Freedom, Security & Justice: European Legal Studies

Rivista giuridica di classe A

2021, n. 3

EDITORIALE SCIENTIFICA
ES

DIRETTORE

Angela Di Stasi
Ordinario di Diritto Internazionale e dell'Unione europea, Università di Salerno
Titolare della Cattedra Jean Monnet 2017-2020 (Commissione europea)
"Judicial Protection of Fundamental Rights in the European Area of Freedom, Security and Justice"

COMITATO SCIENTIFICO

Sergio Maria Carbone, Professore Emerito, Università di Genova
Roberta Clerici, Ordinario f.r. di Diritto Internazionale privato, Università di Milano
Nigel Lowe, Professor Emeritus, University of Cardiff
Paolo Mengozzi, Professore Emerito, Università "Alma Mater Studiorum" di Bologna - già Avvocato generale presso la Corte di giustizia dell'UE
Massimo Panebianco, Professore Emerito, Università di Salerno
Guido Raimondi, già Presidente della Corte EDU - Presidente di Sezione della Corte di Cassazione
Silvana Sciarra, Professore Emerito, Università di Firenze - Giudice della Corte Costituzionale
Giuseppe Tesauro, Professore f.r. di Diritto dell'UE, Università di Napoli "Federico II" - Presidente Emerito della Corte Costituzionale †
Antonio Tizzano, Professore Emerito, Università di Roma "La Sapienza" - Vice Presidente Emerito della Corte di giustizia dell'UE
Ennio Triggiani, Professore Emerito, Università di Bari
Ugo Villani, Professore Emerito, Università di Bari

COMITATO EDITORIALE

Maria Caterina Baruffi, Ordinario di Diritto Internazionale, Università di Verona
Giandonato Caggiano, Ordinario f.r. di Diritto dell'Unione europea, Università Roma Tre
Pablo Antonio Fernández-Sánchez, Catedrático de Derecho Internacional, Universidad de Sevilla
Inge Govaere, Director of the European Legal Studies Department, College of Europe, Bruges
Paola Mori, Ordinario di Diritto dell'Unione europea, Università "Magna Graecia" di Catanzaro
Lina Panella, Ordinario di Diritto Internazionale, Università di Messina
Nicoletta Parisi, Ordinario f.r. di Diritto Internazionale, Università di Catania - già Componente ANAC
Lucia Serena Rossi, Ordinario di Diritto dell'UE, Università "Alma Mater Studiorum" di Bologna - Giudice della Corte di giustizia dell'UE

COMITATO DEI REFEREES

Bruno Barel, Associato di Diritto dell'Unione europea, Università di Padova
Marco Benvenuti, Associato di Istituzioni di Diritto pubblico, Università di Roma "La Sapienza"
Raffaele Cadin, Associato di Diritto Internazionale, Università di Roma "La Sapienza"
Ruggiero Cafari Panico, Ordinario f.r. di Diritto dell'Unione europea, Università di Milano
Ida Caracciolo, Ordinario di Diritto Internazionale, Università della Campania - Giudice dell'ITLOS
Federico Casolari, Associato di Diritto dell'Unione europea, Università "Alma Mater Studiorum" di Bologna
Luisa Cassetti, Ordinario di Istituzioni di Diritto Pubblico, Università di Perugia
Giovanni Cellamare, Ordinario di Diritto Internazionale, Università di Bari
Marcello Di Filippo, Ordinario di Diritto Internazionale, Università di Pisa
Rosario Espinosa Calabuig, Catedrática de Derecho Internacional Privado, Universitat de València
Ana C. Gallego Hernández, Profesora Ayudante de Derecho Internacional Público y Relaciones Internacionales, Universidad de Sevilla
Pietro Gargiulo, Ordinario di Diritto Internazionale, Università di Teramo
Giancarlo Guarino, Ordinario f.r. di Diritto Internazionale, Università di Napoli "Federico II"
Elspeth Guild, Associate Senior Research Fellow, CEPS
Victor Luis Gutiérrez Castillo, Profesor de Derecho Internacional Público, Universidad de Jaén
Ivan Ingravallo, Associato di Diritto Internazionale, Università di Bari
Paola Ivaldi, Ordinario di Diritto Internazionale, Università di Genova
Luigi Kalb, Ordinario di Procedura Penale, Università di Salerno
Luisa Marin, Marie Curie Fellow, European University Institute
Simone Marinai, Associato di Diritto dell'Unione europea, Università di Pisa
Fabrizio Marongiu Buonaiuti, Ordinario di Diritto Internazionale, Università di Macerata
Rostane Medhi, Professeur de Droit Public, Université d'Aix-Marseille
Stefano Montaldo, Associato di Diritto dell'Unione europea, Università di Torino
Violeta Moreno-Lax, Senior Lecturer in Law, Queen Mary University of London
Claudia Morviducci, Professore Senior di Diritto dell'Unione europea, Università Roma Tre
Michele Nino, Associato di Diritto Internazionale, Università di Salerno
Anna Oriolo, Associato di Diritto Internazionale, Università di Salerno
Leonardo Pasquali, Associato di Diritto dell'Unione europea, Università di Pisa
Piero Pennetta, Ordinario f.r. di Diritto Internazionale, Università di Salerno
Emanuela Pistoia, Associato di Diritto dell'Unione europea, Università di Teramo
Concetta Maria Pontecorvo, Ordinario di Diritto Internazionale, Università di Napoli "Federico II"
Pietro Pustorino, Ordinario di Diritto Internazionale, Università LUISS di Roma
Santiago Ripol Carulla, Catedrático de Derecho internacional público, Universitat Pompeu Fabra Barcelona
Teresa Russo, Associato di Diritto dell'Unione europea, Università di Salerno
Alessandra A. Souza Silveira, Diretora do Centro de Estudos em Direito da UE, Universidad do Minho
Ángel Tinoco Pastrana, Profesor de Derecho Procesal, Universidad de Sevilla
Chiara Enrica Tuo, Ordinario di Diritto dell'Unione europea, Università di Genova
Talitha Vassalli di Dachenhausen, Ordinario f.r. di Diritto Internazionale, Università di Napoli "Federico II"
Alessandra Zanobetti, Ordinario di Diritto Internazionale, Università "Alma Mater Studiorum" di Bologna

