except, logically, for the reference to subsection a, instead of subsections i–ii of the 2008 Directive).

A novelty, however, seems to be represented by the final clause to the notion of "unlawful", whose intention seems to regulate the permit defence and some exceptions to this defence: four situations are expressly provided for in which

"the conduct may be deemed unlawful even if carried under an authorisation by a competent authority":

– fraud,
– corruption,
– extortion,
– coercion.

The final clause in question, however, does not appear to be properly formulated and seems to lead to a lowering (instead of the raising, which seems to be the Commission's intention) of environmental protection.

The final clause indeed seems overly restrictive and ill-conceived in terms of legislative technique.

The hypotheses taken into consideration are basically three, because the concepts of extortion and coercion seem to partly overlap, in the sense that coercion in criminal law normally represents a component of extortion, so that reference to coercion alone would seem sufficient; it would probably be even better to use the concept of threat, which is more psychologically connoted and broader than coercion, which instead seems generally refer more to physical violence, that is overall much rarer in the context of possible criminal activities aimed at obtaining authorization, compared to threat.

There is no reference to the concept of collusion, which instead seems appropriate to place alongside corruption, within the framework of the exceptions to the permit defence: In many cases, indeed, the public official benefits the operator with an illegitimate authorization, with the agreement of the operator or, in any case, aided or abetted by him or her, without the public official obtaining from the operator a direct compensation in money or other benefit, as remuneration for the performance of the unlawful administrative deed; in other terms, without there being the elements of corruption. The unlawful authorization is consciously granted for other reasons, whether or not linked to a co-interest of the public official with the beneficiary of the administrative deed. This abuse of the public official may consist in the violation of specific rules of conduct, expressly provided for by law, or in the omission to abstain in the presence of self-interest or a close associate's interest; conduct from which an unfair advantage derives in favour of the private party. Such abuse, which is less serious than corruption, is normally punished and in several criminal law systems expressly

mentioned among the exceptions to the permit defence: *e.g.*, in the German Criminal Code rule on abuse of rights (*Rechtmissbrauch*), § 330 d, no. 5, which expressly provides for collusion among the hypotheses of punishability of the beneficiary of a permit; or in the well-established jurisprudence of the Italian Supreme Court on collusion or complicity of the private individual in the offence of abuse of authority by a public official, pursuant to Article 323 Italian Criminal Code.[42]

The main problem with the final clause to the concept of unlawfulness appears, however, from a broader perspective: this clause refers only to authorizations that are the result of criminal activity, whereas unlawfulness, which is a prerequisite for the offence, consists in the violation of legislation in general, and therefore not necessarily in the violation of criminal legislation (which is clearly only a subset of public law).

It follows that, among the hypotheses of conduct that can be considered unlawful, even if authorized, should be included not only hypotheses of authorization obtained through criminal activity, but also, more generally, hypotheses of unlawfulness of the authorization, *i.e.*, hypotheses of violation of the law. Violation of the law is a flaw of the administrative deeds that is different from the flaw of competence, the only one that seems to have been taken into consideration in the Commission's proposal: the proposal indeed dictates that the authorization must come from a "competent authority in a Member State", and not be the result of criminal activity, but there is clearly a wide range of authorizations issued by competent authorities and, nevertheless, illegitimate due to violation of the law, even if they are not the result of criminal activity such as fraud, corruption, *etc.*

Since the concept of unlawful is not assimilable to that of criminal, the former should extend to all authorizations that are unlawful due to violation of the point (a) or (b) of the Article 2 (in the above proposed text), and not only cover authorizations emanating from incompetent authorities or resulting from criminal activity (as seems to be inferred from reading the proposal).

An issue different from the existence of unlawfulness is that of ascertaining the offence, which requires, in addition to unlawfulness, a finding of one of the offences listed in Article 3 of the Directive and the *mens rea* of the perpetrator, in the form of intention or gross negligence (gross negligence, incidentally, limited in the new proposal only to some of the offences listed in Article 3, which again, compared to the Directive 2008/99/EC, results in a lowering of protection, whose rationale is not clear). The *mens rea* of the authorized person, when the authorization is unlawful, but not the result of

42 See, among others, Italian Supreme Court, Criminal sect. III, 17 Jul. 2012 (public hearing 16 Feb. 2012), no. 28545, Cinti, in *DeJure*.

criminal activity by the authorized person, could in fact be lacking, due to the private operator's confidence on the public authority and its deeds.

The assessment of the private operator's trust on the administrative deed, for the purposes of the private operator's excusability, must be carried out in concrete terms, in relation to various factors, such as: the type of pathology afflicting the deed (the more serious the flaw in the administrative deed, the less easy it is for the authorized person to be excused[43]), the novelty of the matter, the level of clarity and precision of the law violated, the presence of a consolidated case law, and above all, the different professional, technical and legal qualifications and skills of the private operator. For a layperson, not well equipped in terms of knowledge and/or experience, an error as to the lawfulness of an administrative act could indeed be more easily excusable; whereas it would be more difficult for a qualified expert to invoke this reason for the exclusion of guilt.

In conclusion, the final clause of the concept of "unlawful" could be reformulated in the following terms: The conduct shall be deemed unlawful even if carried out under an authorisation by a competent authority in a Member State when the authorisation is unlawful".

If one wish instead to regulate the permit defence in criminal proceedings, in this Directive, the appropriate forum for such regulation does not appear the definition of the general concept of unlawfulness, but the *mens rea* of the offender: here it could be provided that where the activity has been unlawfully authorized and the authorized person has however relied on the administrative permit, the *mens rea* of the authorized person is excluded; specifying that the authorized person may not invoke such confidence when:

> (1) he obtained the authorization through threat, corruption, collusion, incomplete or inaccurate statements, or
> (2) was aware of the unlawfulness of the authorization or was unaware of it due to gross negligence.

The Commission proposal excludes any possible form of environmental criminal protection autonomous from administrative law.

With reference to the most serious forms of crimes, this also appears to be inappropriate, as it does not guarantee adequate protection of primary interests such as human health and the environment: in some cases even a person who has acted without infringing administrative law – which may be lacking, deficient or obsolete – may deserve criminal blame, if that person is aware

43 Consider the distinction made in Germany, as well as in Italy, between annullability (*Rechtwidrigkeit*) and the more serious nullity (*Nichtigkeit*), the latter due, *e.g.*, to a lack of essential elements of the deed: in the case of nullity, the deed is considered *ab initio* ineffective, both in administrative and criminal law.

of the particular harmfulness or dangerousness of his or her conduct for the interests of health and/or the environment, or if that person is unaware of it due to gross negligence. The Member States, it seems to us, should not have the power to consider legitimate (or legalize), at an administrative and criminal level, hypotheses (*e.g.*) of environmental disaster, that irreversibly or nearly irreversibly affect environmental interests, or have repercussions on public safety (see more extensively *infra*, para. 3.2).

The proposal could therefore be supplemented by a form of autonomous offence, characterized either by multi-offensiveness, *i.e.*, by an offence not only against the environment, but also against a significant number of persons, damaged or exposed to danger; or characterized by a very serious offence against environmental interests, such as irreversible damage or damage the repair of which is particularly costly and achievable only by exceptional means.

4. The Autonomous, or Purely Criminal Model: The Elimination of the Link with Administrative Law

4.1 Features and Advantages of the Autonomous or Purely Criminal Model

The traditional, integrated paradigm of criminal-administrative protection of the environment can be surpassed, in some cases, if we assume that the conflict between different interests, which are at stake, can be resolved in absolute terms, without the mediation of rules and/or administrative acts, but by identifying *a priori* the prevailing legal interest; and thus establishing a direct relationship between criminal law and the judge called upon to ascertain the offence.[44]

This is the so-called "purely criminal", or "autonomous" model of protection, in which the type of offence is entirely described in the criminal norm, and is structured around the causing of a danger or damage to the protected interest, without the presence of normative elements that refer to other branches of the legal system.

This model of protection normally concerns only the most critical hypotheses of environmental pollution, the effects of which tend to be long lasting, or to affect public/individual safety, outside of a possible balance with interests pertaining to the economic sphere.

44 See Bernasconi, *supra* n. 1, p. 23 ff.

The elimination of the link with administrative law occurs through the uncoupling of the offence from the violation of other legal norms, or conditions imposed by authorizations, licenses or permits.[45]

While the accessory or "political-administrative" model of environmental protection, "conceives of environmental protection as a moment of unitary and articulated program of territorial management, and as such, under the primary responsibility of the public administration"[46], the autonomous, or purely criminal model of environmental protection, instead, enhances the role of the judge as a direct protagonist in the fight against pollution.[47]

In this case, criminal law intervenes autonomously from administrative law, because the offence is of a greater magnitude than that contemplated by administrative law.[48] This type of protection assumes that the administrative discipline can never allow damage of this magnitude.

In this perspective, the effects of the polluting activity are characterized by their extreme nature. The idea is to contain both the provisions and the practical applications of the criminal figures belonging to the pure/autonomous criminal model within a rigorous canon of *extrema ratio* (last resort option).

Criminal law, emancipated from the administrative sphere, recovers full functional autonomy: criminal law can identify premises and elements that are worth making a fact "deserving of punishment"[49], within a logical framework of legal asset protection characterized in an empirical-effective sense, and detached from any conditioning by the political-administrative model "of government" of the community.

In this way, it seems possible to overcome even residual reservations, under the profile of legal provision requiring that certain matters only be governed

45 See Mandiberg & Faure, *supra* n. 1, p. 29; Faure, *supra* n. 7, p. 327: "Administrative law, however, cannot be the sole source of environmental criminal law since some serious cases of environmental pollution should be directly punishable, even if no violation of administrative provisions is at hand"; more recently, on the "autonomous"/purely criminal offence for the protection of the environment, in a general-preventive view, see M. G. Faure, C. Gerstetter, S. Sina & G. M. Vagliasindi, *Instruments, Actors and Institutions in the Fight Against Environmental Crime*, in *www.efface.eu*, 2015, para. 3.3.4; Faure, *supra* n. 4, p. 335 ff.; M. G. Faure, *The Development of Environmental Criminal Law in the EU and its Member States*, in *Rev. Eur. Comp. & Int'l Envtl. L.*, 2017, p. 139 ff. 61

46 Fiandaca & Tessitore, *supra* n. 5, p. 35.

47 See Insolera, *supra* n. 5, p. 739: "In a purely criminal model […] it is the judge who through a direct appreciation of the damage or the danger (in the example given, damage to natural beauty; in the environmental field stricto sensu, damage to an ecosystem), is the direct author of the mediation between specific (of the concrete case) opposing interests"; in favour of this model, see more recently EFFACE, *Conclusions and Recommendations*, in *www.efface.eu*, 2016, p. 28 ff.

48 Mandiberg & Faure, *supra* n. 1, p. 29 ss.

49 See Faure & Visser, *supra* n. 1, p. 342.

by Parliament, and raised by offences integrated by threshold values, outside the criminal law, resulting from "technical" evaluations, as referred to by administrative sources, only apparently "neutral"[50].

The pure criminal paradigm serves to remedy the problem of incomplete protection, *i.e.*, the problem of facts which are substantially offensive, but not illegal under administrative norms (a problem of both the purely accessory and the partially accessory models). The problem is remedied by establishing, between judge and criminal offence, a relationship that is not mediated by administrative norms and/or acts.[51]

It's worth noting that the offences that respond to this model of protection are relatively rare in the criminal law of European countries and the USA.

In these cases, the link with administrative regulations is eliminated by removing the "protective umbrella" provided by authorization, or by eliminating the so-called "special unlawful" component from the structure of the crime.[52]

Where the legislator follows this approach, the criminal norm knows no (so to speak) "formal-intrinsic" application limits, due to the possible non-violation of administrative/authorizing prescriptions.

4.2 (continued)…The Possible Problematic Aspects of the Autonomous Model: Unity of the Legal System, Uncertainty, *Mens rea*. What Answers? Between Criminal and Extra-criminal Responsibility

By adopting a model of protection that refers the task of ascertaining the offence directly to the judge, regardless of factors of interaction and mediation with administrative law – factors that "convey" the criminal instrument of protection in the furrow already traced by administrative norms – there is a real risk that applicative certainty can be weakened. A risk which seems to be contained through a severe reduction in the number and content of such autonomous offences, limited to the most serious ones.

Another principle that potentially comes into discord with the autonomous/purely criminal model of protection is the unity of the system,[53] with eventually connected, negative repercussions on the principle of guilt. If the operator complies with the administrative norm, but may nevertheless incur, for the same fact, the violation of the criminal norm, a dystonia may be produced between the two levels of the system, the administrative one and the

50 *Ibid.*, p. 342 f.; Catenacci, *supra* n. 1, p. 191 ff.; Plantamura, *supra* n. 1, p. 166.

51 See Faure & Visser, *supra* n. 1, p. 345.

52 See Mandiberg & Faure, *supra* n. 1, p. 30 ff.

53 *Ibid.*, p. 40.

criminal one. Moreover, at the same time producing a contrast with principles of the subsidiary and fragmentary nature of criminal law, which requires criminal law to intervene as a last resort of protection, within a field of action that is more restricted than the overall sphere of the "unlawfulness".

To limit the scope of such systematic problems, the range of action of the autonomous/purely criminal types of offence must be based on profiles of "merit of punishment" such as to justify the prevalence of the criminal norm over another, possibly conflicting, administrative source: the operative terrain that would be ideal for the autonomous model of protection seem to be the hypotheses in which the administrative norm is obsolete or non-existent (see *supra*, para. 3.2).

In the event of an alternative evaluation of the conduct, from administrative to criminal law, possible inconveniences seem to arise with regards to the principle of guilt.[54]

By making the choice to leave these possible inconveniences as unresolved on the level of *actus reus*, the autonomously/purely criminal model requires that they be appropriately addressed in ascertaining *mens rea*. The confidence placed by the operator in the administrative deed or in the administrative law framework legitimizing him to act must be examined. This confidence may vary in relation to several factors: first and foremost, the different professional, technical and legal qualifications and skills of the subject in question, capable of making him understand or not the harmfulness of his conduct to the interests of the environment and/or human health.

With the *caveat* that it appears logically easier to affirm the liability of the operator in the case where he acts on the basis of an unlawful permit (see above, para. 3.3)[55], compared with the case where he acts without infringing administrative rules, or on the basis of a permit that is lawful under national administrative law: in the latter case, criminal liability may be affirmed only exceptionally, when the person is aware of the extreme harmfulness of his conduct for the protected interests (whereas the competent public authority is unaware or delays its action); or even when the operator is not aware, through gross negligence, of the extreme harmfulness of his or her conduct.

Where, instead, there is no *mens rea* of the operator, or where the operator's trust or good faith is found, the most appropriate solution for the protection of the interests in question does not seem to be criminal, but

54 Also with reference to the US system, *ibid.*, p. 39 ff.

55 In the case of an unlawful administrative deed, it will be necessary to consider in principle, in addition to the various professional, technical and legal qualifications and skills of the person in question, the pathology afflicting the act (*i.e.*, the level of seriousness of the administrative flaw: the more serious the administrative flaw of the deed, the more difficult it will be to recognize the good faith of the beneficiary of the deed), the novelty of the matter, the level of clarity and precision of the rule, the presence of established case law.

extra-criminal law: solutions such as those stated by Directive 2004/35/EC (European Community), so called Environmental Liability Directive (or ELD: "Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage"), which designs a system of imputation of damage based on strict liability (*i.e.*, regardless of intention, recklessness or negligence), when such damage is caused by a professional activity that poses a risk to human health or the environment. It is true that Directive 2004 on environmental (extra-criminal) liability provides for, in favour of the operator, the controversial permit defence,[56] at an optional level, in the sense that the EU has left the Member States free to choose whether or not to introduce such a clause.[57] But the operating margins of the permit seem to be interpreted restrictively in extra-criminal law (unlike in criminal law[58]): in extra-criminal law (in the Member States that have opted to introduce permit defence in extra-criminal proceedings), the permit defence seems to be understood as a clause excluding costs (and not liability);[59] it does not seem to be applicable

56 The permit defence clause in extra-criminal proceedings raised perplexities, as it seems to contrast with the basic regime of strict liability, dictated by the Directive 2004/35/EC itself for operators carrying out activities with the greatest environmental impact. The permit defence clause ends up by attributing the costs necessary to remedy environmental damage to the community, rather than to the operators, who are instead deemed to have to bear such costs (preferably compared to other subjects) as costs of doing business.

57 The Directive 2004/35/EC in question, in Art. 8 on *Prevention and remediation costs*, para. 4, states that: "The Member States may allow the operator not to bear the cost of remedial actions taken pursuant to this Directive where he demonstrates that he was not at fault or negligent and that the environmental. damage was caused by:
(a) an emission or event expressly authorised by, and fully in accordance with the conditions of an authorisation conferred by or given under applicable national laws and regulations which implement those legislative measures adopted by the Community specified in Annex III, as applied at the date of the emission or event".

58 In criminal law (unlike in extra-criminal law) strict liability is generally not admitted, and therefore the operating margins of the permit defence seem to be wider.