COMITATO DI REDAZIONE

Francesco Buonomenna, Associato di Diritto dell'Unione europea, Università di Salerno
Caterina Fratea, Associato di Diritto dell'Unione europea, Università di Verona
Anna Iermano, Assegnista di ricerca in Diritto dell'Unione europea, Università di Salerno
Angela Martone, Dottore di ricerca in Diritto dell'Unione europea, Università di Salerno
Michele Messina, Associato di Diritto dell'Unione europea, Università di Messina
Rossana Palladino (*Coordinatore*), Ricercatore di Diritto dell'Unione europea, Università di Salerno

Revisione abstracts a cura di
Francesco Campofreda, Dottore di ricerca in Diritto Internazionale, Università di Salerno

Rivista quadrimestrale on line "Freedom, Security & Justice: European Legal Studies"
www.fsjeurostudies.eu
Editoriale Scientifica, Via San Biagio dei Librai, 39 - Napoli
CODICE ISSN 2532-2079 - Registrazione presso il Tribunale di Nocera Inferiore n° 3 del 3 marzo 2017

Indice-Sommario

2021, n. 3

Commenti e Note

IN SEARCH OF *ECOCIDE* UNDER EU LAW. THE INTERNATIONAL CONTEXT AND EU LAW PERSPECTIVES

Alfredo Rizzo*

SUMMARY: Introductory remarks. – 1. General framework under international and EU law standards. – 2. The "Regional" Approach to *Ecocide*: The ECHR and the EU. – 2.1. The ECHR and ECtHR. – 2.2. The EU. – 2.2.1. Relevant context under EU criminal law. – 2.2.2. Environmental protection in the Charter of fundamental rights of the European Union. – 2.2.3. Environmental liability and individual right to appeal against EU legislation. – 2.2.4. Criminal liability for infringement of environmental standards under EU law. – Some (preliminary) conclusions.

Introductory remarks

The following chapters, while aimed at focusing on relevant EU rules on the topic, will also try to offer a fast overview of the international framework to which those same rules make reference. It is firstly wise to recall that a different qualification must be given to the relevant international law rules on the State's responsibility[1], on the one hand, and to the other branch of international law rules concerning the criminal liability of individuals. For this, one should bear in mind issues dealing with the ways in which environmental protection is tackled under, on the one hand, international law rules and

Double blind peer reviewed article.

* Researcher at the National Institute for Public Policy Analysis (INAPP), expert on EU law at University of Rome I "la Sapienza" and member of European Law Institute (ELI). E-mail: a.rizzo@inapp.org.

This draft relates to a research on *Ecocide* promoted under ELI auspices: https://www.europeanlawinstitute.eu/projects-publications/current-projects-upcoming-projects-and-other-activities/upcoming-projects/ecocide/.

[1] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (A/56/10, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, as corrected), *ex multissimis*, J. CRAWFORD (ed.), *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries*, Leiden, 2002; J. CRAWFORD, *The International Law Commission's Articles on State's responsibility, A restrospective,* in *The American Journal of International Law*, 2002, p. 874; Various Authors, *Assessing the work of the International Law Commission on State Responsibility,* in *European Journal of International Law*, 2002, no. 5, http://www.ejil.org/archive.php?issue=33; with a focus on the European region, A. SACCUCCI, *La responsabilità internazionale dello Stato per violazione strutturale dei diritti umani*, Napoli, 2018.

ISSN 2532-2079
DOI: 10.26321/A.RIZZO.03.2021.08

institutions (including some international treaties dealing with issues of environmental protection, such as the Aarhus Convention), and, on the other hand, under the current competencies conferred on the International Criminal Court, being the latter specifically competent on the prosecution of crimes that are relevant under same ICC Statute (being the Court's competences forged under relevant treaty rules, that is to say, the Statute itself)[2]. The "duality" of international jurisdiction on those issues has been assessed by the same International Court of Justice (ICJ) in its judgment on the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*[3], where the Court referred to those *parallel* systems (that is to say, with no exclusive effects of one on another) as a "duality of responsibility" (that of individuals, on the one hand, and that of the State, on the other). In the less wide scope of European and EU law, relevant case-law and legislation specifically deal with the liability of public authorities (in particular under the European Convention for the protection of Human Rights and fundamental freedoms) for environmental wrongdoings or omissions (EU legislation, on the other hand, tackles responsibility of private actors as well), though having different impacts for the States-parties to the relevant treaties.

As we will see, a series of existing rules both at the level of general law and of treaty law proves how the need to deal with certain acts with large and significant negative impacts for the environment had always been seen as a true challenge on the way of achieving the well-being of the entire international community. Second World War and the post-war scenarios (together with the well-known nuclear threat) have favored a progressive awareness on the need that specific acts committed at the level of both the States and of other actors with particularly serious consequences for the international community as a whole be concretely tackled, including acts with specific environmental implications. No one can deny, in fact, that in modern law the protection of the environment is even more felt as indissolubly connected to the protection of every living being[4].

---

[2] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute], *The States Parties to the Rome Statute*, International Criminal Court, https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx. [https://perma.cc/3END-ESVT]. Given the too vast literature on this fundamental text, as an "all-embracing" text see W.A. SCHABAS & N. BERNAZ (eds.), *Routledge Handbook of International Criminal Law*, UK, USA, Canada, 2011.

[3] *Application of the Convention on Prevention and Punishment of Crime of Genocide* (Bosn. & Herz. v. Serb. & Montenegro), Judgment of 26 feb. 2007 I.C.J. Rep. 43. Recently, on this Convention, see the International Court of Justice case on *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar),* Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020, p. 3. In the relevant literature, too vast to mention here, see *ex multissimis* A. CASSESE, *The* Nicaragua *and* Tadic *Tests Revisited In Light of ICJ Case on Genocide in Bosnia,* in *European Journal of International Law*, 2007, p. 649; A. CASSESE (ed.), *The Oxford Companion to International Criminal Justice*, Oxford, 2009; F. LATTANZI (ed.), *Genocidio: conoscere e ricordare per prevenire*, Rome, 2020.

[4] This has been clarified in particular, but not only, in the Euratom treaty, see in part. under art. 30 (Nuclear safety). Jean Monnet's Euratom system was in fact designed with a view to ensuring the maximum institutional and political growth of the same Coal and Steal Community born in Paris 1951 and therefore aimed above all at the political and economic consolidation of Western Europe countries in a long-term perspective E. B. HAAS, *The uniting of Europe: political, social, and economic forces, 1950-1957*, U.S.A.,

Before entering a more detailed analysis of subjects under study – although with a reporting approach in order to help the reading of the following pages – it can be wise mentioning some views on the definition of what an *ecocide* is.

The *Convention on the Prevention and Punishment of the Crime of Genocide* (CPPCG)[5], though not clearly defining that same crime (genocide), favored the depiction of a list of acts progressively equal to true international crimes finally detailed in the Rome Statute 1998, establishing the International Criminal Court. In Lay and others' view[6], "*Genocide and ecocide address different forms of harm: one is directed at social groups, the other at the dependence of humanity upon eco-systems. They can both result in similar amounts of death and destruction, and potential prosecution rests upon both criminal and human rights jurisprudence. At this juncture what is essential is the moral recognition that ecocide should be an international crime, and that resultant processes are set in motion for its incorporation into law*"[7].

As we will see, considering the entry into force of the Rome Statute at the end of last century, above actions and their related outcomes can achieve the same relevance of criminal acts when committed by physical persons[8].

Though above definitions (among the many others that might have been chosen and quoted here) are sufficiently indicative of the contents of the topics under study, a fragmentation between several juridical systems at the different levels (international regional and national)[9] is not supporting progress towards a common standard on what *ecocide* is or should be and what kind of legal consequences it should entail.

2004, pp. 303 ss. On same topics, see recently the Council Directive 2013/59/Euratom of 5 December 2013 laying down basic safety standards for protection against the dangers arising from exposure to ionising radiation, and repealing Directives 89/618/Euratom, 90/641/Euratom, 96/29/Euratom, 97/43/Euratom and 2003/122/Euratom, OJ L 13 17.1.2014.

[5] United Nations Treaty Series, vol. 78, p. 277.

[6] B. LAY, L. NEYRET, D. SHORT, M.U. BAUMGARTNER, A. OPOSA JR, *Timely and Necessary: Ecocide Law as Urgent and Emerging*, in *The Journal Jurisprudence*, 2015, n. 28, p. 431.

[7] The same authors mention relevant literature according to which: "*ecocide is the extensive damage to, destruction of 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"* (P. HIGGINS, *Eradicating ecocide: laws and governance to prevent the destruction of our planet*, London, 2010; L. NEYRET, *Des écocrimes à l'écocide, le droit penal au secours de l'environnement*, Brussels, 2015, p. 288).

[8] When assessing the relationships between a State and individuals' liability under the Rome Statute, one should not forget the Prof. Ago proposal of a specific provision on that topic in the then draft Convention on the State responsibility (R. AGO, '*Fifth Report on State Responsibility'*, UN Doc. A/CN.4/291 (1976), reprinted in *ILC Yearbook*, 1976, vol. II, Part Two). In this Report, Article 19 of the Ago project read as follows: *3.(…) on the basis of rules of international law in force, an international crime may result, inter alia, from: (…) d. a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas* (emphasis added). *Any internationally wrongful act which is not an international crime in accordance with paragraph 2, constitutes an international delict.*

[9] F. POCAR, *The International Proliferation of Criminal Jurisdictions Revisited: Uniting or Fragmenting International Law?,* in H. HESTERMEYER, D. KÖNIG, N. MATZ-LÜCK, V. RÖBEN, A. SEIBERT-FOHR, P-T. STOLL, S. VÖNEKY (eds.), *Liber Amicorum Rudiger Wolfrum, Coexistence, cooperation and Solidarity*, Brill-Nijhoff, 2012, p. 1705 .

1. General framework under international and EU law standards

Several international law rules and tools prove an emerging right for anyone to benefit from a "safe" environment as an international binding rule confirming both the State's and individuals' international liability in cases of damages for wrongful practices implemented by both private or public actors with a negative environmental impact also, and in particular, whenever such impact has "extra-boundaries" outcomes. It remains to be seen whether a true ban and a crime under general international law exists related to some specific activities performed by the States and other actors, whenever such activities are apt to cause serious harms to the environment. Under relevant international law principles and rules a general duty of compensation has been assessed for cases where behaviors of both public and private actors cause threat or true damages with cross-borders (or beyond-borders) effects[10]. A growing trend is however acknowledged towards the construction of a true duty under international customary law forcing the State to keep a safe environment both abroad and inside own national borders. This trend has been confirmed also by relevant case-law of the International Court of Justice by way of an extensive understanding of treaty law rules related to both the State's international liability and more specific environmental protection standards[11].