59 According to the first interpretation (permit defence as a ground for exclusion of the costs of environmental liability, in extra-criminal proceedings), the operator would in any case be obliged initially to repair the damage, and could subsequently claim reimbursement, from the State, of the costs incurred to that end.
According to the second thesis (permit defence as a cause of exclusion of environmental liability, in extra-criminal proceedings), instead, the operator would be exempt from the restorative obligations, being able to contest its own liability from the outset: only when the exception of the permit defence, raised by the operator, is unsuccessful, the operator would be subject to the request to carry out the restorative actions; whereas in the case where the operator successfully invokes the permit defence, the carrying out of the remedial activity would be the responsibility of the public authority.
In favour of the first thesis, which ensures a more effective and rapid protection of the environment, see V. Fogleman, *Study on Analysis of Integrating the ELD into 11 National Legal Frameworks. Final Report*, 15 Dec. 2013, in *www.ec.europa.eu*, 2014, p. 89; S. Salès, S. Mudgal & V. Fogleman, *ELD Effectiveness: Scope and Exceptions, Final Report Prepared for European*

in the case of accidents;[60] in order to benefit from the permit defence, the operator must demonstrate that he is not at fault or negligent;[61] this defence does not seem to apply to unlawful authorizations.[62]

Commission – DG Environment, in *www.ec.europa.eu*, 2014, p. 133; V. Fogleman, *The Polluter Pays Principle for Accidental Environmental Damage; Its Implementation in the Environmental Liability Directive*, in A. D'Adda, I. Nicotra & U. Salanitro (eds.), *Principi europei e illecito ambientale*, Giappichelli, Turin 2013, 142.

60 Accidents seem to fall outside the concept of "emission or event expressly authorised" (Art. 8, para. 4 of the Directive 2004/35/EC): see U. Salanitro, *Directive 2004/35/EC on Environmental Liability*, in *www.efface.eu*, 2015, p. 17.

61 This is expressly provided for in Art. 8 (4) of the Directive 2004/35/EC.

62 This because Art. 8 (4) of the Directive 2004/35/EC refers to "an authorisation conferred by or given under applicable national laws and regulations".

Parental Liability Doctrine and Environmental Crimes: Limits and Perspectives

Sofia Confalonieri
Italian Criminal Defense Lawyer
DOI: 10.54103/milanoup.151.c200

In the context of European Environmental Law, Directive 2008/99/EC mandates Member States to institute corporate criminal liability for environmental offenses. However, there is uncertainty within the Directive regarding whether Member States should ensure that parent companies are held accountable for environmental crimes committed by their subsidiaries and, if so, under what conditions. This matter gains significance as numerous studies indicate that, in the absence of any form of effective parental liability, companies may externalize the risk of penalties by incorporating hazardous activities into separate legal entities. To curb such potentially exploitative practices, the paper scrutinizes the applicability of the "parental liability doctrine" in EU environmental criminal law. Despite this exploration, the author argues against the expansion of this doctrine, advocating instead for a fault-based form of parental liability, as the one outlined in the Proposal for a Directive on Corporate Sustainability Due Diligence. This form of liability is linked to compliance deficiencies and, consequently, aligns with the culpability principle. Furthermore, it would encourage parent companies to institute compliance programs, aiming primarily to prevent subsidiaries from engaging in criminal activities

Keywords: Criminal Environmental Law (domestic/international); Criminalization; Sanctions

1. Introduction.

Under Article 6 of Directive 2008/99/EC on the protection of the environment through criminal law[1] – commonly referred to as the Environmental Crime Directive – Member States are required to ensure that legal persons are held liable for the environmental offences listed in Article 3 and 4 of the same Directive.

Although the Directive mandates Member States to introduce corporate criminal liability for environmental offences, the European law remains largely silent on its regulation, leaving much of the implementation to the discretion of Member States.

Therefore, under Directive 2008/99/EC, it is doubtful if Member States shall ensure parent companies are held responsible for the environmental crimes committed within their subsidiaries, and, if so, under which conditions.

This issue is particularly relevant, since numerous studies have shown that, without any form of parental liability – or any *effective* form of parental liability –, companies may externalize the risk of being subject to penalties, incorporating hazardous activities into separate legal entities.[2]

In essence, companies could abuse their limited liability, by creating separate corporations, directly exposed to penalties and to civil or administrative consequences.[3]

---

1 The adoption of the so-called Environmental Crime Directive has had a long history: see G. Van Calster – L. Reins, *EU Environmental law*, Edward Elgar Pub., Gloucestershire, 2017, pp. 157 ss.; F. Comte, *Criminal Environmental Law and Community Competence*, in *Eur. Enery & Envtl. L. R.*, 2003, pp. 147 – 156; F. Comte, *Environmental Crime and the Police in Europe: A Panorama and Possible Paths for Future Action*, in Eur. Envtl. L. R., vol. 15, 2006, pp. 190 – 231; M. Hademann-Robinson, *The Emergence of European Union Environmental Criminal Law: A Quest for Solid Foundations*, in *Environmental Liability*, vol. 16(3), 2008, pp. 71-91; M. Faure, *The Revolution in Environmental Criminal Law in Europe*, in *Virginia Environmental Law. Journal*, vol. 35, 2017, pp. 321-356; H.E. Zeitler, *Strengthening Environmental Protection through European Criminal Law*, in *Journal for European Environmental and Planning Law*, 2007, vol. 4(3), pp. 213-220.

2 Policy Department for Citizens' Rights and Constitutional Affairs, *Environmental liability of companies*, 2020, available at *https://www.europarl.europa.eu/RegData/etudes/STUD/2020/651698/ IPOL_STU(2020)651698_EN.pdf*, p. 56. This issue is related to the well-known question of parent company accountability for infringements of human rights committed by their insolvent subsidiaries, in the field of private suits. See Amnesty International, *Injustice Incorporated: Corporate Abuses and the Human Right to Remedy, Amnesty International Publications*, London, 2014; G. Skinner, *Parent Company Accountability: Ensuring Justice for Human Rights Victims, The International Corporate Accountability Roundtable*, available at http://www.bhrinlaw.org/documents/pcap-report-2015.pdf, 2015; G. Lyson, *Parent Company Liability and the European Convention of Human Rights – An Analysis from the Perspective of English Law*, in *European Business Law Review*, 2020, vol. 31, no. 5, p. 819-844.

3 See H. Hansmann – R. Kraakman, *Toward Unlimited Shareholder Liability for Corporate Tort*, in T*he Yale Law Journal*, 1991, vol. 100, p. 1879 – 1934; G. Skinner, *Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law*, in

In order to limit such abusive conducts, the paper explores the possibility to apply the so-called "parental liability doctrine" in the field of EU environmental criminal law.

The parental liability doctrine, developed under the domain of EU competition law by the European Courts, implies that parent companies are strictly liable for the infringements committed within their subsidiaries.

Ultimately, the Author affirms the extension of this doctrine is not desirable, and it should be preferred a fault-based form of parental liability, as the one embodied in the Proposal for a Directive on Corporate Sustainability Due Diligence.

Specifically, in paragraph 2, the Author will first introduce the parental liability doctrine as developed in the domain of EU competition law.

In paragraph 3, the Author will illustrate how the European Courts could require national authorities to apply the parental liability doctrine in the field of environmental criminal law, especially to ensure full effect to the provisions of the Environmental Crime Directive.

In paragraph 4, the argument will be made that the parental liability doctrine should *not* be applied in the field of environmental criminal law, since it would be inconsistent with the respect of human rights and the specific features of EU environmental law.

In paragraph 5, the Author will illustrate the new form of parental liability emerging under the Proposal for a Directive on Corporate Sustainability Due Diligence, affirming that its application would be desirable in the field of environmental criminal law as well.

2. The "parental liability doctrine" as developed in the field of EU competition law.

As mentioned above, the parental liability doctrine has been developed by European Courts in the domain of competition law, throughout a functional interpretation of the term "undertaking", embodied in Article 101 of the Treaty on the Functioning of the European Union (TFEU).

Article 101 of the Treaty on the Functioning of the European Union (TFEU) states: "The following shall be prohibited as incompatible with the internal market: all agreements between *undertakings*, decisions by associations of *undertakings* and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market" (emphasis added).

Washington & Lee Law Review, 2015, p. 1823-1864; N. Mendelson, *A Control-Based Approach to Shareholder Liability for Corporate Torts*, in *Columbia Law Review*, 2002, vol. 102, p. 1203-1303.

Under this provision, the legal term of undertaking has been interpreted as referred to any "economic unit", defined as "a unitary organization of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision"[4].

The notion of economic unit has been referred to various companies which operate on the market as a single actor. It has been considered decisive "the existence of unity of conduct on the market, without allowing the formal separation between various companies that results from their separate legal personalities to preclude such unity for the purposes of the application of the competition rules"[5].

In the context of group of companies, since the case of *Imperial Chemical Industries v. Commission*, the European Court held that "the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company. Such may be the case in particular where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company".[6]

---

4 Court of First Instance, Case T-11/89, *Shell International Chemical Company Ltd v Commission of the European Communities*, 10.03.1992, §311.

5 See recently, the judgment of the European Court of Justice (Grand Chamber), Case C882/19, *Sumal SL v. Mercedes Benz Trucks España SL*, 6.10.2021, §41. It is worthy of note that the legal concept of "economic unit" leads to the liability of every companies within the group of corporates; not only the liability of the parent company, but also of the "sister" or the "daughter" of the company who committed the infringement. See C Kersting, *Liability of Sister Companies and Subsidiaries in European Competition Law*, in *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht (ZHR)*, 2018, 182, *8*, p. 1-25.

6 Court of Justice, Case 48-69, *Imperial Chemical Industries Ltd. v Commission of the European Communities*, 14.07.1972, §132. With regard to groups of companies, as B. Cortese, *Piercing the Corporate Veil in EU Competition Law: The Parent Subsidiary Relationship and Antitrust Liability*, in B. Cortese (ed.), *EU Competition Law Between Public and Private Enforcement*, Kluwer Law International, Croydon, 2014, pp. 73-93, noted, the concept of economic unit was first adopted in the case of *Beguelin Import* (1971) as a "shield", in order to "exclude intra-group agreements from the scope of Article 85 EEC when the subsidiary, 'although having separate legal personality, enjoys no economic independence' ".According to the economic unit doctrine, different companies belonging to the same group were allowed to pursue a unitary commercial strategy without committing any infringement of EU competition law. Some years later, in the case of *Imperial Chemical Industries v. Commission*, the European Court started to use the same doctrine in an "offensive way", as a "sword", to recognize the EC Commission's jurisdiction over a parent company which was not established in the European Union, where its subsidiary was established. It is important to note that in case the parent company is responsible for its subsidiary's conduct, the fine can be increased for deterrence and based on the turnover of the entire group, even if only one subsidiary was involved in the infringement. The ten percent limit on the amount of the fine, imposed by Regulation 1/2003, Article 23, is applied to the group turnover, and not to the turnover of the subsidiary, see J. Temple Lang, *How Can the Problem of the Liability of a Parent Company for Price Fixing by a*

Thereafter, the parental liability doctrine was soon adopted in order to impose fines over parent companies, if they exert a decisive influence over the market conduct of their subsidiary, "having regard in particular to the economic, organizational and legal links between those two legal entities"[7].

In the well-known case of *Akzo Nobel v. Commission*, the Court of Justice introduced a presumption "where a parent company has a 100% shareholding in a subsidiary which has infringed the Community competition rules". In this case, since the parent company has the *possibility* to exercise a decisive influence over the conduct of the subsidiary, there is a "rebuttable presumption that the parent company *does in fact* exercise a decisive influence over the conduct of its subsidiary"[8] (emphasis added).

In practice, the "Azko presumption" has never been rebutted upon substantial grounds. However in more recent cases, the European Courts have overruled the contested decision on procedural grounds, finding the Commission had not adequately addressed the arguments put forward by the companies in order to rebut the Azko presumption.[9]

Wholly-owned Subsidiary be Resolved?, in *Fordham International Law Journal*, 2014, vol. 37, issue 5,. p. 1481 – 1524.

Interestingly, M. Bronckers, *No Longer Presumed Guilty: The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law*, in *World Competition: Law and Economics Review*, vol. 34, no. 4, 2011, p. 554, has noted: "it is not obvious that the parental liability presumption is proportionate to the in itself laudable goal of ensuring the effective implementation of competition law. The effects this presumption may have really go quite far: not only piercing the corporate veil but also enabling an increase of the fine as the parent's presumably larger global turnover will now operate as a ceiling.102 Why would a fine imposed on a subsidiary for its infringing conduct normally not be good enough to ensure the effective implementation of EU competition law?".

7 European Court of Justice, Case C-152/19 P, *Deutsche Telekom AG v. European Commission*, 25.03.2021, §74. The existence of such decisive influence can be derived by the instructions the parent company gave to its daughter company or by a body of consistent evidence, as the presence of senior managers of the parent company on its subsidiary's board of directors, the provision of staff of the parent company to its daughter company, or the "regular reporting, by a subsidiary to its parent company, of detailed information relating to its commercial policy"; see V. Ufbeck, *Vicarious Liability in Groups of Companies and in Supply Chains – Is competition Law leading the Way?*, in *Market and Competition Law Review*, 2019, v. III, n. 2, p. 112 – 113.

8 Court of Justice, C-97/08 P., *Akzo Nobel NV and Others v Commission of the European Communities*, 17.09.2009, §60. Therefore, in those circumstances, "it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary"; see §61.

9 In the case of Air Liquide, the General Court has recognized the Commission did not address "the arguments put forward by the applicant", failing to "set out the reasons why the Commission is of the view that the matters submitted by the applicant were inadequate to rebut the presumption at issue"; see General Court, Case T185/06, *L'Air liquide, société anonyme pour l'étude et l'exploitation des procédés Georges Claude v. European Commission*, ECLI:EU:T:2011:275, 16.06.2011, §67. In this case, the applicant put forward specific arguments to ground the

Despite several criticism,[10] the European Courts have continued to adopt the parental liability doctrine and the "Azko presumption" in the domain of competition law and, recently, they have expanded the presumption as well.

In the *Goldman Sachs* case,[11] the General Court of the European Union applied the "Azko presumption" whereas the indirect partner's shareholdings was

daughter's company independence; among others: there was not a directory interlocking, since none of the subsidiary's director was a member of the applicant's management board; the subsidiary's board of directors and it managing directors had widely powers; the subsidiary company had its own departments, namely a commercial department, a marketing department, a human resources department, an IT department and an accounts department; the subsidiary company independently managed the shareholding in several other companies; directives and broad guidelines concerning price were issued exclusively by subsidiary's directors, decisions on a price offered to a specific customer were taken by operatives, under the sole control of their directors, which has been demonstrated by internal correspondence and customer visit reports provided to the Commission; there was no evidence the parent company gave any instructions to the subsidiary. In a similar way, in the case of Elf Aquitaine, the Court of Justice overruled the impugned decision since it did not state the reasons for the Commission's position; see European Court of Justice, Case C-521/09, *Elf Aquitaine SA, v. European Commission*, 29.11.2011, §160. It is important to note the Elf Aquitaine judgment followed the Menarini case before the European Court of Human Rights (European Court of Human Rights, 27.9.2011*, A. Menarini Diagnostics Srl v. Italy*), in which the ECHR recognized the Italian competition law as criminal matter. On the reverse, in many case law, the arguments submitted by the parent companies have been considered insufficient to rebut the Azko presumption. For instance, in Servizio Elettrico Nazionale s.p.a. case, the Court held "that the claim that the decentralised decision-making processes within the group resulted in ENEL merely having the role of promoting synergies and best practices among the various companies in the group does not, in any event, appear to be sufficient to rebut that presumption in so far as, inter alia, it does not preclude ENEL representatives from being members of [the subsidiary's] decision-making bodies or even guarantee that members of those bodies were functionally independent of the parent company"; see European Court of Justice, Case C-377/20, *Servizio Elettrico Nazionale SpA and Others v Autorità Garante della Concorrenza e del Mercato and Others*, 12.05.2022, §122. An accurate analysis of the relevant case law is provided by L. Solek – S. Wartinger, *Parental Liability: Rebutting the Presumption of Decisive Influence*, in *Journal of European Competition Law & Practice*, vol. 6, n. 2, 2015, p. 73-84 and in J. Temple Lang, *How Can the Problem of the Liability of a Parent Company for Price Fixing by a Wholly-owned Subsidiary be Resolved?*, cit. The legal concept of parental liability has been heavily criticized as being not rebuttable; see B. Leupold, *Effective Enforcement of EU Competition Law Gone Too Far? Recent Case Law on the Presumption of Parental Liability*, in *European Competition Law Review*, 2013, pp. 570 – 582; J. Temple Lang, *How Can the Problem of the Liability of a Parent Company for Price Fixing by a Wholly-owned Subsidiary be Resolved?*, cit.; J. Joshua – Y. Botteman – L. Atlee, *'You Can't Beat the Percentage': The Parental Liability Presumption in EU Cartel Enforcement*, in *European Anitrust Review*, 2012; J. D. Briggs – S. Jordan, *Presumed Guilty; Shareholder Liability for a Subsiadiry's infringements of Article 81 EC Treaty*, in *Global Competition Litigation Review*, 2009, p. 203–204.