The International Court of Justice[12] established a prohibition under customary law with specific reference to the threat that atomic weapons entail for the natural environment. On this, the ICJ clearly stated what follows: "[…] *the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the genera l obligation of*

[10] International conventions exist on the liability for, e.g., pollution or dangerous activities, such as the 1969 Brussels Convention on the Compensation for damages related to hydrocarbons' pollution establishing the International Oil Pollution Compensation Fund, IOPCF. According to the IOPCF Claims Manual, any loss of property and economic loss are covered, though if limited to reinstatement to 'reasonable measures' (see IOPC Fund 2016). This principle relates to a strict liability criterion. The Court of justice of the European Union (CJEU) gave a broader scope to relevant State's duties, CJEU of 24 June 2008, C-188/07, *Commune de Mesquer v Total France SA and Total International Ltd*., I-4501). *Ex multis,* T. SCOVAZZI, *Sul principio precauzionale nel diritto internazionale dell'ambiente,* in *Rivista di diritto internazionale*, 1992, p. 699; N. DE SADELEER, *Liability for Oil Pollution Damage versus Liability for Waste Management: The Polluter Pays Principle at the Rescue of the Victims*, in *Journal of Environmental Law*, 2009, p. 299; N. DE SADELEER, *The Polluter-pays Principle in EU Law – Bold Case Law and Poor Harmonisation*, in *Pro Natura. Festskrift til H.-C. Bugge*, 2012, Oslo: Universitetsforlaget, p. 405; J. ADSHEAD, *The Application and Development of the Polluter-Pays Principle across Jurisdictions in Liability for Marine Oil Pollution: The Tales of the 'Erika' and the 'Prestige'*, in *Journal of Environmental Law*, 2018, p. 425; R. GIUFFRIDA, F. AMABILI (eds.), *La tutela dell'ambiente nel diritto internazionale ed europeo,* Turin, 2018.

[11] See, among others, Advisory Opinion of 8 July 1996, *Legality of The Use by A State of Nuclear Weapons*, ICJ Reports 1996 and Judgment of 25 September 1997, ICJ Reports 1997 s.c. *Gabčíkovo-Nagymaros* case. See also Judgment of 20 April 2010, *Pulp Mills on the River Uruguay,* ICJ Rep. 2010, p. 14. For some, the latter decision lacks consideration of pre-emptive aims pursued under the precautionary principle, particularly relevant in cases of environmental damages with trans-boundary characters, F. FRANCIONI, C. BAKKER, *The Evolution of the Global Environmental System. Trends and Prospects in the EU and the US,* in F. FRANCIONI, C. BAKKER (eds.), *The EU, the US and the Global Climate Governance,* New York, 2016, pp. 15 and 31.

[12] Advisory Opinion of 8 July 1996, *Legality of The Use by a State of Nuclear Weapons* ICJ Reports 1996.

States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment"[13]. Same ICJ reached the following conclusions (para. 31 *Legality of Nuclear weapons* opinion): "[…] *Taken together, these provisions embody a general obligation to protect the natural environment against* widespread, long-term and severe environmental damage (emphasis added)*; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals. These are powerful constraints for all the States having subscribed to these provisions*". To sum up, the State bears a triple-obligation: 1) a *general obligation* to protect the environment against "widespread, long-term and severe" environmental damages, 2) a general ban to make recourse to methods and means of warfare apt at causing same abovementioned kind of damages, 3) a general ban to make recourse to same methods under previous point 2 by way of reprisals. While points 2 and 3 above are related to specific circumstances where environmental damages might occur in a warfare context, point 1 clarifies that States bear a general obligation to protect the *environment of other States or of areas beyond national control* from activities *within their jurisdiction and control*, but only whenever such activities entail a threat of "widespread, long-term and severe" damages for the environment of the other State (this threat is characteristically originated by the envisaged use of nuclear weapons)[14]. It is also wise bearing in mind that, during the draft of UN Articles on State's international responsibility (in the International Law Commission early works on this[15]), the ban of "massive" pollution had been conceived as an interest for the international community as a whole. The breach of such a ban was meant for the first time as a breach of one basic duty under general international law and as a true *international crime*[16].

[13] See at para. 29 of mentioned ICJ adv. Opinion 1996. The Court also makes reference to Principle 24 of the Rio Declaration (United Nations Conference on Environment and Development of 3-14 June 1992, A/CONF.151/26 (Vol. I), providing "*Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary*".

[14] It is also wise mentioning how the protection of the environment had been invoked in the mentioned Judgment of 25 September 1997, ICJ Reports 1997 s.c. *Gabčíkovo-Nagymaros*, in particular by Hungary in order to prove a *state of necessity* (art. 25 UN articles on the responsibility of the State) apt to ground same Hungary's infringement of a bilateral agreement presumably breaching basic environmental standards. The ICJ however rejected such arguments, stating that in the case at hand the presumed environmental damages claimed by Hungary were not "imminent" or "severe" (with particular reference, as for "severity", to mentioned *Use of Nuclear Weapons* decision).

[15] Report of the International Law Commission on the Work of Its Thirty Second Session, U.N. GAOR, 35th Sess., Supp. No. 10, at 64, U.N. Doc. A/35/10 (1980). According to draft article 19(2), international crime is any "*internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole*" whereas an international delict is *"[a]ny internationally wrongful act which is not an international crime*".

[16] Under this meaning, the same draft referred to cases of *massive pollution* of both terrestrial and maritime environment (draft art. 19 (3) (d)).