10 Several Authors have pointed out that the parental liability doctrine is inconsistent with the principle of personal liability and the presumption of innocence, as explained in paragraph 4 of this paper.

11 General Court, Case T-419/14, *The Goldman Sachs Group, Inc. v European Commission*, 12.07.2018.

lower than 84.4.% of the equity, recognizing it controlled 100% of the voting rights associated with that company's shares – so that, according to the General Court, the indirect partner was "in a situation similar to that of a sole owner of the […] group".[12]

Moreover, in the *Skanska* case, the Court of Justice affirmed the parental liability doctrine should be applied in the field of *civil labiality* for damage claims based on a competition law infringement.[13]

Ultimately, under Directive (EU) 2019/1, the parental liability doctrine has been extended to national competition authorities, since they "should be able to apply the notion of undertaking to find a parent company liable, and impose

12 *The Goldman Sachs Group, Inc. v European Commission*, cit., §48. According to the European Courts, the presumption of actual exercise of decisive influence should be applied "in the case where a parent company is able to exercise all the voting rights associated with the shares of its subsidiary, since that parent company is in a position to exercise total control over the conduct of that subsidiary without any third parties, in particular other shareholders, being in principle able to object to that control" (see §52). In this case the General Court of the European Union upheld a 7.3 milions fine on Goldman Sachs, which was the indirect partner of Prysmian group of companies, in respect of an infringement committed by the Prysmian group itself.

13 European Court of Justice, Case C-724/17, *Vantaan kaupunki v Skanska Industrial Solutions Oy and Others*, 14.03.2019. See C. Kersting, *Liability of Sister Companies and Subsidiaries in European Competition Law*, in *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht (ZHR) 182,* 2018, 8; B. Freund, *Reshaping Liability – The Concept of Undertaking Applied to Private Enforcement of EU Competition Law*, in *GRUR International*, 2021, vol. 70, issue 8, p. 731–743. As pointed out by V. Ufbeck, *Vicarious Liability in Groups of Companies and in Supply Chains – Is competition Law leading the Way*?, in *Market and Competition Law Review*, 2019, vol. 3, no. 2, p. 144, "prior to the *Skanska* decision, it was uncertain whether the doctrine of the economic unit, as developed with regard to administrative liability, would also apply to civil liability incurred by the subsidiary". It is worthy of note that the Directive 2014/10/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, makes use of the term "undertaking" in the definition of 'infringer' provided by Article 2. See J. L. da Cruz Vilaça – M. M. Pereira, *Parental Liability under the ECN+ Directive and its Extension to Accessory Sanctions*, online version available: https://www.concorrencia.pt/sites/default/files/imported-agazines/CR_42-4304_EN.pdf. In particular, in case of succession of legal entities, the Court affirmed the acquiring corporates are accountable when all the shares of the companies, which have participated in a prohibited cartel, were acquired by other companies, dissolving the former companies and carrying on their commercial activities. In the subsequent *Sumal* case, related to a claims brought against a subsidiary of a parent company that has been found to infringe EU competition law, the Court stated: "actions for damages for infringement of those rules (private enforcement) are an integral part of the system for enforcement of those rules, which are intended to punish anticompetitive behaviour on the part of undertakings and to deter them from engaging in such conduct" and it "follows that the concept of 'undertaking', within the meaning of Article 101 TFEU, which constitutes an autonomous concept of EU law, cannot have a different scope with regard to the imposition of fines by the Commission under Article 23(2) of Regulation No 1/2003 as compared to actions for damages for infringement of EU competition rules"; see European Court of Justice (Grand Chamber), Case C-882/19, *Sumal, S.L. v Mercedes Benz Trucks España*, S.L., 6.10.2021.

fines on it, for the conduct of one of its subsidiaries, where the parent company and its subsidiary form a single economic unit".[14]

3. Corporate and parental liability in the field of EU environmental criminal law.

As seen above, the parental liability doctrine has enjoyed considerable success in the field of EU competition law.

For this reason, it appears important to inquire whether the parental liability doctrine should be applied – or *could* be applied – in the domain of European environmental criminal law.

As previously discussed, under the Environmental Crime Directive, Member States are mandated to ensure that serious infringements of EU law regarding the protection of the environment, as listed in Article 2 and 4 of the Directive, constitute criminal offences.

In this case, the Directive provides both individual and *corporate* criminal liability, since Article 6, paragraph 1, reads as follows: "Member States shall ensure that legal persons can be held liable for offences referred to in Articles 3 and 4 where such offences have been committed for their benefit by any person who has a leading position within the legal person, acting either individually or as part of an organ of the legal person".

Furthermore, under Article 6, paragraph 2, "Member States shall also ensure that legal persons can be held liable where the lack of supervision or control, by a person referred to in paragraph 1, has made possible the commission of an offence referred to in Articles 3 and 4 for the benefit of the legal person by a person under its authority".

In other terms, the Environmental Crime Directive requires Member States to hold corporations liable in the case, among others factors, "the lack of supervision or control" – by a person who has a leading position within the company – have "made possible the commission of an offence […] by a *person* under its authority" (emphasis added).

Notably, under Article 8b of Directive 2009/123/EC amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties

14 According to recital (46). The Directive "sets out certain rules to ensure that national competition authorities have the necessary guarantees of independence, resources, and enforcement and fining powers to be able to effectively apply Articles 101 and 102 TFEU". See Article 1 of the Directive 1/2019 adopted on 11 December 2018 by European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. In this scenario, Article 13 disciplines "fines on undertakings and associations of undertakings", providing "Member States shall ensure that for the purpose of imposing fines on parent companies and legal and economic successors of undertakings, the notion of undertaking applies".

for infringements, legal persons shall be held liable whether the crime has been committed "by any *natural* person acting either individually or as part of an organ of the legal person, and who has a leading position within the structure of the legal person" or "where lack of supervision or control by a *natural* person referred to in paragraph 1 has made the commission of a criminal offence […] possible for the benefit of that legal person by a *natural* person under its authority" (emphasis added).

Therefore, it is possible to argue that, under the so-called Environmental Crime Directive, Member States shall ensure legal person can be held liable when the crime is committed by either a natural or a *legal* person under its authority.

Throughout this provision, one could consider Member States shall held parent companies liable whether the illicit conduct has been committed within their subsidiaries – if the crime has been made possible by the lack of supervision or control of a person who has a leading position within the legal entity.

In addition, under Article 7, the offences must be punishable by effective, proportionate and dissuasive penalties. Therefore, types and levels of the penalties are not indicated under the Directive.

In this scenario, if a Member State does not ensure any effective form of parental liability, European Courts could consider the national provisions do not satisfy the requirement of EU law that penalties for environmental offences be effective and dissuasive, if parent companies are allowed to use their subsidiaries to externalize hazardous activities and escape criminal liability.

To ensure effective and dissuasive penalties under Article 7 of the Directive, therefore, European Courts could require national courts to apply the parental liability doctrine, as developed in the field of EU competition law.

The application of the parental liability doctrine, as a form of strict liability, could guarantee the full effect of EU environmental law, limiting corporations in abusing their limited liability.

Although the application of parental liability doctrine could serve several desirable purposes – for instance, it could in fact reduce the risk of exploitation of limited liability by multinational companies –, the following arguments suggest the parental liability doctrine may not be applied under the domain of environmental criminal law.

4. Critical issues of the "parental liability doctrine" in the field of EU competition law.

In the field of competition law, many Authors have pointed out that the parental liability doctrine is inconsistent with the fundamental guarantees of criminal law, as it violates the principle of personal liability and the presumption of innocence.

These arguments have been firstly developed under the domain of EU competition law, as it is considered criminal in nature according to the well-established Engel criteria.[15]

(a) The principle of personal liability

As regards the principle of personal liability, many criticisms have been raised about the nature of the parental liability in the field of competition law.

Especially after the Azko case[16], many authors have pointed out that the parent company is held responsible for the infringement committed within its subsidiary solely because it controls or has the possibility of control the daughter company's commercial policy[17].

In other terms, since the European Courts do not require any participation of the parent company in the illicit conduct of its subsidiary, the parental liability, as a control-based liability, is "strict" or "not based on fault".

---

15 In the Menarini case, the European Court of Human Rights recognized the Italian competition law as criminal matter; see European Court of Human Rights, 27.9.2011*, A. Menarini Diagnostics Srl v. Italy*.

16 As noted by R. Oliveira – S. Estima Martins, *EU Competition Law and Parental Liability: The Akzo II Case*, in K. Lenaerts, N. Piçarra, C. Farinhas, A. Marciano and F. Rolin (eds), *Building the European Union. The Jurist's View of the Union's Evolution*, Bloomsbury Publishing Oxford, 2021 p. 548 "unlike in early cases where some kind of direct participation of the aren't company seemed to be required in order to impute the infringement to it, in more recent cases, particularly after the *Azko I* and subsequent case law, derive from the possibility of exerting decisive influence over the conduct of the subsidiary in general terms – and not specifically the conduct leading to the infringement – which would be presumed to actually take place in cases where the parent owned 100 per cent of the subsidiaries' shares".

17 The criticism towards the parent company's liability as it is strict, is extensive and unanimous. See, e.g., C. Koenig, *An Economic Analysis of the Single Economic Entity Doctrine in EU Competition Law*, in *J. Comp. L. & Econ.*, 2017, p. 286; B. Leupold, *Effective Enforcement of EU Competition Law Gone Too Far?: Recent Case Law on the Presumption of Parental Liability*, in *Eur. Competition L. Rev.*, 2013, vol. 34, p. 570 – 582; S. Thomas, *Guilty of a Fault that One Has Not Committed: The Limits of the Group-Based Sanction Policy Carried Out by the Commission and the European Courts in EU-Antitrust Law*, *in J. Eur. Competition L. & Prac.*, 2012, p. 11-28; S. Burden – J. Townsed, *Whose Fault Is It Anyway? Undertaking and the Imputation of Liability*, in *Competition L.J.*, 2013, vol. 12, no. 3, p. 294-303; J. Joshua – Y. Botteman – L. Atlee, *'You Can't Beat the Percentage': The Parental Liability Presumption in EU Cartel Enforcement*, in *Eur. Antitrust Rev.*, vol. 13, no. 3, 2012, p. 3-9; M. Bronckers, *No Longer Presumed Guilty: The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law*, in *World Competition: Law and Economics Review*, vol. 34, no. 4, 2011, p. 535-570. V. Ufbeck, *Vicarious Liability in Groups of Companies and in Supply Chains – Is competition Law leading the Way?*, in *Market and Competition Law Review*, vol. 3, no. 2, 2019, p. 112, affirms: "since there is no requirement that the parent company was involved or had knowledge or ought to have had knowledge of the infringements committed by its subsidiary". According to K. Hofstetter – M. Ludescher, *Fines against Parent Companies in EU Antitrust Law. Setting Incentives for "Best Practice Compliance"*, in *World Competition*, 2010, vol. 33, no. 1, p. 2, the parental liability espouses the parent company to a system of "guilt by association".

Therefore, it "does not matter whether the parent company was involved in the antitrust infringement. Neither does it matter whether the parent could have prevented the violation of the competition law, or whether it knew or could have known about the violation. The only point that matters is the parent company's relation to the subsidiary".[18]

The European Court has tackled this criticism, affirming that "it should be borne in mind that, according to settled case-law, the concept of 'undertaking' covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. On that point, the Court has stated that in this context the term 'undertaking' must be understood as designating an economic unit even if in law that economic unit consists of several natural or legal persons, and that if such an economic entity infringes the competition rules, it is for that entity, consistently with the principle of personal liability, to answer for that infringement".[19]

This justification seems to be unsatisfactory, since the Court resolved the issue concerning the violation of the principle of personal liability, referring the infringement to the undertaking itself, as a new legal subject under Article 101 TFEU.

However, as noted by Oliveira and Martins, "only natural or legal persons have personality. Economic entities do not. An infringement is a violation of an obligation established by law; since only natural or legal persons may be bound by obligations, only they can violate them".[20]

For this reason, "placing the expression 'single economic entity' and 'principle of personal liability' in the same sentence seems […] a contradiction difficult to overcome". [21]

---

18 C. Koenig, *Comparing Parent Company Liability in EU and US Competition Law*, in *World Competition*, 2017, vol. 41, n. 1, p. 73 – 74.

19 European Court of Justice, Case C-521/09, *Elf Aquitaine SA, v. European Commission*, 29.11.2011, § 53.

20 R. Oliveira – S. Estima Martins, *EU Competition Law and Parental Liability: The Akzo II Case*, cit., p. 147. C. Koenig, *An Economic Analysis of the Single Economic Entity Doctrine in EU Competition Law*, in J. *Comp. L. & Econ.*, 2017, p. 286 notes that "the Court consistently speaks of the conduct of the subsidiary being 'imputed' to the parent company. Furthermore, in recent decisions concerning the reduction of fines, the Court has explained that the parent's liability is 'purely derivative and secondary and thus depends on that of its subsidiary'. Thus, the language used by the European Court is ambiguous. It can be understood as holding the parent company liable for having infringed the antitrust law itself (*direct liability)*, or for simply being the parent of the infringing subsidiary (*indirect, control-based liability*)". J. Temple Lang, *How Can the Problem of the Liability of a Parent Company for Price Fixing by a Wholly-owned Subsidiary be Resolved?*, in *Fordham International Law Journal*, 2014, vol. 37, no. 5, 1481 – 1524, p. 87 argues that the application of human rights "cannot be made dependent on the application of a 'special' approach to legal personality, according to the choice and convenience of the prosecutor".

21 R. Oliveira – S. Estima Martins, *EU Competition Law and Parental Liability: The Akzo II Case*, cit., p. 147.

(b) The presumption of innocence

Almost unanimously, jurists and legal scholarship have criticized the "Azko presumption" as it is in fact not rebuttable, introducing a "*probatio diabolica*" upon the parent company.[22]

In particular, Koening has affirmed that the "Azko presumption is today firmly established, despite allegations that is in fact not rebuttable, and thus infringes upon fundamental procedural rights, such as the presumption of innocence".[23]

On the contrary, the Court of Justice has stated the presumption "does not infringe the right to be presumed innocent that is guaranteed by Article 48(1) of the Charter or the principles of *in dubio pro reo* and *nullum crimen, nulla poena sine lege*. The presumption that a parent company exercises decisive influence over its subsidiary when it holds all or almost all of the capital in the subsidiary does not lead to a presumption of guilt on the part of either one of those companies and therefore does not infringe either the right to be presumed innocent or the principle of *in dubio pro reo*".[24]

In fact, as seen above, in paragraph 2, the European Courts have in some cases annulled the impugned decisions since they did not contain an adequate assessment of the appellant's allegations.

On the other hand, it is important to underline that the "goal of refuting the presumption is reached by demonstrating the complete autonomy of the subsidiary's conduct on the market and not only by proving that the subsidiary was independent as regards the infringing behaviour. It should not be forgotten that the parent company is rebutting the existence of a single undertaking and not its direct participation in the infringement".[25]

Once again, therefore, the critic issue regards the accordance of the parental liability doctrine with the principle of culpability, since the parent company

22 J. Temple Lang, How *Can the Problem of the Liability of a Parent Company for Price Fixing by a Wholly-owned Subsidiary be Resolved?*, cit.; J. Joshua, Y. Botteman, L. Atlee, *'You Can't Beat the Percentage': The Parental Liability Presumption in EU Cartele Enforcement*, cit., p. 7-8; I. Vanderborre, T. C. Goetz, *Rebutting the Presumption of Parental Liability – A Probatio Diabolica?*, in *The International Comparative Legal Guide to: Cartels & Leniency*, 2012, p. 17; J.D. Briggs – S. Jordan, *Presumed Guilty; Shareholder Liability for a Subsidiary's infringements of Article 81 EC Treaty*, in *Business Law International*, 2007, vol. 8, n. 1, p. 1-37; L. Bettina, *Effective enforcement of EU competition law gone too far? Recent case law on the presumption of parental liability*, in *European Competition Law Review*, 2013, vol. 34, no. 11, p. 570-582, M. Bronckers, *No Longer Presumed Guilty: The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law*, in *World Competition: Law and Economics Review*, 2011, vol. 34, no. 4, p. 535-570.

23 C. Koenig, *Comparing Parent Company Liability in EU and US Competition Law*, cit., p. 74.

24 European Court of Justice, Case C 625/13 P, *Villeroy & Boch AG, v. European Commission*, 26.01.2017, §149.

25 L. Solek – S. Wartinger, *Parental Liability: Rebutting the Presumption of Decisive Influence*, in *Journal of European Competition Law & Practice*, 2015, vol. 6, n. 2, p. 77.

has to demonstrate it has not had any control over its subsidiary's commercial policy, rather than over the illicit conduct.

4.1. Critical issues of the "parental liability doctrine" in the field of environmental criminal law.

As seen above, in the field of competition law, many Authors have criticized the parental liability doctrine as being inconsistent with the principle of personal liability and with the presumption of innocence.

The same arguments, therefore, suggest the parental liability doctrine should not be applied in the domain of EU environmental criminal law, as environmental corporate liability should be considered criminal as well – taking into account the severity of the penalties foreseen in many Member States and their deterrence aim.

In this field, moreover, corporate liability seems to be even closer to the core of criminal law, since it is intrinsically related to an *individual liability*, which is formally and substantially *criminal*. For this reason, the criminal-head guarantees should necessarily apply with their full stringency. [26]

In addition, one should bear in mind that, while competition law is primarily enforced by the Commission, environmental criminal law is exclusively enforced by national authorities.

Therefore, national courts could be reluctant to apply the parental liability doctrine as developed in the field of EU competition law, intending to safeguard the recalled guarantees, which are strongly affirmed in many Member States.

Ultimately, it is worthy of note that the parental liability doctrine has not been yet considered in respect of the more recent case law of the European Court of Human Rights on the culpability principle.

In particular, in the well-known G.I.E.M. case[27], the Grand Chamber of the European Court of Human Rights stated that "the rationale of the sentence and punishment, and the 'guilty' concept (in the English version) and the corresponding notion of 'personne coupable' (in the French version), support an interpretation whereby Article 7 requires, for the purposes of punishment, an intellectual link (awareness and intent) disclosing an element of liability in the

26 As it is well known, under ECHR case law, the criminal-head guarantees will not necessarily apply with their full stringency in all cases, in particular those that do not belong to the traditional categories of criminal law such as tax surcharges proceedings (European Court of Human Rights, Grand Chamber, *Jussila v. Finland*, 23.11.2006, § 43), minor road traffic offences proceedings (European Court of Human Rights, *Marčan v. Croatia*, 10/07/2014, § 37) or proceedings concerning an administrative fine for having provided premises for prostitution (European Court of Human Rights, *Sancakh v. Turkey,* 15/05/2018, §§ 43-52).

27 European Court of Human Rights, Grand Chamber, 28.06.2018, *G.I.E.M. S.R.L. and Others v. Italy*, §116.

conduct of the perpetrator of the offence, failing which the penalty will be unjustified. Moreover, it would be inconsistent, on the one hand, to require an accessible and foreseeable legal basis and, on the other, to allow an individual to be found 'guilty' and to 'punish' him even though he had not been in a position to know the criminal law owing to an unavoidable error for which the person falling foul of it could in no way be blamed".[28]

Therefore, the European Court of Human Rights has interpreted the principle of legality in criminal law as "a prohibition on punishing a person where the offence has been committed by another".

Recently, this principle was examined before the European Court of Justice, by Advocate General M. Priit Pikamäe in the case of Criminal proceedings against Delta Story.[29]

The Advocate General affirmed that, in the context of corporate liability, the culpability principle is assured throughout the application of the *identification theory*, as the legal person is held liable for the crime committed or permitted by a natural person who has a leading position within the corporate.

Therefore "the natural person concerned is not a third party in respect of the legal person but is the legal person, in which they identifies their self" and "it is a liability for one's own act by reason of a relationship of representation and not of substitution"[30].

For this reason, the legal person can be held liable for the crime committed by a natural person whereas an element of liability is established in its representatives, who identify the legal person itself.

As applied in domain of competition law, on the reverse, the parental liability doctrine implies parent company is strictly held liable for the infringement committed within one of its subsidiaries, even if no element of liability has been proven in respect of the parent company's representatives.

4.2. Different fields and different disciplines.

Ultimately, the extension of the parental liability doctrine in the field of the environmental criminal law appears inconsistent with the specific features of European environmental law.

In other terms, inquiring whether or not the parental liability doctrine should be applied under environmental law, one should bear in mind that this doctrine

28 European Court of Human Rights, Grand Chamber, 28.06.2018, *G.I.E.M. S.R.L. and Others v. Italy*, §116.

29 Opinion of Advocate General Pikamäe, delivered on 9 June 2022, case C-203/21, Criminal proceedings against Delta Story 2003.

30 Conclusions of the Advocate General M. Priit Pikamäe, 9.06.2022, *Procédure pénale contre DELTA STROY 2003*; §49. Please, note the text has been translated by the Author, since the document is not available in English.

has been developed in the domain of competition law and it has been shaped by the features of this field.

Therefore, the exportation of the parental liability doctrine would be inconsistent with the principles, rules, and enforcement of EU environmental law.

(a) Principles

As seen above, in the domain of competition law, the parental liability doctrine has been developed as a general rule, which has been extended to civil liability for infringement of EU competition rules.

On the reverse, considering the entire domain of environmental law, it should be noted that under the Environmental Liability Directive, which regards the prevention and remedying of environmental damage, the corporate liability is envisaged as a fault-based liability – as strict liability is foreseen in exceptional cases, as it will be showed below.

The Environmental Liability Directive – i.e. Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage – is based, among others, on the 'polluter pays' principle.[31]

In particular, as the Court of Justice affirmed in the case of Raffinerie Mediterranee, "it is apparent from Article 3(1)(b) of Directive 2004/35 that, where there is damage to protected species and habitats caused by any occupational activities other than those listed in Annex III to the directive, the directive applies, provided that it is established that the operator *has been at fault or negligent*. On the other hand, there is no such requirement where one of the occupational activities listed in Annex III has caused environmental damage, namely – as defined in Article 2(1)(a) to (c) of the directive – damage to protected species and habitats, and water and land damage"[32] (emphasis added).

---

31 Under the EU Environmental Liability Directive, the liable person is the "operator", defined as "any natural or legal, private or public person who operates or controls the occupational activity". Therefore, it has been questioned if the concept of "operator" encompasses the parent company which indirectly controls the occupational activity. According to L. Bergkamp – B. Goldsmith (editors), *The EU Environmental Liability Directive: a Commentary*, Oxford University Press, Croydon, 2013, p. 53, if the term "operator" would be referred to parent companies "they would have a incentive to discontinue corporate environmental and health programmes and compliance auditing, which might be deemed indicia of 'control'". See also L. Bergkamp, *The Environmental Liability Directive and Liability of Parent Companies for Damage Caused by Their Subsidiaries ('Enterprise Liability')*, in *European Company Law*, 2016, vol 13, n. 5, p 185: if "the parent company does not exercise direct operational control, treating it as an operator can have adverse effects. It would have a strong incentive not to be deemed to be 'controlling' the activities of their its subsidiaries"; S. Cassotta – C. Verdure, *La Directive 2004/35/CE sur la responsabilité environnementale : affinement des concepts et enjeux économiques*, in *Revue du droit de l'Union Européenne*, 2012, n. 2, p. 242.

32 Court of Justice, Grand Chamber, 9.3. 2010, *Raffinerie Mediterranee (ERG) SpA, Polimeri Europa SpA and Syndial SpA v Ministero dello Sviluppo economico and Others*, Case C-378/08.

Therefore, the 'polluter pays' principle embodies a liability which is fault based for the purposes of the Environmental Liability Directive, except for those occupational activities listed in Annex III of the Directive.[33]

For this reason, the adoption of the parental liability doctrine in the field of environmental criminal law, as a form of vicarious or strict liability, would be discontinuous with this principle, which generally requires a fault-based liability for prevention and remedying of environmental damage.

In addition, since criminal penalties are usually more severe than the administrative sanctions, it should be considered that criminal liability should not be stricter or less guaranteed than the administrative one.

(b) Rules

It is worthy of note that, under competition law, the parental liability doctrine meets certain limits or adjustments under the Commission's guidelines on the method of setting fines.

In the field of competition law, the power of imposing fines on undertakings or associations of undertakings when they infringe Article 81 or 82 of the Treaty, belongs to the Commission, pursuant to Article 23(2)(a) of Regulation No 1/2003.

In exercising its power to impose such fines, the Commission enjoys a wide margin of discretion; thus, starting from January 1998, the Commission has published guidelines on the method of setting fines.

In this context, the paragraph 35 of the Guidelines on the method of setting fines published in the Official Journal of the European Union on 1 September 2006, provides:

"In exceptional cases, the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on the mere finding

33 Therefore, according to S. Cassotta – C. Verdure, *La Directive 2004/35/CE sur la responsabilité environnementale : affinement des concepts et enjeux économiques*, cit. p. 242, under the Environmental Liability Directive, the liability of the parent company for the pollution caused by one of its subsidiaries could be envisaged exclusively through a statutory provision, which modify the Directive itself. In addition, V. Ufbeck, *Vicarious Liability in Groups of Companies and in Supply Chains*, cit., p. 122-123, pointed out that "competition law plays a key role in the development of the common, inner market. Accordingly, market efficiency arguments are used to apply the concept of an undertaking as a 'shield' and exclude the application of competition law rules on 'inner group company agreements' and as a -logical – corollary to support the use of the concept of an undertaking as a 'sword' to establish parental liability for competition law infringements. Outside the area of competition law, the concept of the undertaking is not called for to have a 'shield function' and in general market efficiency arguments can only more indirectly support parental liability for workers' injuries and environmental damage". Notwithstanding these arguments, the Author points out as well reasons underpinning parental liability which might speak in favour of extending parental liability to the field of environmental damage.

of an adverse or loss-making financial situation. A reduction could be granted solely on the basis of objective evidence that imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value".

This provision introduces an adjustment mechanism which sets a limit upon the amount of the fine the Commission can impose on parent company, as the penalty can not expose the parent company to consequences which could jeopardise its own economic viability.[34]

Since in the field of environmental criminal law no such limit is provided, the importation of the parental liability doctrine could lead to undesirable results or, even, to overdeterrence, unless such adjustment is imported too.

(c) Enforcement

Regarding the enforcement of European environmental law, it should be noted that environmental law encompasses individual criminal liability, which is not foreseen under EU competition law.

This difference can be significant as, according to Koening, the parental liability doctrine has been developed primarily to ensure "effective deterrence where the primary target of liability – the corporation in the course of whose business the antitrust violation was committed – is underdeterred"[35].

In other terms, holding parent company liable for infringements by subsidiaries "prevents parent companies from opportunistically exploiting limited liability" and "contributes to *general deterrence* (deterring all undertakings from infringing competition law) by increasing parent companies' risk of being fined for competition law infringements and allowing for the imposition of higher fines"[36].

Interestingly, Koening notes this deterrence effect can be achieved as well with other enforcement instruments, such as individual liability of managers and employees.

Under this perspective, one could argue the parental liability doctrine was developed in the field of competitive law as a form of strict liability since no individual liability was foreseen for the same illicit conduct.

---

34 These criteria is followed by national authorities too, since the "inability to pay as a circumstance to be considered in imposing the fine is taken into account by most competition authorities" (see International Competition Network, *Setting of Fines for Cartels in ICN Jurisdictions, Report to the 7th ICN Annual Conference, Kyoto, April 2008*, European Communities, 2008, Italy). See for instance the Italian Antitrust Authority's Guidelines on calculating fines for serious breaches of national or EU competition law, Art. VIII "Capacità contributiva".

35 C. Koenig, *Comparing Parent Company Liability in EU and US Competition Law*, in *World Competition*, 2017, vol. 41, n. 1, p. 70.

36 C. Koenig, *Comparing Parent Company Liability in EU and US Competition Law*, cit., p. 92.

On the reverse, in the field of environmental law, parental liability could be shaped in a different way – e.g. as a fault-based liability – since the "individual liability helps to maintain incentives for efficient behavior"[37].

5. The emerging of a new form of parental liability in the context of EU environmental law.

As anticipated above, in the field of EU environmental law, it is emerging a new form of corporate and parental liability, which is a fault-based liability, related to compliance failure.

This form of corporate liability is embodied in the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, adopted on 23 February 2022.[38]

The Proposal provides large companies, as listed in Article 2[39], with an obligation of deploying *due diligence process* for human rights and environmental risks and impacts.

The due diligence process implies: *(i)* identifying actual or potential adverse impacts on human right and environment; *(ii)* preventing and mitigating such potential adverse impacts, *(iii)* bringing actual adverse impacts to an end[40].

---

37 C. Koenig, *Comparing Parent Company Liability in EU and US Competition Law*, cit., p. 71.

38 It is worthy of note that on June 1st 2023, the European Parliament adopted amendments to the proposal for a Directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937.

39 With regard companies which are formed in accordance with the legislation of a Member State, Article 2, paragraph 1 sets out the following conditions: "(a) the company had more than 500 employees on average and had a net worldwide turnover of more than EUR 150 million in the last financial year for which annual financial statements have been prepared; (b) the company did not reach the thresholds under point (a), but had more than 250 employees on average and had a net worldwide turnover of more than EUR 40 million in the last financial year for which annual financial statements have been prepared, provided that at least 50% of this net turnover was generated in one or more of the following sectors: (i) the manufacture of textiles, leather and related products (including footwear), and the wholesale trade of textiles, clothing and footwear; (ii) agriculture, forestry, fisheries (including aquaculture), the manufacture of food products, and the wholesale trade of agricultural raw materials, live animals, wood, food, and beverages; (iii) the extraction of mineral resources regardless from where they are extracted (including crude petroleum, natural gas, coal, lignite, metals and metal ores, as well as all other, non-metallic minerals and quarry products), the manufacture of basic metal products, other non-metallic mineral products and fabricated metal products (except machinery and equipment), and the wholesale trade of mineral resources, basic and intermediate mineral products (including metals and metal ores, construction materials, fuels, chemicals and other intermediate products)".

40 Under Article 3, lett b), "'adverse environmental impact' means an adverse impact on the environment resulting from the violation of one of the prohibitions and obligations pursuant to the international environmental conventions listed in the Annex, Part II". Notably,

Under Article 1 of the Proposal, the due diligence obligation should be fulfilled by corporations in respect to – among others – "the operations of their subsidiaries".

In case of violations of this obligation, the Proposal provides administrative and civil liability, under Articles 20[41] and 22.[42]

Under the mentioned provisions, therefore, parent companies should prevent adverse environmental impacts in respect of their subsidiaries' activities.

Moreover, in order to fulfill this duty, parent companies should carry out a due diligence process, providing their subsidiaries with a *proper organization* to identify, prevent, mitigate and bring to an end any adverse impacts on environment and human rights.[43]

---

according to the amendments adopted by the European Parliament on June 1st 2023, companies should also: establish or participate in a mechanism for the notification and out-of-court handling of complaints, monitor and verify the effectiveness of actions taken in accordance with the requirements set out in the Directive, communicate publicly on their due diligence and consult relevant stakeholders throughout this process.

41 Under Article 20, paragraph 1 ("Sanctions"), "Member States shall lay down the rules on sanctions applicable to infringements of national provisions adopted pursuant to this Directive, and shall take all measures necessary to ensure that they are implemented. The sanctions provided for shall be effective, proportionate and dissuasive". Notably, according to the amendments adopted by the European Parliament on June 1st 2023, sanctions include measures such as "naming and shaming", taking a company's goods off the market, or fines of at least 5% of the net worldwide turnover.

42 Under Article 22 ("Civil liability"), "Member State shall ensure that companies are liable for damages if: (a)they failed to comply with the obligations [of preventing potential adverse impacts (Article 7) and bringing actual adverse impacts to an end (Article 8)]; (b)as a result of this failure an adverse impact that should have been identified, prevented, mitigated, brought to an end or its extent minimised through the appropriate measures laid down in Articles 7 and 8 occurred and led to damage".

43 According to the amendments adopted by the European Parliament on June 1st 2023, Article 4a introduces a specific provision on "Due diligence support at group level". Article 4a reads at follow: "1. Member States shall ensure that parent companies may perform actions which can contribute to their subsidiaries falling under the scope of this Directive meet their obligations set out in Articles 5 to 11 and Article 15. This is without prejudice to the civil liability of subsidiaries in accordance with Article 22. 2. The parent company may perform actions which contribute to fulfilling the due diligence obligations by the subsidiary company in accordance with paragraph 1, subject to all the following conditions: (a) the subsidiary provides all the relevant and necessary information to its parent company and cooperates with it; (b) the subsidiary abides by its parent company's due diligence policy; (c) the parent company accordingly adapts its due diligence policy to ensure that the obligations laid down in Article 5(1) are fulfilled with respect to the subsidiary; (d) the subsidiary integrates due diligence into all its policies and risk management systems in accordance with Article 5; (e) where necessary, the subsidiary continues to take appropriate measures in accordance with Articles 7 and 8, as well as continues to perform its obligations under Articles 8a, 8b and 8d; (f) where the parent company performs specific actions on behalf of the subsidiary, both the parent company and subsidiary clearly and transparently communicate so towards relevant stakeholders and the public domain; (g) the subsidiary integrates climate in its policies and risk management systems in accordance with Article 15".

Ultimately, parent companies should be held liable in case of adverse impacts, if they fall to fulfill their organizational duty.