As regards Treaty law rules, International humanitarian law (IHL) lends some guidance for the definition of an "environmental" wrongful act, based on both general and treaty law rules, though considering how the ICJ expressly stated that relevant sources concerning this branch of law are an expression of *"intransgressible principles of customary international law*"[17]. 1977 Protocols to the Geneva Convention[18] ban any warfare action causing "superfluous injury or unnecessary suffering" or "widespread, long-term and severe damage to the natural environment", including indiscriminate attacks on civilians and civilian infrastructure, and protects civilian infrastructure critical to the survival of civilian populations. The same concept of "widespread, lasting and serious" damages caused to the environment are also mentioned under articles 35 para. 3 and 55[19] of Protocol I to the Geneva Convention.

On the other hand, private and public law entities' liability (in the widest meaning above, outside the strict meaning of a true *ecocide*) for environmental damages caused in a foreign State can be assessed "internally" by same national judiciaries, those both of the State where such public and private entities have been established and keep their main legal premises and the judiciaries of the State who suffered from those illicit behavior's effects, particularly in the light of the "polluter pays" principle established under UN Rio Declaration[20]. EU's public policies are particularly attentive to environmental issues that, since the Treaty of Amsterdam's reforms at the end of 90s last century, are one of the major topics under same EU's competences (though if included among competences that the Union "shares" with its Member States, see art. 4 (2) (e) TFEU)[21].

---

[17] See p. 79 of advisory opinion of 8 July 1996, *Legality of The Use by A State of Nuclear Weapons*, ICJ Reports 1996, quoted *supra*, as recalled also by advocate general P. Mengozzi, in his opinion of 18 July 2013, on case C-285/12, *Aboubacar Diakité*, ECLI:EU:C:2013:500, at p. 26.

[18] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 (Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Bern, Federal Department of Foreign Affairs, 1978) and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 (Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Bern, Federal Department of Foreign Affairs, 1978).

[19] See *ex multis*, E. GREPPI, *Diritto internazionale umanitario dei conflitti armati e diritti umani: profili di una convergenza*, in *La Comunità internazionale*, 1996, p. 473; N. RONZITTI, *Diritto internazionale dei conflitti armati*, Turin, 2014. On the interaction between international human rights law, international humanitarian law and EU law, see *Updated guidelines of the European Union to promote compliance with international humanitarian law*, 2009/C 303/06 (OJEU C 303 of 15 December 2009, 12), *ex multis*, F. NAERT, *International Law aspects of the EU's Security and Defense Policy, with a Particular focus on the Law of Armed Conflicts and Human Rights*, Bruxelles, 2009; A. RIZZO, *Profili giuridico-istituzionali della politica di difesa e Sicurezza comune dell'Unione europea,* in *Il Diritto dell'Unione europea*, 2016, p. 285.

[20] United Nations Conference on Environment and Development of 3-14 June 1992, A/CONF.151/26 (Vol. I).

[21] See p. 5 of the Resolution of the Council and of the Representatives of the Governments of the Member States of the EU, meeting within the Council, of 1 February 1993 concerning a Community program of policy and action in favor of the environment and sustainable development - Political and action program of the European Community in favor of the environment and sustainable development (OJ 17 May 1993, C 138, in part. p. 12). Sustainable development is enshrined under principles 3 and 4 of mentioned Rio Declaration and is also mentioned at arts. 3 (5) and 21 (2) (d) Treaty on the European Union (TEU) and in

At the international treaties level, with a specific reference to the definition of the precautionary principle as a core component of environmental law and related proceedings[22], articles 4 and 5 of the Aarhus Convention of 25 June 1998[23] compel all public bodies of a State to collect and make environmental information available to those who request it. In case of non-compliance to such requirement, art. 9 agrees that "anyone who has a sufficient interest […]" is entitled to submit a judicial appeal in order to achieve the information requested[24]. Aarhus Convention's standards (access to information, participation in decisions-making, access to justice) have been confirmed in the Union's legal order by means of regulation 1367/2006[25]. Aarhus Convention's wording has clearly inspired also some provisions of Directive 2004/35/EC on environmental liability[26]: indeed, under art. 5 of the directive any "operator" (be it a private or a public body under the same directive's definitions) has a duty to provide *preventive* information of any

the Preamble to the Union's Treaties. For a general overview, A. RIZZO, *L'affermazione di una politica ambientale dell'Unione europea. Dall'Atto unico europeo al Trattato di Lisbona*, in R. GIUFFRIDA, F. AMABILI (eds.), *La tutela dell'ambiente nel diritto internazionale ed europeo,* Turin, 2018, p. 21.

[22] Principle 15 of mentioned Rio Declaration and EU Commission Guidelines on the Precautionary Principle, COM(2000) 1, CJEU 22 December 2010, *Gowan*, C-77/09, I-13533, A. ALEMANNO, *The Shaping of European Risk Regulation by Community Courts*, in *Jean Monnet Working Papers*, n. 18, 2008, B. BERTHOUD, *The Precautionary Principle in EU Risk Regulation*, Hamburg, 2014; M. MALAIHOLLO, *Due Diligence in International Environmental Law and International Human Rights Law: A Comparative Legal Study of the Nationally Determined Contributions under the Paris Agreement and Positive Obligations under the European Convention on Human Rights*, in *Netherlands International Law Review*, 2021.

[23] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (ECE/CEP/43, 25 June 1998, United Nations Economic Commission for Europe).

[24] On Article 9(3) Aarhus Convention – according to which "*(…) members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment" –* , the CJEU stated that it *"(…)does not contain any unconditional and sufficiently precise obligation capable of directly regulating the legal position of individuals and therefore does not meet those conditions* (…)*",* CJEU 13 January 2015, cases C-401/12 P, C-402/12 P, C-403/12, *Council and Others v. Vereniging Milieudefensie and Others*, ECLI:EU:C:2015:4. Aarhus Convention has been opened to Regional International Organizations (REIO): see the relevant European Community's declaration of accession to Aarhus Convention https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=_en#EndDec.

[25] Regulation of 6 September 2006, on the application to Community institutions and bodies of the provisions of the Aarhus Convention on access to information, public participation in decision-making processes and access to justice in environmental matters (OJ L 264 of 25.9.2006). The need of a balance between the Aarhus Convention's provisions and the EU Regulation 1367/2006 was raised by the EU General Court of 14 July 2012, *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht v. European Commission*, T-396/09, ECLI:EU:T:2012:301, see *ex multis*, R. MASTROIANNI, *I limiti all'accesso al giudice dell'Unione per l'impugnazione di atti confliggenti con accordi internazionali: una nuova "fortress Europe"?*, in A. TIZZANO (ed.), *Verso i 60 anni dai trattati di Roma. Stato e prospettive dell'Unione europea,* Torino, 2016, p. 179; N. NOTARO, M. PAGANO, *The Interplay of International and EU Environmental Law*, in I. GOVAERE, S. GARBEN (eds.), *The Interface between EU and International Law*, Oxford, 2019, p. 151.

[26] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage OJ L 143 of 30.4.2004, p. 5.

imminent threat to the environment. Furthermore, article 6 of directive n. 2003/4/EC[27] provides a sufficiently wide possibility for individuals as the "public", that is to say, "(…) *one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups concerned*" (see under art. 2 n. 6), to take swift actions before a judicial or administrative body, independent and impartial, in the event that the applicant has received from the requested public entities a reply considered as not suited to meet main transparency requirements.

With specific regard to the characters of *ecocide* under the Statute of Rome establishing the International Criminal Court, such kinds of behaviors with similar effects, whenever committed by individuals, achieve specific relevance under Rome Statute[28]. State and individuals' liability is related to both objective and subjective elements required in order that a harmful behavior be qualified as true ecocide. It is well-known that, under both civil and common law approaches, strict liability arises for certain kind of activities, such as, transport or management of hazardous wastes (on this, reference should be made to the management of any good or wastes coming from atomic nuclear sources, see relevant Euratom rules). So, a true *ecocide* arises only under awareness on the perpetrator's side (intent), while a strict liability criterion relates generally to specific acts or activities considered hazardous *per se*[29].

The Rome Statute on the International Criminal Court (ICC) lists mainly acts forbidden under some existing general international law rules. However, with the view of giving a wider scope and the best applicability to the Statute, many other kinds of acts are listed, some with a more evolutionary character though if always belonging to the *crimes against humanity* group[30]. ICC jurisdiction to prosecute "environmental" crimes is

[27] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC OJ L 41, 14.2.2003, p. 26. ff. In the CJEU's view, according to its article 1, the Directive "*seeks to guarantee the right of access to environmental information held by public authorities and that, as a matter of course, environmental information is progressively made available and disseminated to the public"* (Judgment 14 February 2012, *Flachglas Torgau GmbH v. Bundesrepublik Deutschland*, C-204/09, ECLI:EU:C:2012:71).

[28]The new international crime to be tentatively put under ICC jurisdiction would be related to "[acts] *or omissions committed in times of peace or conflict by* any senior person within the course of State, corporate or any other entity's activity *which cause, contribute to, or may be expected to cause or contribute to serious ecological, climate or cultural loss or damage to or destruction of ecosystem(s) of a given territory(ies), such that peaceful enjoyment by the inhabitants has been or will be severely diminished. 2. To establish seriousness, impact(s) must be widespread, long-term or severe"*. In this context, the perpetrator might be considered "[a senior] person within the course of State, corporate or any other entity's activity in times of peace or conflict" (emphasis added) https://perma.cc/L326-S4KA .

[29] R.A. FALK, *Environmental Warfare and Ecocide: Facts, Appraisal and Proposals*, in *Belgian Review of International Law*, 1973, p. 1, had already suggested that in the then proposed Convention on the crime of *ecocide*, a criminal intent "*to disrupt or destroy, in whole or in part, a human ecosystem*" should have been conceived as a constituent part of the crime in question.

[30] International crimes coming under the Rome Statute's purview are the followings: murder, extermination, enslavement, deportation, incarceration, torture, rape, persecution for political, racial and religious reasons and other inhuman acts. The same Statute mentions "other inhuman acts" as being "of a similar character [to other crimes against humanity] that are intentionally enacted to cause major suffering or serious injury to the body or mental or physical health to the victims, see D. SCHAFFER, *The International Criminal Court,*

however formally limited to crimes occurring after the Rome Statute was adopted in 1998. At the same time, Article 8(2)(b)(iv) is the only Statute's provision expressly addressing environmental wrongdoings, though if dealing specifically with environmental negative feedbacks of crimes in a warfare scenario. The provision in question applies to international armed conflicts or non-international conflicts where there is a protracted armed conflict between the government and armed groups. ICC jurisdiction, in this case, is limited to crimes (committed in the abovementioned warfare scenario) occurring within current ICC member states, committed as part of a plan or policy or as part of a large-scale commission of such crimes. Crimes listed at the mentioned Statute's provision often occur while the armed conflict is pending so that, in order to come under Rome Statute's purview, they should not just follow an armed conflict separately[31]. The ICC Prosecutor Office has taken on board the modalities through which a crime has been committed in order to consider it included among same prosecutor's investigative activities. For this, several elements have been considered as relevant to assess "[the] *manner of commission of the crimes".* In order to assess *the impact* of the relevant crimes, one should take into consideration, *inter alia, "the increased vulnerability of victims, the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities"*. In the same document it is finally stated that "*the Office will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land"* (emphasis added)[32]. The chance of establishing a crime corresponding to a conduct – equal to either an act or an omission, but always unlawful or wanton (see infra) – that is apt to cause severe and either

in W.A. SCHABAS, N. BERNAZ (eds.), *Routledge Handbook of International Criminal Law*, UK, USA, Canada, 2011, at p. 70 ff.