Under these terms, the Proposal for a Directive on Corporate Sustainability Due Diligence introduces a new form of parental liability, which is fault-based and related to a compliance deficiency.[44]

In particular, under this Proposal, parental liability can be established if an element of liability is recognized in respect of the parent companies' representatives, who have failed in providing a proper organization for the subsidiaries' activities.

Therefore, since this form of parental liability assures the respect of the culpability principle, its application appears desirable in the field of environmental criminal law too – safeguarding the recalled guarantee the parental liability doctrine seems to violate.

In addition, this ultimate form of parental liability would overcome an another critic issue some Authors[45] have pointed out in respect of the parent liability doctrine, which does not incentive parent companies in implementing a compliance organization, whose principal goal is preventing subsidiaries in committing crimes.

In particular, Hofstetter and Ludescher have noted that, since "parent companies are consistently held liable for the behavior of their subsidiaries, regardless of whether or not they had made every conceivable effort to ensure compliance", "fundamental structures embedded in company law are disregarded and deterrence as the ultimate purpose of cartel fines is being defeated"[46].

On reverse, parental liability "should primarily be aimed at deterrence and thereby take into account the principle of fault" as "a deficiency in [the parent company's] compliance organization"[47], to effectively prevent illicit conducts.[48]

---

44 In addition, it is worthy of note that, whereas the adverse impact on environment constitutes an environmental offence, the Directive would provide the parent company with an actual duty to prevent the commission of such offence, even in respect of its subsidiaries – since the due process obligation would encompass the duty to *prevent* this crime too. On a national level, therefore, these provisions could in fact extend corporate criminal liability from the subsidiary to the parent company, whereas the latter did not prevent the offence it has the duty to.

45 See K. Hofstetter – M. Ludescher, *Fines Against Parent Companies in EU Antitrust Law – Setting Incentives for 'Best Practice Compliance'*, in *World Competition: Law and Economics Review*, 2010, vol. 33, no. 1, p. 1-19.

46 K. Hofstetter – M. Ludescher, *Fines Against Parent Companies in EU Antitrust Law*, cit., p. 16.

47 K. Hofstetter – M. Ludescher, *Fines Against Parent Companies in EU Antitrust Law*, cit., p. 2.

48 This point of view is not unanimously shared, since other scholars have concluded as well that strict liability does incentive parent companies in enforcing compliance, as "the setup of a proper compliance organization is the only tool parent companies have in their hands in order to prevent infringements of EU Competition law and ultimately their own liability"; see L. Solek – S. Wartinger, *Parental Liability: Rebutting the Presumption of Decisive Influence*, cit., p. 84. Similarly see G. Skinner, *Transnational Corporations and Human Rights. Overcoming Barriers to*

For these reasons, it would be desirable EU legislature take a further step in the field of environmental criminal law, implementing a fault-based parental liability, as the one embodied in the Proposal for a Directive on Corporate Sustainability Due Diligence.

This form of parental liability would assure the principle of culpability and incentive parent companies to provide their subsidiaries with a proper organization to prevent the commission of environmental crimes.

Judicial Remedy, 2020, Cambridge University Press, Padstow, p. 87; and C. Koenig, *An Economic Analysis of the Single Economic Entity Doctrine in EU Competition Law*, p. 326.

Making Nature's Voice Heard in Criminal Proceedings

Jakob Hajszan
University of Vienna
ORCID: https://orcid.org/0000-0001-5291-1410
DOI: 10.54103/milanoup.151.c201

As nature and parts thereof do not enjoy legal personhood in almost all EU-Member states, criminal cases concerning crimes against the environment and other crimes that cause harm to nature do not involve victims who could participate in the proceedings and demand compensation. This lack of participation and representation differs from other areas of procedural law: As litigation and participation of NGOs or other members of the public on behalf of the environment is quite frequent in environmental law and certain legal instruments such as the Aarhus Convention or certain EU-Directives even obligate states to grant participation rights in some administrative proceedings. However, some countries already allow environmental NGOs or other members of the public, including individuals, to participate in criminal proceedings on behalf of the environment. Furthermore, a planned new EU-Directive on environmental criminal law might bring an obligation to grant the public concerned appropriate rights to participate in proceedings regarding environmental crimes.

Keywords: Criminal Environmental Law; Procedural law and the Environment; Collective remedies; Victim-status; NGO-participation; Public participation; Aarhus Convention

Information on ongoing proceedings – 4.5. What rights and remedies should be granted? – 4.5.1. Rights and remedies during the investigative phase – 4.5.2. Rights and remedies during the trial phase – 5. Conclusion.

1. Introduction

The number of cases of so-called climate litigation grew over the past years. Most of them involve humans claiming compensation because of environmental damages or demanding measures to restore or protect the environment and combat climate change. However, apart from those lawsuits brought by humans on behalf of themselves or future generations, cases are also brought on behalf of nature, certain landscapes or individual animals. In such cases, humans act as nature's representatives because nature not only cannot represent itself but neither constitutes a legal person in most countries and therefore cannot participate in court proceedings. Accordingly, criminal cases concerning crimes against the environment and other crimes that cause harm to nature – contrary to cases involving humans as injured parties – do not involve victims who could participate in the prosecution and demand compensation.

While litigation and participation in proceedings on behalf of the environment are quite frequent in environmental law and certain legal instruments obligate states to grant participation rights in some administrative proceedings, participation in criminal proceedings is rather uncommon. However, some countries already allow environmental NGOs (eNGOs) to participate in criminal proceedings on behalf of the environment and a planned new EU-Directive on environmental criminal law might bring an obligation to grant the public concerned appropriate rights to participate in proceedings regarding environmental crimes (see below 3.3.2).

2. Legal personhood or representation of nature?

2.1. Representation of nature in (criminal) proceedings internationally

Some countries outside the European Union recognised nature or certain landscapes as legal persons either by law or through court decisions. Because of their legal personhood, the authorities and courts have to regard nature's rights in their decision-making process and nature – through representatives – can participate in court proceedings. Most famously, Ecuador's constitution recognises and guarantees the right of nature to restoration and to integral respect

for its existence, maintenance and regeneration.[1] According to Art. 71 of the Ecuadorian constitution, all persons and communities may invoke these rights before the courts or other authorities.[2] However, this broad authorisation does not apply to criminal proceedings, because only directly affected persons are recognised as parties. As a result, in the first publicly known criminal case where an eNGO tried to participate on behalf of nature, a court denied the eNGO's request to represent sharks caught in illegal fisheries and only allowed them to submit *amicus curiae* letters.[3] Other countries legally recognise the personhood of nature, e.g. Bolivia, Uganda and some municipalities in the United States,[4] or certain parts of nature, e.g. New Zealand[5] and recently Spain, which recognised the legal personhood of a coastal saltwater lagoon called '*mar menor*'[6]. Furthermore, the Constitutional Court of Colombia recognised the personhood of the *Atrato River*[7] and the High Court of Uttarakhand in India recognised two glaciers and two rivers as legal persons.[8]

---

1 L. Kotzé, P. Villavicencio Calzadilla, *Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador*, in *TEL*, 2017, vol. 6, p. 401-433, p. 422 ss; N. Pain, R. Pepper, *Can Personhood Protect the Environment? Affording Legal Rights to Nature*, in *Fordham Int'l L J*, 2021, vol. 45, p. 315-378, p. 335.

2 L. Krämer, *Rights of Nature and Their Implementation*, in *JEEPL*, 2020, vol. 17, p. 47-75, p. 50; C. Kaufmann, P. Martin, *Can Rights of Nature Make Development More Sustainable? Why some Ecuadorian Lawsuist Succeed and Others Fail*, in *World Development*, 2017, vol. 92, p. 130-142, p. 132; M. Whittemore, *The Problem of Enforcing Nature's Rights under Ecuador's Constitution: Why the 2008 Environmental Amendments Have No Bite*, in *Pac Rim L & Pol'y J*, 2011, vol. 20, p. 659-692, p. 668.

3 C. Kaufmann, P. Martin, *Can Rights of Nature Make Development More Sustainable? Why some Ecuadorian Lawsuist Succeed and Others Fail*, cit., p. 136; E. Wagner, W. Begrthaler, M. Krömer, L. Grabmair, *Eigenrechtsfähigkeit der Natur*, Jan Sramek Verlag, Vienna, 2022, p. 19 s.

4 E. Wagner et al, *Eigenrechtsfähigkeit der Natur*, cit., p. 23 ss with references.

5 D. Boyd, *The Rights of Nature*, ECW, Toronto, 2017, p. 131 ss; in depth K. Sanders, *Beyond Human Ownership'? Property, Power and Legal Personality for Nature in Aotearoa New Zealand*, in *J Envtl L*, 2018, vol. 30, p. 207-234, p. 207 ss.

6 Ley 19/2022, de 30 de septiembre, para el reconocimiento de personalidad jurídica a la laguna del Mar Menor y su cuenca, BOE-A-2022-16019, cf. M. Bertel, *Spanien: Per Gesetz die größte Salzwasserlagune Europas „Mar Menor" als Rechtssubjekt anerkannt*, in *Nachhaltigkeitsrecht*, 2023, vol. 3, p. 102-104; B. Soro Mateo, S. Álvarez, *The Mar Menor Lagoon Enjoys Legal Standing: and now, what?*, in *Verfassungsblog*, 14.10.2022. On the legislative proceedings leading to the granting of legal personhood T. Vicente Giménez, E. Salazar Ortuño, *La iniciativa legislativa popular para el reconocimiento de personalidad jurídica y derechos propios al Mar Menor y su cuenca*, in *Revista Catalana de Dret Ambiental*, 2022, vol. 13, p. 1-38.

7 Constitutional Court of Colombia, T-622/16, 10.11.2016; P. Wesche, *Rights of Nature in Practice: A Case Study on the Impacts of the Colombian Atrato River Decision*, in *J Envtl L*, 2021, vol. 33, p. 531-556.

8 High Court of Uttarakhand, Writ Petition (PIL) No. 126 of 2014, *Mohd. Salim v State of Uttarakhand & others*, 20.03.2017; Writ Petition (PIL) No. 140 of 2015, *Lalit Miglani v State of Uttarakhand & others*, 30.03.2017. The Supreme Court of India later stayed the *Mohd. Salim*-ruling, cf. E. O'Donnell, *At the Intersection of the Sacred and the Legal: Rights for Nature in Uttarakhand, India*, in *J Envtl L*, 2018, vol. 30, 135-144, p. 136 ss.

2.2. Granting rights to nature itself or others on nature's behalf?

Granting rights to nature itself would be of high symbolic power because it would create a new legal person and underline the importance of nature and its protection. The recognition of nature as a legal person however requires rules on the extent of its rights and obligations as well as provisions regarding the representation of nature or the environment. Therefore, the environment would need humans to represent it and exercise the rights on its behalf.[9]

Another possibility to ensure the safeguarding of environmental interests in criminal proceedings is the granting of participation rights to individuals, eNGOs or other legal entities. This already is the case in several fields of environmental law in Europe as required by Art. 9 of the Aarhus Convention (AC),[10] EU-law[11] or certain national laws, e.g. the French Environmental Code[12]. Furthermore, the European Commission intends to introduce compulsory public participation in environmental criminal law.[13] This option requires less altercation of laws as already recognised legal persons would receive procedural rights. Therefore, this option would be easier to implement into the current legal order. In addition, it would not require additional rules on representation as individuals or NGOs are able to represent themselves, the latter through their members. Since granting procedural rights to existing persons – natural or legal – on behalf of the environment also achieves sufficient representation, granting rights to nature is not necessary.[14]

---

9 E.g. J. Bétaille, *Rights of Nature: Why it Might Not Save the Entire World*, in *JEEPL*, 2019, vol. 6, p. 35-64, p. 55 s.

10 UN Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 2161 UNTS 447; on the obligations under Art. 9 AC, I. Hadijiyianni, *Multi-Level Governance in Action: Access to Justice in National Courts in Light of the Aarhus Convention*, in *Europ Public L*, 2020, vol. 26, p. 889-920, p. 892 ss; A. Danthinne, M. Eliantonio, M. Peeters, *Justifying a presumed standing for environmental NGOs: A legal assessment of Article 9(3) of the Aarhus Convention*, in *RECIEL*, 2022, vol. 31, p. 411-420, p. 412 s.

11 E.g. Art. 11 Directive 2011/92/EU, OJ L 26/2012, 1; Art. 10, 12 Regulation (EC) No 1367/2006, OJ L 264/2006, 13; R. Caranta, *Environmental NGOs (eNGOs) or: Filling the Gap between the State and the Individual under the Aarhus Convention,* in R. Caranta, A. Gerbrandy, B. Müller (eds.), *The Making of a New European Legal Culture: the Aarhus Convention*, Europa Law Publishing, Zutphen, 2017, p. 373-404; p. 413 ss.

12 Cf. J. Bétaille, *Rights of Nature: Why it Might Not Save the Entire World*, cit., p. 51; on possibilities to claim damages E. Fasoli, *The Possibilities for Nongovernmental Organizations Promoting Environmental Protection to Claim Damages in Relation to the Environment in France, Italy, the Netherlands and Portugal*, in *RECIEL*, 2017, vol. 26, p. 30-37.

13 Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC, COM(2021) 851.

14 P. Elder, *Legal Rights for Nature: The Wrong Answer to the Right(s) Question*, in *Osgoode Hall L J*, 1984, vol. 22, p. 285-295, p. 290 ss; and in depth J. Bétaille, *Rights of Nature: Why it Might Not Save the Entire World*, cit., 51.

3. Representation of the environment within the European Union

While until today – apart from Spain – no European countries have recognised the legal personhood of nature or natural areas, there are certain forms of participation on behalf of the environment within the European Union: On one hand, because of the ratification of the AC by the EU,[15] Art. 9 (3) AC in conjunction with Art. 216 (2) TFEU obligates Member States to guarantee that the public concerned has access to justice in certain matters of environmental law.[16] This obligation mainly concerns matters of administrative law regarding the protection of nature or activities potentially affecting the environment but may also apply to criminal law under certain circumstances (see 3.3.1.). On the other hand, some European countries also allow the participation of eNGOs or individuals in certain criminal proceedings.[17]

3.1. Existing possibilities of participation on the behalf of the environment in selected European countries

In Spain Art. 125 of the Spanish Constitution as well as Art. 101 of the Spanish Criminal Procedure Act guarantee the right of every Spanish citizen to join criminal proceedings as a so-called *popular accuser* even if they are not affected by the respective crime in any way (*acción popular*).[18] According to the jurisprudence of the Spanish Constitutional Court, the term *citizen* in Art. 125 of the Constitution includes not only individuals but also legal entities, therefore also eNGOs.[19] However, the popular accuser cannot claim civil damages, this right is only granted to a person directly affected by the respective crime

15 A. Danthinne, M. Eliantonio, M. Peeters, *Justifying a presumed standing for environmental NGOs: A legal assessment of Article 9(3) of the Aarhus Convention*, cit., p. 411.

16 Regarding the implementation into different legal systems cf. D. Dragos, B. Neamtu, *Access to Justice under the Aarhus Convention: the Comparative View,* in R. Caranta, A. Gerbrandy, B. Müller (eds.), *The Making of a New European Legal Culture: the Aarhus Convention*, cit., p. 373-404; I. Hadijiyianni, *Multi-Level Governance in Action: Access to Justice in National Courts in Light of the Aarhus Convention*, cit., p. 898 ss.

17 L. Schalk-Unger, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, in *Opolskie Studia Administracyjno-Prawne*, 2022, vol. 20, p. 211-236, p. 231.

18 J. Ridaura Martinez, *La Acción Popular: ¿Uso o Abuso de un Derecho?*, in *Teoría y Realidad Constitucional*, 2022, num. 50, p. 219-246, p. 221 ss; P. Crespo Barquero, *Artículo 125*, in M. Rodríguez-Piñero y Bravo Ferrer, M. Casas Baamonde (dir.), *Comentarios a la Constitución Española Tomo II*, Agencia Estatal Boletín Oficial del Estado, Madrid, 2018, p. 781-794, p. 789.

19 Spanish Constitutional Tribunal, STC 53/1983, 20.06.1983; STC 241/1992, 21.12.1992; STC 34/1994, 31.1.1994; N. Jiménez Cardona, *La acción popular en el sistema procesal español*, in *Revista Chilena de Derecho y Ciencia Política*, 2014, vol. 5, p. 47-89, p. 61; E. Martínez García, *Las partes acusadoras*, in J.-L. Gómez Colomer, S. Barona Vilar (cord.), *Proceso Penal*, tirant lo blanch, Valencia, 2nd ed. 2022, p. 73-88, p. 84 s.

who can join the proceedings as a so-called particular accuser.[20] Generally, the popular accuser cannot maintain the charge if both the public prosecutor and the particular accuser choose to drop their charges.[21] If, however – because the crime in question protects meta-individual or collective rather than individual legal interests and therefore lacks directly affected victims who could join the proceedings as particular accusers – a case does only involve the public prosecutor and the accused, the popular accuser can insists on the opening of oral proceedings.[22] The right to start proceedings as a popular accuser is reiterated by Art. 6 of the act granting legal personhood to the '*mar menor*' lagoon, which states that any person can bring an action before the courts in order to enforce the rights of the '*mar menor*'.