[31] See, *ex multis*, R. PEREIRA, *After the ICC Office of the Prosecutor's 2016 Policy Paper on Case Selection and Prioritisation: Towards an International Crime of Ecocide?*, in *Criminal Law Forum*, 2020, p. 179; A. MISTURA, *Is there Space for Environmental Crimes Under International Criminal Law? The Impact of the Office of the Prosecutor Policy Paper on Case Selection and Prioritization on the Current Legal Framework*, in *Columbia Journal of Environmental Law*, 2018, p. 181.

[32] Office of The Prosecutor, Policy Paper on Case Selection and prioritisation, https://www.icc-cpi.int/items Documents/20160915_OTP-Policy_Case-Selection_Eng.pdf [https://perma.cc/UY3NC62R], at paras. 40 and 41, In cases such as that of Rohingya Muslims in Myanmar and that of most of countryside peoples in Cambodia, a liability emerged on the part of both the States and of individuals placed at the governmental level of those States for decisions and related practices (dispossessions, expulsions) with significant negative feedbacks on the living conditions, basic rights and consequent forced migrations of local populations, Council on Foreign Rel., *The Rohingya Crisis* (Dec. 7, 2017), [https://perma.cc/BU32- C5ER] and, for the relevant case-law, International Court of Justice Order of 23 Jan. 2020 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020*, I.C.J. Reports 2020, p. 3. M. O'BRIEN & G. HOFFSTAEDTER, *"There We Are Nothing, Here We Are Nothing!". The Enduring Effect of Rohingya Genocide,* in *Social Sciences*, 2020, p. 9, Global Diligence, *Land Grabbers May End Up In The Hague: Global Diligence Welcomes The ICC Prosecutor's New Case Selection Policy* (Sept. 15, 2016), http://www.globaldiligence.com/2016/09/15/land-grabbers-may-end-up-in-the-hague-global-diligence - welcomes-the-icc-prosecutors-new-case-selection-policy/ [https://perma.cc/8Q2 9-43FM]. See also, Global Diligence, *Communication Under Article 15 of the Rome Statute of the I.C.C., The Commission of Crimes Against Humanity in Cambodia* (2014), https://www.fidh.org/IMG/pdf/executive_summary-2.pdf [https://perma.cc/6SPK-ML28].

widespread or long-term damages to the environment is foreseen. This definition entails a two-tier element that must come into play in order that the Rome Statute be applicable in those cases: 1) the damage must be particularly qualified (*severe, widespread and with long-term implications*); 2) *act or omission* should be considered as *unlawful* under both international and national law criteria applied when assessing the criminal character of that same act or omission[33].

Though under some general conditions, ICC is anyway enabled to provide a wider reading of the Statute, and this also in accordance to the mentioned position recently expressed by same ICC prosecutor's office with the view of bringing under same Prosecutor's investigative tasks in particular acts with significant negative environmental impacts and entailing negative feedbacks on local populations' living conditions (including, as it may be the case, dispossessions of land properties and causing forced migrations)[34].

2. The "Regional" Approach to *Ecocide*: The ECHR and the EU

The following chapters will focus on the developments of the topics under study specifically in the European continent, under the two special regimes of the European Convention on Human Rights and Fundamental Freedoms (ECHR)[35] and the treaties on the European Union. Under those legal regimes, though reciprocally different[36], environmental issues are tackled, on the one hand, under the specific perspective of a

[33] In that context, a *wanton* act would fall under the effects of same Rome Statute's provisions that apply to acts or omissions implemented in disregard of their consequences, considering the latter to be expected (awareness) by the offender(s) (on the psychological/substantive elements of an *ecocide* see *supra* when comparing *ecocide* to other acts entailing a civil law liability of the perpetrator), STOP ECOCIDE FOUNDATION, *Independent Expert Panel for the Legal Definition of Ecocide, Commentary and Core Text*, June 2021.

[34] Article 10 of the Rome Statute specifically provides that "*[n]othing* [in Part 2 of the Rome Statute, which sets out the jurisdiction of the ICC] *shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute*". This raises issues of interactions between, on the one hand, the Rome Statute implementation under a more evolutionary perspective, and, on the other hand, the chance that, in the implementation of the same Statute, some practices progressively raise to the level of obligations under international customary law.

[35] 4 November 1950, 213 UN Treaties Series 221.