Under French law, recognised eNGOs fulfilling certain requirements[23] can participate as civil parties in criminal proceedings regarding environmental crimes as stipulated by Art. L142-2 of the French Environmental Code.[24] Furthermore, according to Art. L142-3 eNGOs can act on behalf of multiple natural persons if they suffered individual damages caused by the same person and originating from the same acts. In addition to eNGOs Art. 142-4 empowers local authorities to participate as civil parties if crimes against the environment directly or indirectly inflict damage on territory forming part of their jurisdiction.[25]

In Italy, the Supreme Court of Cassation opened the possibility for eNGOs to participate in criminal proceedings.[26] Therefore, eNGOs can constitute themselves as a so-called civil party (*parte civile*) according to Art. 76 of the Italian Code of Criminal Procedure if they not only pursue an interest merely

20 E. Martínez García, *Las partes acusadoras*, cit., p. 85 s; N. Jiménez Cardona, *La acción popular en el sistema procesal español*, cit., p. 65 s.

21 Spanish Supreme Court, STS 1045/2007, 17.12.2007; STS 8/2010, 20.01.2010; P. Crespo Barquero, *Artículo 125*, cit., p. 788; J. Ridaura Martinez, *La Acción Popular: ¿Uso o Abuso de un Derecho?*, cit., p. 240.

22 Spanish Supreme Court, STS 54/2008, 08.04.2008; STS 8/2010, 20.01.2010; P. Crespo Barquero, *Artículo 125*, cit., p. 789; R. Sánchez Gómez, *El Ejercicio de la Acción Popular a Tenor de la Jurisprudencia del Tribunal Supremo*, in *Lex Social*, 2016, vol. 6, p. 284-293, p. 288; J. Tomé García, *La acción popular en el proceso penal: situación actual y propuestas para una futura reforma*, in J. Chozas Alonso (cord.), *Los sujetos protagonistas del proceso penal*, Dykinson, Madrid, 2015, p. 263-314, p. 304.

23 Cf. J. Bétaille, *Rights of Nature: Why it Might Not Save the Entire World*, cit., 51.

24 F. Bianco, A. Lucifora, G. Vagliasindi, *Fighting Environmental Crime in France: A Country Report*, 2015, p. 43.

25 M. Lucas, *La représentation de la nature par les collectivités territoriales devant le juge judiciaire à la lumière de l'article L.142-4 du Code de l'environnement*, in *VertigO*, 2015, Hors-Série 22.

26 E.g. Italian Supreme Court of Cassation (Cass.), 3rd Penal Section, n. 46746, 02.12.2004; 1st Penal Sec., n. 44528, 31.10.2019; 6th Penal Sec., n. 20517, 25.05.2022; F. Bianco, A. Lucifora, G. Vagliasindi, *Fighting Environmental Crime in Italy: A Country Report*, 2015, p. 39. Critical N. Furin, E. Sbabo, *L'intervento delle associazioni ambientaliste nel processo penale: Persone offese e non parti civili*, in *Cassazione penale*, 2012, p. 2735-2750, p. 2748 s.

connected to the public interest of protecting the environment but made the protection of the environment the true purpose of their work and constituent element of the association. In those cases, the collective and diffuse interest in environmental protection becomes subjective and personified.[27] NGOs fulfilling those requirements, such as the *WWF*,[28] may claim compensation for damages directly affecting a subjective right inherent to the pursued aim.[29] Compensation for environmental damages only affecting the general public interest in the preserving of the environment on the other hand exclusively belong to the state.[30] Other territorial entities can only participate as a civil party if they suffer further and concrete pecuniary or non-pecuniary damages because of the criminal act against the environment (such as expenses for waste-removal or damages to the entity's image).[31]

3.2. Possibilities for NGOs to participate on behalf of the environment in Austria

3.2.1. Participation in criminal proceedings under the Code of Criminal Procedure

The Austrian Code of Criminal Procedure (StPO) specifies who can participate in criminal proceedings and what rights and remedies are at the disposal of the different participants. In addition to the prosecutor and the defendant, others can only be active participants if they are victims as defined by the law. § 66 StPO lists the rights of victims in criminal proceedings which include the right to inspect the prosecution and court files, the right to receive information on the progress of the proceedings, the right to file a petition for the continuation of discontinued investigations, and the right to be present at the hearing and to ask questions.[32] In case the public prosecutor violates those rights, victims can raise an objection pursuant to § 106 StPO and if the court breaches said rights victims can file a complaint according to § 87 StPO. If victims chose to participate as a private party (*Privatbeteiligter*) and demand compensation for

27 Cass., 3rd Penal Sec., n. 46746, 02.12.2004; 3rd Penal Sec., n. 19439, 23.05.2012; 1st Penal Sec., n. 44528, 31.10.2019; 4th Penal Sec., n. 13843, 07.05.2020; M. Pelissero, *Reati contro l'ambiente e il territorio*, Giappichelli, Torino, 2019, p. 470 s.

28 Cass., 6th Penal Sec., n. 20517, 25.05.2022.

29 Cass., 3rd Penal Sec., n. 14828, 16.04.2010; 3rd Penal Sec., n. 19439, 23.05.2012; 1st Penal Sec., n. 44528, 31.10.2019; 4th Penal Sec., n. 13843, 07.05.2020; M. Pelissero, *Reati contro l'ambiente e il territorio*, cit., p. 471.

30 Cass., 3rd Penal Sec., n. 41015, 22.11.2010; 3rd Penal Sec., n. 20150, 16.05.2016; 3rd Penal Sec., n. 911, 12.01.2018; 1st Penal Sec., n. 44528, 31.10.2019.

31 Cass., 3rd Penal Sec., n. 20150, 16.05.2016; 3rd Penal Sec., n. 911, 12.01.2018; M. Pelissero, *Reati contro l'ambiente e il territorio*, cit., p. 470.

32 H. Hinterhofer, P. Oshidari, *System des österreichischen Strafverfahrens*, Manz, Vienna, 2017, para. 6.156 s; R. Kier, § 65 StPO, in H. Fuchs, E. Ratz (eds.), *Wiener Kommentar zur Strafprozessordnung*, Manz, Vienna, 2022, para. 2.

their damages, they enjoy the rights of victims and certain other rights as provided by § 67 (6) StPO. Those additional rights contain the right to request the introduction of evidence, the right to be notified of planned oral hearings, the right to file a petition for the continuation of proceedings discontinued by the court and to appeal acquittals.[33] Private parties can furthermore uphold the indictment as a subsidiary prosecuting party pursuant to § 72 (1) StPO if the public prosecutor withdraws the previously filed indictment. Apart from those parties, the StPO only confers singular rights to the public, such as the right to denounce crimes according to § 80 StPO or listen to public oral hearings as stipulated by § 228 StPO.[34]

3.2.2. eNGOs as victims?

In order to play an active role during trails, eNGOs would have to be *victims*, which would also enable them to join as a private party. § 65 Num. 1 StPO defines the term of victim and in principle also includes legal persons.[35] § 65 StPO describes three groups of victims: Lett. a and b concern victims of crimes involving physical violence or threats and regards relatives of a person allegedly killed because of a criminal act and are not applicable on crimes only damaging the environment. Consequently, eNGOs or other people trying to act on behalf of the environment can only be victims according to lett. c. This definition encompasses anyone who might have suffered damage due to a criminal offense (first alternative) or whose legal interests protected by criminal law might have been infringed by said act (second alternative). However, doctrine and case law interpreted this provision narrowly and restrictively in order to secure a timely conducting of criminal investigations and possible trials.[36]

The first alternative of § 65 Num. 1 lett. c StPO requires the existence of a damage, which means a claim under civil law. This claim may be either pecuniary or non-pecuniary. In the case of damages not covered by the protective purpose of the criminal provision (indirect damage), only losses that are explicitly compensable under civil law give rise to the status of victim.[37] Hence, eNGOs or individuals would be considered victims if they suffer direct damages caused

33 H. Hinterhofer, P. Oshidari, *System des österreichischen Strafverfahrens*, cit., para. 6.183.

34 L. Schalk-Unger, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 218.

35 Austrian Supreme Court of Justice (OGH), 17 Os 9/14y, 06.03.2014; Higher Regional Court (OLG) Vienna, 18 Bs 244/11f, 10.10.2011 (unofficial English translation); L. Schalk-Unger, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 219.

36 OLG Vienna, 18 Bs 244/11f, 10.10.2011; 22 Bs 97/12v, 15.03.2012; R. Haumer, § 65 StPO, in A. Birklbauer, R. Haumer, R. Nimmervoll, N. Wess (eds.), *Linzer Kommentar zur Strafprozessordnung*, Verlag Österreich, Vienna, 2020, para. 3; R. Kier, § 65 StPO, cit., para. 7.

37 OLG Vienna, 18 Bs 244/11f, 10.10.2011; R. Kier, § 65 StPO, cit., para. 22; L. Schalk-Unger, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 219.

by crimes against the environment. This would be the case if a criminal act affects land, plants or animals owned by the NGO or natural person.[38] Those damages fall within the scope of protection of the criminal offenses against the environment (§§ 180–183 Criminal Code [StGB]), because they not only protect the environment but furthermore the financial interest of those bearing compulsory costs of conservation, protection and restoration measures.[39] Furthermore, even the killing of wild animals might lead to the recognition of the status of victim because of a direct damage, e.g. the damage suffered by the operator of a national park legally obliged to replace the animal.[40] The financial interests of those who voluntarily remove pollution and restore the environment or expenses made by NGOs investigating environmental crimes on the other hand lay outside the scope of protection.[41]

In addition to persons suffering damages because of a criminal act, § 65 Num. 1 lett. c StPO further grants victim status to a person, who does not have a claim under civil law against the perpetrator, but whose other legal interests protected by criminal law may have been infringed.[42] In addition to breaches of individual legal interests, the violation of general legal interests – such as the protection of the environment or the administration of justice – can potentially lead to victim status in the sense of criminal procedure law, if the criminal act also affects the position of individuals. Thus, a person who is wrongly accused is a victim of the crime of false accusation (§ 297 StGB), even though this provision protects the administration of justice.[43] However, the crimes against the environment in §§ 180–183 StGB protect the environment's function as a source of human life[44] and – such as the offenses in § 7 of the Trade in Endangered Species Act[45] – the public's idealistic interest in the preservation of certain species[46] as well as ecosystems[47] and are therefore

38 L. Schalk-Unger, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 219.

39 B. Koller, §§ 181f, 181g StGB, cit., para. 22; L. Schalk-Unger, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 220.

40 OGH, 6 Ob 229/16v, 22.12.2016.

41 OGH, 7 Ob 47/97f, 26.02.1997; OLG Vienna, 18 Bs 244/11f, 10.10.2011; L. Schalk-Unger, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 220.

42 G. Kirschenhofer, § 65 StPO, in G. Schmölzer, T. Mühlbacher (eds.), *StPO Band 1*, LexisNexis Vienna, 2nd ed. 2021, para. 6; R. Kier, § 65 StPO, cit., para. 7.

43 R. Haumer, § 65 StPO, cit., para. 18 with references.

44 S. Reindl-Krauskopf, F. Salimi, *Umweltstrafrecht*, Verlag Österreich, Vienna, 2013, para. 9.

45 B. Mascha, J. Molterer, § 7 ArtHG 2009 – eine Betrachtung des illegalen Artenhandels aus strafrechtlicher Sicht, in Österreichische Jurist:innenzeitung, 2020, p. 962-974, p. 963 ss.

46 OGH, 6 Ob 229/16v, 22.12.2016.

47 B. Mascha, J. Molterer, § 7 ArtHG 2009 – eine Betrachtung des illegalen Artenhandels aus strafrechtlicher Sicht, cit., p. 963; S. Reindl-Krauskopf, F. Salimi, *Umweltstrafrecht*, cit., para. 8.

safeguarding a general legal interest.[48] Individual interests are only co-protected in rare cases.[49] Aside from the impairment of a legal interest, case law further requires a particular personal and concrete impact on the person who claims victim status.[50] The larger the group against which the offence in question is allegedly directed, the less likely this is to be the case.[51] In view of the large number of natural and legal persons who pursue objectives related to the protection of the environment, a mere ideological interest in the protection of the environment or animals does not constitute a sufficiently concrete and personal affectedness.[52] Even if certain circumstances, such as the eNGO's focus on the protection of the particular natural habitat affected by a criminal act, would constitute sufficient affectedness, this would still not lead to the victim status of eNGOs because of the lack of impairment of an individual legal interest.[53]

Furthermore, according to case law, NGOs cannot base their victim status on Art. 9 (3) AC or the EU-Directives implementing the AC, because these instruments are not directly applicable in Austria and victim status can neither be achieved through an interpretation of national law in line with the AC or the directives, as their wording is vague and leaves a wide margin of discretion to Member States.[54] Therefore, it is only in very rare cases and under strict conditions that § 65 StPO grants victim status to eNGOs.[55]

3.2.3. Right to inspect files?

In addition to victims, according to § 77 (1) StPO, any other person may inspect files on ongoing investigations and proceedings if they can prove a legitimate legal interest. However, if overriding public or private interests outweigh the interest in inspecting the files, the request must be denied.[56] A legitimate interest exists only if it has a basis in the legal order and exceeds a mere

48 S. Reindl-Krauskopf, F. Salimi, *Umweltstrafrecht*, cit., para. 9; L. Schalk-Unger, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 222.

49 See OGH, 6 Ob 229/16v, 22.12.2016.

50 E.g. OLG Vienna, 18 Bs 244/11f, 10.10.2011; R. Kier, § 65 StPO, cit., para. 31; L. Schalk-Unger, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 221.

51 OLG Vienna, 18 Bs 244/11f, 10.10.2011; 22 Bs 97/12v, 15.03.2012.

52 OLG Vienna, 18 Bs 244/11f, 10.10.2011; 22 Bs 97/12v, 15.03.2012; L. Schalk-Unger, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 222.

53 L. Schalk-Unger, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 221 s.

54 OLG Vienna, 18 Bs 244/11f, 10.10.2011; 22 Bs 97/12v, 15.03.2012.

55 Aarhus Convention Compliance Committee (ACCC), ECE/MP.PP/C.1/2014/3, 27.09.2013 para. 21.

56 E. Leitner, § 77 StPO, in G. Schmölzer, T. Mühlbacher (eds.), *StPO Band 1*, cit., para. 1 ss.; P. Oshidari, § 77 StPO, in H. Fuchs, E. Ratz (eds.), *Wiener Kommentar zur Strafprozessordnung*, Manz, Vienna, 2019, para. 1 ss.

economic interest or interests of private or public information, decency or ethics.[57] In addition, knowledge of the file must be likely to improve the applicants' position in other criminal, civil or administrative proceedings or to minimise the risk of an infringement of their rights.[58] Since the current Austrian legal system does not contain any provisions granting eNGOs a legitimate interest within the meaning of § 77 (1) StPO, and because in most cases the eNGOs do not participate in other proceedings in which knowledge of the files would improve their position, they are not entitled to inspect the files.[59]

3.3. The Aarhus Convention and possible developments within EU-law

3.3.1. Existing obligation under the Arhus Convention?

As the EU is a signatory to the AC, Member States are bound to comply with Art. 9 (3) AC according to Art. 216 (2) TFEU. This raises the question if said article is applicable on criminal proceedings and therefore obliges states to grant eNGOs access to justice. Art. 9 (3) AC in principle grants participation rights to challenge any act or omission by a private person or public authority that violate laws relating to the environment.[60] However, Art. 2 (2) AC exempts bodies acting in a judicial capacity from the term 'public authority'. Consequently, court rulings and decisions by the public prosecutor are not acts or omissions by public authorities as understood by Art. 9 (3) AC.[61] A possible obligation to grant access to justice in criminal proceedings does therefore only extend to the challenging of acts or omissions violating laws relating to the environment committed by a private person.[62]

Sufficient 'access to justice' requires the possibility to initiate proceedings effectively, participate in proceedings or make use of adequate remedies.[63] The mere right to denounce possible crimes however does not constitute an effective initiation of criminal proceedings.[64] According to the Aarhus Convention

57 OGH, 2 Ob 21/22k, 16.03.2022; OLG Vienna, 22 Bs 97/12v, 15.03.2012; W. Brandstetter, M. Zeinhofer, § 77 StPO, in A. Birklbauer et al, *Linzer Kommentar zur Strafprozessordnung*, cit., para. 5.

58 OLG Vienna, 22 Bs 97/12v, 15.03.2012; P. Oshidari, § 77 StPO, cit., para. 2.

59 OLG Vienna, 18 Bs 244/11f, 10.10.2011; 22 Bs 97/12v, 15.03.2012.

60 D. C. Dragos, B. Neamtu, *Access to Justice under the Aarhus Convention: the Comparative View,* cit., p. 382, 389; A. Ohler, M. Peeters, M. Eliantonio, *How to Represent the Silent Environment? An Update on Germany's Struggle to Implement Article 9 (3) of the Aarhus Convention*, in *JEEPL*, 2021, vol. 18, p. 370-389, p. 373.

61 L. Schalk-Unger, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 214 s.

62 L. Schalk-Unger, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 215.

63 ACCC, ECE/MP.PP/C.1/2016/10, 29.11.2016, para. 85

64 ACCC, ECE/MP.PP/C.1/2014/3, 27.09.2013, para. 59 ss; in-depth L. Schalk-Unger, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 215 s.

Compliance Committee (ACCC) the term of 'law relating to the environment' also includes criminal law provisions aiming at the protection of the environment, such as the environmental crimes stipulated in §§ 180–183b StGB.[65] However, Art. 9 (3) AC does not require state parties to grant the public concerned the right to challenge acts or omissions relating to environmental laws through criminal proceedings as long as there are other possibilities to obtain administrative or judicial review, e.g. through environmental liability proceedings.[66] Consequently, an obligation under Art. 9 (3) AC to allow the public to appeal decisions to terminate criminal proceedings only exists in cases where the public has no other opportunity to initiate proceedings differently.[67]

3.3.2. Directive Proposal COM(2021) 851 and the Council's general approach

While only a few European countries currently allow eNGOs or individuals to participate in criminal proceedings regarding environmental crimes, a proposal for a new directive on the protection of the environment through criminal law contains a first step towards EU-wide public participation. According to Art 14 of the proposal, Member States shall ensure that members of the public concerned have appropriate rights, to participate in proceedings concerning the environmental offenses listed in the directive itself.[68] Art. 2 (4) of the proposal defines the term 'public concerned' and includes persons affected or likely to be affected by the offenses listed in the directive as well as persons having a sufficient interest or maintaining the impairment of a right and eNGOs. Recital 26 further states that Art. 2 (5) and Art. 9 (3) AC[69] have to be taken into account when determining the scope of the term 'public concerned'. However, even

65 ACCC, ECE/MP.PP/C.1/2014/3, 27.09.2013, para. 55; L. Schalk-Unger, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 215.

66 ACCC, ECE/MP.PP/C.1/2016/10, 29.11.2016, para. 77 s; ECE/MP.PP/C.1/2014/3, 27.09.2013, para. 63–65; ECE/MP.PP/2008/5/Add.4, 29.04.2008, para. 28 ss; L. Schalk-Unger, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 222.

67 ACCC, ECE/MP.PP/C.1/2014/3, 27.09.2013 para. 56; L. Schalk-Unger, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 222 s; E. Wagner, W. Bergthaler, S. Fasching, *Umsetzung der Aarhus-Konvention in Umweltverfahren*, Trauner, Linz, 2018, p. 35.

68 P. Sander, S. Tober, *EU-Richtlinienvorschlag zum strafrechtlichen Schutz der Umwelt*, in *Zeitschrift für Wirtschafts- und Finanzstrafrecht*, 2023, vol. 9, p. 23-27, p. 26; L. Schalk-Unger, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 212 s; F. Zeder, *Neue Vorhaben der Union im materiellen Strafrecht, Teil 1: Umweltstrafrecht*, in *Journal für Strafrecht*, 2022, vol. 9, p. 146-150, at 150.

69 Regarding the different terms used in Art. 2 (5) (*public concerned*) and Art. 9 (3) AC – *public* according to Art. 2 (4) – cf. ECJ, C-826/18, *Stichting Varkens in Nood and Others*, 14.01.2021, para. 31 ss; A. Danthinne, M. Eliantonio, M. Peeters, *Justifying a presumed standing for environmental NGOs: A legal assessment of Article 9(3) of the Aarhus Convention*, cit., p. 413; J. Jendrośka,

though the proposal references the AC with regard to the definition of the public concerned, the content of the obligation under Art. 14 of the proposal is different from that of Art. 9 (3) AC. While access to justice within the meaning of Art. 9 (3) AC only includes the right to effectively initiate proceedings regarding acts of private persons that contravene national environmental law (see 3.3.1), Art. 14 of the proposal obliges Member States to grant broader rights of participation: Those may include, but are not limited to, the right to challenge decisions of the public prosecutor or the court. As the proposed Directive mentions the position of the civil party as an example, it can be concluded that the public concerned must also be able to participate actively in the criminal proceedings and to claim damages.

However, in its general approach[70], the Council intends to soften this obligation. Different from the Commission's proposal the text of the general approach only obliges those states whose criminal procedure codes already grant the public concerned certain rights in connection with other crimes.[71] Apart from the group of the Member States concerned, the general approach also limits the scope of the rights to be granted. In contrast to the Commission's proposal, countries would not have to allow the public to participate, for example as a civil party, but only to grant them appropriate procedural rights. The granting of a possibility to claim damages would therefore not be obligatory. The report of the Legal Affairs Committee of the European Parliament on the other hand follows the Commission's proposal and even suggests including information rights for the public concerned in addition to participation rights and implementing measures to facilitate the access to justice.[72]

4. Possible participation of the public concerned in criminal proceedings in the future

4.1. Possibilities of implementation regarding Art. 14 Directive Proposal COM(2021) 851 in Austria

If Art. 14 of the Commission's proposal is adopted, the Austrian legislator would have to reform the rules on standing in criminal proceedings. There are various ways of achieving the than mandatory participation of the public: One would be the granting of victim status in the sense of the Code of Criminal

Access to Justice in the Aarhus Convention – Genesis, Legislative History and Overview of the Main Interpretation Dilemmas, in *JEEPL*, 2020, vol. 17, p. 372-408, p. 406.

70 General approach of the Council of the European Union, ST 16171 2022 INIT, 09.12.2022.

71 Cf. Art. 15 General approach.

72 See the proposed amendments to Art. 14 of the Commission's proposal (Amendments 121-123), Report on the proposal for a directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC, A9-0087/2023, 28.3.2023.

Procedure. To this end, the legislature may introduce a provision granting a civil claim to eNGOs in cases of environmental crimes, which would lead to victim status according to § 65 Num. 1 lett. c first alternative StPO. However, this way would not guarantee broad access to justice if the claim only encompasses investigation costs by eNGOs because the organisations would still have to be affected individually and individuals would be excluded.[73]

Another possibility is the clarification that no impairment of a co-protected legal individual interest is necessary to consider someone a victim under § 65 Num. 1 lett. c second alternative StPO. This could probably be achieved by an Aarhus-compliant interpretation of § 65 StPO,[74] as it has been applied by the Supreme Administrative Court regarding the standing of eNGOs as parties in administrative proceedings concerning EU environmental law[75] since the ECJ's ruling in *Protect*[76]. However, this interpretation would run contrary to the current opinion of the Higher Regional Court of Vienna[77] which stated that victim status cannot be achieved by an Aarhus-compliant interpretation of § 65 StPO.

Another way to comply with the obligation to provide the public concerned with adequate participation rights is to implement a specific provision establishing said rights.[78] Such a provision should include the rights and remedies granted as well as the scope of persons who can exercise these rights, which could be done by referring to other provisions of the Code of Criminal Procedure and to other laws, e.g. the Environmental Impact Assessment Act (UVP-G) which contains the requirements for the official recognition of eNGOs. This option may be preferable as the recognition as victim would not really be fitting and separate provision outlining the scope of rights and enabled persons would provide more clarity.

However, if the provision on public participation were to be adopted as proposed by the Council in its general approach (above 3.3.2), this would not require any changes to the Austrian Code of Criminal Procedure, as the Council's proposal would only apply to states already granting participation rights to the

73 L. Schalk-Unger, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 225 s.

74 L. Schalk-Unger, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 226 s.

75 E.g. Supreme Administrative Court (VwGH), Ra 2015/07/0055, 28.03.2018, para. 40 ss; Ro 2018/10/0010, 20.12.2019 para. 27; Ra 2019/10/0148, 16.02.2021 para. 26 s.

76 ECJ, C-664/15, *Protect*, 20.12.2017. Similar ECJ, C-240/09, *Bown Bear I*, 08.03.2011. Both judgments require national courts to interpret national procedural law in accordance with Art. 9 (3) AC.

77 OLG Vienna, 18 Bs 244/11f, 10.10.2011; 22 Bs 97/12v, 15.03.2012; see 3.3.1. at the end.

78 L. Schalk-Unger, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., 227 s, regarding the right to appeal the termination of criminal investigations.

public and there are currently no procedural rights for the public concerned regarding any criminal offenses in Austria.

4.2. Represented parts of the environment

The offenses against the environment stipulated in the Austrian Criminal Code and the Commission's directive proposal not only protect the environment as a whole but further safeguard specific and separate parts of the environment. Therefore, if Art. 14 of the Commission's proposal would enter into force, the public would not always act on behalf of the whole environment but in some cases also on behalf of smaller parts thereof. For example, the existing § 181h, § 181i StGB (which transposed Art. 3 lett. h of Directive 2008/99/EC into Austrian law) and Art. 3 (1) lett. o of the Commission's proposal criminalise certain conducts harming single habitats within a protected site.[79] Furthermore, § 181f, § 181g StGB (killing of protected wild animals, transposing Art. 3 lett. f Directive 2008/99/EC) and Art. 3 (1) lett. e of the Directive proposal prohibit the killing or possession of a certain number of individuals belonging to a protected species of wild animals or even single wild animals.[80] In such cases, the eNGOs would act on behalf of a very small part of the environment, as it already is the case in some provincial hunting laws.[81]

4.3. Who should participate on behalf of the environment?

If individuals or legal entities are to be granted the right to participate in proceedings concerning environmental crimes, the question of the personal scope of application remains. Moreover, even if nature itself were to be granted procedural rights, it would still need to be represented since it cannot participate in the proceedings itself.[82] When implementing the participation of nature or others on its behalf, there are different possibilities regarding the person able to participate. However, as the requirement of reasonable duration of criminal proceedings must be taken into account, the number of possible participants needs to be narrowed down in order to avoid extensively long proceedings.[83]

---

79 S. Reindl-Krauskopf, F. Salimi, *Umweltstrafrecht*, cit., para. 8, 185 ss.

80 S. Reindl-Krauskopf, F. Salimi, *Umweltstrafrecht*, cit., para. 8, 174 ss.

81 E.g. § 3 Lower Austrian Hunting Act, cf. Provincial Administrative Court (LVwG) Lower Austria, LVwG-AV-1191/001-2019, 02.06.2020; § 54c Carinthian Hunting Act, cf. LVwG Carinthia, KLVwG-1924/4/2021, 19.11.2021; § 53a Tyrolean Hunting Act, cf. LVwG Tyrol, LVwG-2021/18/2929-11, 01.12.2021 regarding the waiving of hunting exemptions.

82 Recital 26 COM(2021) 851; M. Miller, *Environmental Personhood and Standing for Nature: Examining the Colorado River case*, in *UNH L Rev*, 2019, vol. 17, p. 355-377, p. 374.

83 L. Schalk-Unger, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., p. 229. OLG Vienna, 18 Bs 244/11f, 10.10.2011 is also raising concerns regarding extensively long proceedings in case of the participation of eNGOs.

4.3.1. Participation of individuals

Countries granting legal personhood to nature sometimes empower any individual person to initiate – at least civil or administrative – proceedings on behalf of nature.[84] However, the unrestricted possibility of representation of the environment in criminal proceedings by any member of the public could raise certain difficulties. It could make investigations and proceedings inefficient, as a potentially very large number of individuals could participate. Moreover, different participants may express contradictory views and there would be no guarantee of the quality of the contributions. Therefore, the public entitled to intervene needs to be limited.

The Commission's directive proposal attempts such a restriction. However, the requirement of a 'sufficient interest' is very openly phrased and vague. Therefore, it does not really limit the number of possible participants. The scope of this prerequisite should hence be described in detail, e.g. through the restriction to interests recognised by law or the requirement of a geographical link to the areas affected by the respective crime.[85] In addition to a sufficient interest, the impairment of a right could be a condition to grant standing to individuals.[86] These requirements would be an appropriate limit on the number of potential participants and would avoid an excessively large number of parties being involved in the criminal proceedings.

4.3.2. Participation of NGOs

Another possibility to achieve the participation of the public in criminal proceedings regarding environmental crimes is the involvement of specialised and accredited NGOs. In accordance with the AC and the proposal for a new Directive against environmental crimes, the right to participate may be limited to organisations that promote the protection of the environment and meet proportionate requirements under national law.[87] Therefore, the standing in criminal proceedings could require an official recognition by public authorities such as the Minister of the Environment,[88] which in turn requires the fulfilment

84 Cf. C. Kaufmann, P. Martin, *Can Rights of Nature Make Development More Sustainable? Why some Ecuadorian Lawsuist Succeed and Others Fail*, cit., p. 132; M. Whittemore, *The Problem of Enforcing Nature's Rights under Ecuador's Constitution: Why the 2008 Environmental Amendments Have No Bite*, cit., p. 668.

85 Art. 9 (3) AC allows States to lay down criteria that members of the public have to meet in order to enjoy the participation rights.

86 Cf. Art. 2 (4) COM(2021) 851.

87 Cf. Art. 2 (4) of the proposed Directive and Art. 9 (3) AC. Regarding the requirements for NGOs to participate in administrative proceedings in Austria see D. Altenburger, § 19 UVP-G, in D. Altenburger, *Kommentar zum Umweltrecht*, LexisNexis, Vienna, 2nd ed. 2020, para. 68 ss, and in Germany cf. A. Ohler et al, *How to Represent the Silent Environment? An Update on Germany's Struggle to Implement Article 9 (3) of the Aarhus Convention*, cit., p. 377 s.

88 § 19 (7) UVP-G; in Germany the recognition is granted by the German Environment Authority or state authorities if the NGO is only active in one federal state, cf. § 3 (2) and (3) German Environmental Appeals Act.

of certain criteria. Such conditions could be that the organisation has to be active for a substantial time,[89] that it has to be a non-profit organisation[90] and has to pursue certain objectives, such as the protection of the environment in general, of specific components of nature – e.g., water, air or landscapes – and wildlife management.[91] In Italy, NGOs can participate in criminal proceedings if environmental protection is the true purpose of their actions.[92] Austrian law furthermore requires that the respective NGO has at least 100 members.[93] However, the ECJ has set certain limits on membership requirements, finding a 2,000-member threshold[94] excessively high under the previous Environmental Impact Assessment Directive[95].

The limitation of standing to NGOs meeting certain requirements and receiving an accreditation from the authorities could narrow the number of possible participants down. ENGOs have experience in environmental protection and sometimes in litigation. Therefore, the quality of their interventions is likely to be higher than that of individuals. However, the risk of conflicting opinions remains even with empowered NGOs, as different organisations could participate in the same case. If courts were authorised to choose a single representative for each case, this could avoid the problem of different participants. Moreover, as NGOs cannot be obligated to represent nature in criminal proceedings[96] or may not have sufficient financial resources, effective representation is not guaranteed.[97] Despite these concerns, the participation of eNGOs might be a more effective option then the participation of any individual. However, limiting

89 Cf. three years under Art. L141-1 French Environmental Code; § 3 (1) Num. 2 German Environmental Appeals Act or § 19 (6) Num. 3 UVP-G.

90 § 19 (6) Num. 2 UVP-G and § 3 (1) Num. 2 German Environmental Appeals Act, which both refer to the respective national Tax Code regarding the definition of non-profit aims.

91 § 19 (6) Num. 1 UVP-G and § 3 (1) Num. 1 German Environmental Appeals Act require the protection of the environment in general. Art. L141-1 French Environmental Code further specifies the pursued aims.

92 E.g. Cass., 4th Penal Sec., n. 13843, 07.05.2020; M. Pelissero, *Reati contro l'ambiente e il territorio*, cit., p. 470 s. See also 3.1. above.

93 § 19 (6) UVP-G; cf. Austrian Federal Administrative Court (BVwG), W225 2232540-1, 16.09.2021; D. Altenburger, § 19 UVP-G, cit., para. 73; P. Lueger, B. Schmidthuber, *Einbindung der Öffentlichkeit in Umweltverfahren durch Beteiligtenstellung*, in *Nachhaltigkeitsrecht*, 2021, vol. 1, p. 185-194, p. 189.

94 ECJ, C-263/08, *Djurgården*, 15.10.2009.

95 Art. 10a Council Directive 85/337/EEC, OJ L 175/1985, 40 as amended by Directive OJ L 156/2003, 17.

96 E. Wagner et al, *Eigenrechtsfähigkeit der Natur*, cit., p. 142.

97 A. Ohler et al, *How to Represent the Silent Environment? An Update on Germany's Struggle to Implement Article 9 (3) of the Aarhus Convention*, cit., p. 378. The Legal Affairs Committee of the European Parliament tries to address this concern and suggests an amendment to the proposed directive, obligating Member States to facilitate the participation of NGOs and to establish networks of environmental lawyers who could assist the NGOs, Amendment 123 of the Report, A9-0087/2023.

participation rights to recognised environmental NGOs alone would not meet the requirements of Art. 14 of the proposed directive, as the public concerned must also include certain individuals.[98]

4.3.3. Participation of public authorities

An additional possibility to achieve participation on behalf of the environment would be the authorization of public authorities. This would have been the case in Chile where the *defensoria de la naturaleza* could have filed constitutional actions to safeguard nature's rights, if the draft for a new constitution had been accepted. If only one authority is competent to represent nature, there would be no risk of conflicting interventions, as would be the case if the public were able to participate. Furthermore, if public authorities would act on behalf of the environment, the funding of the representatives would be guaranteed. Through sufficient funding the public authorities could provide interventions of a certain technical quality as they could hire experts and afford to employ sufficient and specialised personnel. If the participation rights were to be granted to authorities focused on environmental protection, responsible officials would likely have experience in climate and environmental protection, which in turn would contribute to the quality of interventions. . The competent authorities can also be obliged to act *ex officio*, which would ensure participation.[99] However, particularly in investigations against government officials, the independence of public authorities may be questioned. Therefore, if public authorities should participate in criminal proceedings, they have to be sufficiently funded and independent.

The Austrian legal order already entrusts certain public authorities with the safeguarding of interest of the environment in some administrative proceedings: The Federal Government and the Provinces established authorities called Ombudsman for the Environment (*Umweltanwalt*).[100] According to § 19 (3) UVP-G, they have standing in environmental impact assessment proceedings and are entitled to claim the compliance with provisions serving to protect the environment and appeal administrative decisions.[101] Similarly, according to § 41 (4) of the Animal Protection Act, the provincial Animal Protection Ombudsperson can participate in administrative criminal proceedings regarding transgressions of the Animal Protection Act. They can further inspect court files in criminal proceedings regarding the offense of animal cruelty

98 P. Sander, S. Tober, *EU-Richtlinienvorschlag zum strafrechtlichen Schutz der Umwelt*, cit., p. 26.

99 E. Wagner et al, *Eigenrechtsfähigkeit der Natur*, cit., p. 142.

100 G. Grassl., S. Lampert, *Aktuelle Entwicklungen zur Parteistellung des Umweltanwalts in UVP-Verfahren*, in *Zeitschrift für Verwaltungsgerichtsbarkeit*, 2015, vol. 2, p. 500-504, p. 501.

101 D. Altenburger, § 19 UVP-G, cit., para. 30; G. Grassl, S. Lampert, *Aktuelle Entwicklungen zur Parteistellung des Umweltanwalts in UVP-Verfahren*, cit., p. 501 ss. The ombundsman can also participate in some other environmental matters, cf. M. Pointinger, T. Weber, *Der Umweltanwalt – das unbekannte Wesen?* in *Recht der Umwelt*, 2015, p. 233-240, p. 239.

(§ 222 StGB) as provided by § 41 (8) Animal Protection Act in conjunction with § 77 (1) StPO.[102]

From 1992 to 2010, the Animal Protection Act of the Swiss Canton of Zurich provided for an officially appointed attorney for animal protection in criminal matters who was not part of a public authority but was granted the right to participate in proceedings regarding the violation of animal protection provisions on behalf of the harmed animals.[103] In particular said attorney had the right to request the prosecution regarding certain crimes, to review files, request evidence and appeal court decisions,[104] but did not receive a compensation for their participation in the proceedings.[105] Since the introduction of the new Swiss Code of Criminal Procedure, the Cantons cannot grant private persons standing as a formal party and therefore Zurich abolished the animal protection attorney and could only reintroduce such a position as a public authority.[106]

To a certain degree, the current Austrian Code of Criminal Procedure allows a public authority to intervene in criminal proceedings regarding environmental crimes. In proceedings which do not involve victims in the sense of § 65 Num. 1 StPO the so-called Commissioner for Legal Protection (*Rechtschutzbeauftragter*) can appeal the decision of the public prosecutor to terminate the investigation as stipulated by § 195 StPO.[107] However this right to appeal can only be exercised in proceedings falling into the jurisdiction of the Regional Court siting as a Court of Lay Assessors or as a Court of Jurors, accordingly – apart from some exceptions – the maximum penalty must supersede five years of imprisonment. Therefore, the Commissioner for Legal Protection can only appeal a termination of an investigation in alleged environmental crimes if the proceedings concern certain offenses committed with intent and the offender – at least negligently – caused the death of a person or inflicted serious bodily harm on a larger number of persons (e.g. § 180 (2) in conjunction with § 169 (3) StGB).

If the legislature wanted to allow public authorities to participate in criminal proceedings, it could authorize the respective Ombudsman for the Environment to appeal against the decision to terminate criminal proceedings for crimes against the environment pursuant to § 195 StPO, similar to the Commissioner for Legal Protection, regardless of the maximum penalty. As

102 E. Wagner et al, *Eigenrechtsfähigkeit der Natur*, cit., p. 163 s.

103 A. Goetschel, *Der Zürcher Rechtsanwalt in Tierschutzstrafsachen*, in *Schweizerische Zeitschrift für Strafrecht*, 1994, vol. 112, p. 64–86, p. 75; E. Wagner et al, *Eigenrechtsfähigkeit der Natur*, cit., p. 165.

104 A. Goetschel, *Der Zürcher Rechtsanwalt in Tierschutzstrafsachen*, cit., p. 76 ss.

105 High Court (OGer) Zurich, UK080085, 01.06.2008.

106 Swiss Federal Supreme Court (BGer), 6B_1060/2017, 14.06.2018; 6B_982/2017, 14.06.2018; see also OGer Berne, BK 17 5, 07.07.2017; BK 17 108, 11.07.2017.

107 H. Nordmeyer, § 194, in H. Fuchs, E. Ratz (eds.), *Wiener Kommentar zur Strafprozessordnung*, Manz, Vienna, 2017, para. 16; R. Steiner, § 194 StPO, in A. Birklbauer et al, *Linzer Kommentar zur Strafprozessordnung*, cit., para. 31.

the public prosecution terminates a high number of investigations concerning environmental crimes, this could have an unneglectable potential to help the fight against destruction of the environment.[108] The mere empowerment of public authorities however would not meet the requirements of Art. 14 of the proposed directive, as it would not enable the public concerned to participate.

4.4. Information on ongoing investigations

If eNGOs or others could participate in criminal proceedings concerning environmental offenses, another issue is the question how representatives learn about investigations involving environmental crimes in order to participate in the respective criminal proceedings. If a wide spectrum of the public can participate or has other procedural rights, the prosecution and the courts face the difficulty of informing a potentially very large number of individuals about the ongoing investigation to guarantee them the possibility of exercising their rights. Personal notification, as it is compulsory regarding victims according to § 66 (1) StPO, would not be feasible for the authorities due to the large number of possible participants.[109] Therefore, the prosecution or the courts could publish information on ongoing investigations and dates of oral hearings via the Internet, as is the case in certain administrative proceedings where NGOs enjoy rights.[110] The notification could include information on the possibility to exercise certain rights and a time limit within which possible participants have to express the intention to use those rights (otherwise they would be precluded). However, if Art. 14 as proposed by the Commission is adopted, such a restriction could be problematic concerning Art. 9 (3) AC and Art. 47 EU-CFR if it also includes the right to challenge the termination of the investigation or to appeal against the decision of the court.[111] Nevertheless, a formal act of joining the proceedings should be required for participation in the main trial phase, as it for example is required for popular accusers in Spain and would not infringe Art. 9 (3) AC.[112]

If the information on ongoing proceedings is publicly available, that could be problematic with respect to data protection and other rights of the accused. Therefore, the courts have to publish the information in anonymous form with the possibility for the concerned public to review the files after joining the

108 Similar L. Schalk-Unger, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., p. 227.

109 OLG Vienna, 18 Bs 244/11f, 10.10.2011.

110 E.g. § 9 (4) UVP-G, D. Altenburger, § 9 UVP-G, in D. Altenburger, *Kommentar zum Umweltrecht*, cit., para. 16.

111 ECJ, C-664/15, *Protect*, 20.12.2017, para. 82 ss; C-197/18, *Wasserleitungsverband Nördliches Burgenland*, 03.10.2019, para. 34; A. Ohler et al, *How to Represent the Silent Environment? An Update on Germany's Struggle to Implement Article 9 (3) of the Aarhus Convention*, cit., 387 s.

112 N. Jiménez Cardona, *La acción popular en el sistema procesal español*, cit., p. 66.

proceedings. To narrow the reach of the publication, the possibility to access the information on ongoing investigations on the Internet could be restricted to accredited NGOs.[113] However, this might not satisfy the obligations under Art. 14 of the directive proposal unless the participation of individuals who are part of the public concerned in the sense of Art. 14 is guaranteed in another way. If public authorities are able to participate, the public prosecutor could be obligated to notify them on the opening of an investigation in criminal proceedings.[114] If the authority cannot participate but only appeal the decision to terminate the proceedings, the public prosecutor would have to notify them about the termination of the investigation.

4.5. What rights and remedies should the public have?

If individuals, eNGOs or public authorities have participation rights or other procedural rights in proceedings regarding environmental crimes, there are different options as to the extent of the granted rights. The scope of the rights granted could also vary depending on whether the procedure is in the investigation phase or in the trail phase.

4.5.1. Rights and remedies during the investigative phase

One already existing right of NGOs and individuals on behalf of the environment is the right to denounce crimes against the environment as well as all other crimes.[115] If Art. 14 of the proposed directive would be adopted, it would be necessary to grant additional rights to the public concerned. They should at least have the right to inspect and review the court files such as victims or private parties.[116] As the directive proposal explicitly lists participation as a civil party, Member States would also have to grant the public concerned the right to claim compensation for damages caused by the alleged crime. In addition, the public concerned should have the right to be informed of certain developments in the investigation, although this may depend whether the natural or legal person concerned has joined the proceedings. Like the popular accuser in Spain, the participating public could also be given the right to propose evidence and request certain investigative measures.[117]

Among the rights that could make the biggest difference is the right to appeal against the prosecution's decision not to prosecute but to close the case

113 Cf. § 54 (2) Carinthian Hunting Act; cf. LVwG Carinthia, KLVwG-1924/4/2021, 19.11.2021.

114 This was the case with the animal protection attorney in Zurich, cf. A. Goetschel, *Der Zürcher Rechtsanwalt in Tierschutzstrafsachen*, cit., p. 76.

115 E.g. § 80 (1) StPO; L. Schalk-Unger, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., p. 218.

116 L. Schalk-Unger, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., p. 229.

117 J. Tomé García, *La acción popular en el proceso penal: situación actual y propuestas para una futura reforma*, cit., p. 302.

(for example, the mentioned animal protection attorney in Zurich enjoyed this right).[118] As a large number of investigations into alleged environmental crimes end in discontinuance, a remedy bringing the question of whether the termination was justified to the courts could be effective.[119] Such a remedy is preferable to the right to insist on an indictment, as it is possible in Spain,[120] because a court is better able to assess the likelihood of success of the indictment than the participating public. This could avoid lengthy and costly criminal proceedings without prospect of success.

The right to appeal the termination of criminal proceedings according to § 195 StPO does not included cases where the public prosecutor did not initiate a criminal investigation but refrained from beginning a formal investigation as provided by § 35c of the Public Prosecutor's Office Act (StAG). Comprehensive control of prosecutions related to environmental crimes and full compliance with Art. 9 (3) AC may require the establishment of a possibility to appeal the decision of the public prosecutor not to initiate proceedings.[121] However, such a right would contravene the intention of § 35c StAG and grant eNGOs broader rights than the victim of a crime and could therefore be problematic regarding the principle of equality enshrined in Art. 7 (1) of the Austrian Federal Constitution Act.

4.5.2. Rights and remedies during the trial phase

The participation of nature's representatives could take place in several ways if the prosecution goes to trial. It could either be limited to written submissions, which would allow the competent representative to deal with a larger number of cases at the same time. Oral participation, on the other hand, would allow for a swift response to procedural developments, thus would be more effective in the public eye. During oral hearings, the representatives of the environment should possess the right to be present and to question witnesses or expert witnesses and request new evidence or call witnesses.[122] In order to ensure effective participation on behalf of nature, the representatives should further have the right to inspect the court files.[123] The participating public or authority could have the right to address the court with opening or closing statements.

---

118 OGer Zurich, UK080085, 01.06.2008; UK080014, 13.10.2009; A. Goetschel, *Der Zürcher Rechtsanwalt in Tierschutzstrafsachen*, cit., p. 80.

119 L. Schalk-Unger, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., p. 227.

120 Cf. Spanish Supreme Court, STS 54/2008, 08.04.2008; STS 8/2010, 20.01.2010; P. Crespo Barquero, *Artículo 125*, cit., p. 789.

121 L. Schalk-Unger, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., p. 228.

122 A. Goetschel, *Der Zürcher Rechtsanwalt in Tierschutzstrafsachen*, cit., p. 78 ss.

123 A. Goetschel, *Der Zürcher Rechtsanwalt in Tierschutzstrafsachen*, cit., p. 76 s; L. Schalk-Unger, *The participation of environmental NGOs in (Austrian) criminal proceedings in the light of Art. 9 (3) Aarhus Convention*, cit., p. 229.

If members of the public could participate as civil parties ('private parties' under the Austrian Code of Criminal Procedure) – they could have the opportunity to appeal court verdicts acquitting the defendant or denying compensation for the damages to the environment caused by the alleged crime. However, this right might be restricted to certain causes for appeal and to cases where the denial of a motion brought by the private party might have had a negative effect on its claims for compensation, as it is the case in § 282 (2) StPO.[124] In cases where the accused is found guilty but the court denies a compensation, according to § 283 (4) in conjunction with § 366 (3) StPO the private party can just appeal the decision not to grant a compensation. In the appeal, the party can only make the argument that the facts regarding the amount of the compensation were already sufficiently investigated, and the court was therefore obliged to grant a compensation but cannot contest the fact-finding itself.[125] Granting a broader right to appeal to eNGOs or others when acting in proceedings regarding environmental crimes could violate the principle of equality and should therefore be avoided.

5. Conclusion

As criminal proceedings concerning environmental crimes and other crimes that cause harm to nature – contrary to cases involving humans as injured parties – do not involve victims, generally no one can participate in the prosecution and demand compensation. Some countries around the world therefore grant legal personhood to nature in order to allow the public to represent nature in court or administrative proceedings. Such a step requires unneglectable changes to the existing legal order and rules on representation. Granting NGOs, other members of the public or authorities the right to participate in proceedings regarding environmental matters would be easier and would also be sufficient and therefore is another – probably preferable – possibility to ensure representation of the environment.

While some countries in Europe already allow eNGOs or others to participate in criminal proceedings regarding environmental crimes, the current Austrian Code of Criminal Procedure – except on very rare occasions – does not grant eNGOs the possibility to take part in proceedings. ENGOs or other members of the public neither can inspect court files regarding investigations in crimes against the environment. However, there might be future developments on an EU-level. In a proposal for a new environmental crimes Directive, the European Commission seeks to obligate all Member States to grant the public concerned appropriate rights to participate in proceedings concerning

124 H. Hinterhofer, P. Oshidari, *System des österreichischen Strafverfahrens*, cit., para. 10.87.
125 H. Hinterhofer, P. Oshidari, *System des österreichischen Strafverfahrens*, cit., para. 10.88.

environmental offenses. The Austrian legislature could fulfil such an obligation, for example, through recognising eNGOs as victims or introducing a separate provision granting them participation rights. In its general approach the Council softened this obligation and restricted it to Member States already granting the public concerned certain rights in proceedings concerning other crimes. Given the conflicting positions of the Commission, who has been joined by the Legal Affairs Committee of the European Parliament, and the Council of the European Union, the outcome of the drafting process remains open.

What future for environmental and climate litigation?

Exploring the added value of a multidisciplinary approach from international, private and criminal law perspectives

Zirulia, Sandrini, Pitea (eds.)

The book provides in-depth analysis and innovative insights on the prospects of climate and environmental litigation, namely by exploring the ability of judicial remedies and sanctions to affect public and private decision-making in every context where natural resources, climate as well as human health are at stake. The chapters reproduce, with additional elaborations, the papers presented at the international workshop that gives the volume its title, held at the University of Milan on 16 September 2022. The underlying question is whether and to what extent, in the face of unsatisfactory and unreasonable political choices on the balance between the different interests at stake, resorting to national and supernational courts represents a valid alternative for a more sustainable future. The relevant contexts covered by the book include, for instance, industrial development, exploitation of natural resources, agricultural production, manufacturing techniques, as well as policies on energy, public and private transport, and urban development. The book is composed of three parts, each one addressing, from multiple perspectives, a specific category of judicial remedies in a certain area of legal studies: I) international human rights law; II) private international law and international trade law; II) domestic and international criminal law.

Cover image: Baobab in the Kunene Region (Namibia).
Photo by Emiliano Negrini © (www.emilianonegrini.it)

ISBN 979-125-510-112-3 (print)
ISBN 979-125-510-116-1 (PDF)
ISBN 979-125-510-118-5 (EPUB)
DOI 10.54103/milanoup.151