[36] Opinion of the CJEU n. 2/13 of 18 December 2014, on the accession of the EU to the ECHR, see *ex multissimis,* L.S. ROSSI, *Il parere 2/13 della Corte di giustizia dell'Unione europea sull'adesione dell'Unione alla convenzione europea dei diritti dell'uomo: scontro tra corti?,* in SIDIBlog, Vol. 1, 2014, p. 157 ss.; J.P. JACQUÉ, *CJUE – CEDH: 2-0, Revue trimestrielle de droit européen,* 2014, p. 82 ; P. EECKHOUT, *Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarky?*, Jean Monnet Working Paper, n. 1/15, 2015; E. CANNIZZARO, *Unitarietà e frammentazione delle competenze nei rapporti fra l'ordinamento dell'Unione e il sistema della Convenzione europea: in margine al parere della Corte di giustizia 2/2013*, in *il Diritto dell'Unione europea,* 2015, p. 623; N.J. CALLEWAERT, B. DE WITTE, M. BOSSUYT, E. BRIBOSIA, C. HILLION, M. KUIJPER, Š. IMAMOVIĆ, J. POLAKIEWICZ, M. CLAES, *The EU Fundamental Rights Landscape After Opinion 2/13***,** in *Maastricht Faculty of Law Working Paper*, 2016; more recently, G. RAIMONDI, *Spazio di libertà, sicurezza e giustizia e tutela multilevel dei diritti fondamentali*, in A. DI STASI, L.S. ROSSI (eds.), *Lo Spazio di libertà, sicurezza e giustizia. A vent'anni dal Consiglio europeo di Tampere*, Naples, 2020, p. 27.

legal element pertaining to the well-being and the protection of life (in a more substantive perspective), and, on the other hand, as a policy that achieves peculiar significance in the light of relevant treaties' objectives, raising specific problematic issues when it interacts with corresponding national competences and related standards of protection. This is particularly true when one comes considering issues of cooperation in the criminal law field, where *ecocide* should as such find its more *natural* context. It is however useful to illustrate even other areas of EU legislation in the meantime developed towards the same direction of granting an effective environmental protection, such as the rules of non-contractual liability for environmental abuses.

2.1. The ECHR and the ECtHR

In the international treaty law domain, the ECHR, though not comprising any express provision establishing a fundamental right to the environment, has been understood by the European Court of Human Rights (ECtHR) under an evolutionary reading. So, the same ECtHR takes frequently into consideration issues related with environmental protection, developing a now well-established jurisprudence aimed at accepting an individual right to a "safe environment" as a component of the right of a private and family life pursuant to art. 8 ECHR[37].

Art. 8 of the Convention under paragraph 1 stipulates what follows: "Everyone has the right to respect for his private and family life, his home and his correspondence". It is also worth noting that the ECtHR (and, previously, the Human Rights Commission) examined aspects of environmental protection as an individual right in the light of Protocol no. 1 article 1 annexed to the ECHR, dealing with the protection of private property[38].

In the decision Lopez Ostra v. Spain[39] ECtHR has recognized that the evacuation of residents in the locality of Lorca, near Murcia, as a result of an accident at the waste disposal plant, built on public land with a subsidy from the Spanish State, constituted a violation of art. 8 of the Convention.

In Guerra v. Italy[40] the same Court found that the fact that the citizens concerned had not received adequate information on the issues concerning the pollution in progress had entailed a violation of the right to respect of private and family life in accordance with art. 8 of the Convention. Again, the question of the applicability of art. 8 of the

[37] *Ex multis*, K. MORROW, *The ECHR, Environment-Based Human Rights Claims, and the Search for Standards* in S. TURNER, D. L. SHELTON, J. RAZZAQUE, O. MCINTYRE (eds.), *Environmental Rights, The Development Standards*, Cambridge, 2019, p. 41; O. PEDERSEN, *The European Court of Human Rights and International Environmental Law*, in J.H KNOX, R. PEJAN (eds.), *The Human Right to a Healthy Environment*, Cambridge, 2018, accessible here https://www.researchgate.net/publication/325649940_The_Human_Right_to_a_Healthy_Environment.

[38] Judgment of 25 November 1993, Zander v. Austria Series A-279 B, where the Court considered access to water to be an integral part of the property right.

[39] 9 December 1994, App. 16798/90.

[40] 19 February 1998 App. 1998-I.

Convention in air pollution cases was submitted to the Court in the judgment Hatton v. United Kingdom[41].

In a remarkable case, the Court held that each time individuals are under concrete threat connected to environmental issues (be them from pollution or natural hazards), the responding government has a positive obligation to put in place regulatory initiatives (such as any regulatory means on the licensing, start-up, operation, and control of the hazardous activity) that must include appropriate public surveys and studies allowing the public to assess the risks and effects associated with the relevant activities. In this case, ECtHR also mentioned the precautionary principle as a constituent factor of a proper environmental policy at the national level[42] .

Later, the ECtHR emphasized the significance of public environmental policies in particular following the Aarhus Convention: in this regard, the Court makes reference to relevant national or supranational impact assessment procedures (environmental feasibility studies) and has reaffirmed frequently the right to individual access to administrative procedures by providing, among other things, means for reviewing these procedures both in the courts and before independent authorities[43].

In another meaningful case, the ECtHR balanced environmental protection with other international law standards related to the protection of international investments. In Fedayeva[44], indeed, the applicant lived in a steel-producing town, close to a privately owned steel plant. The respondent government adopted policies aimed at improving the environmental situation in the applicant's town and protect public health. Among other measures, the policies included the resettlement of people affected by the activities of the steel plant. The ECtHR's reiterated that the failure to regulate a private industry may involve State responsibility under ECHR, due to likely interference between international investment rights and the State's duties under due diligence and human rights law.

In a most recent case[45], the European Court of Human Rights has sentenced Italy for infringement of art. 8 ECHR, in the case concerning the lack of measures aimed at

[41] ECtHR of 2 October 2001, No. 36022/97.

[42] ECtHR of 27 January 2009, Tătar v. Romania, appl. No. 67021/01.

[43] ECtHR of 21 July 2011, Grimkpvskaya v. Ukraine App. 38182/03.

[44] Judgment of 9 June 2005, Fadeyeva v. Russian Federation App no 55723/00. On this case, see in part. M. FANOU, V.P. TZEVELEKOS, *The Shared Territory of the ECHR and International Investment Law,* in Y. RADI (ed.), *Research Handbook on Human Rights and Investment*, UK, 2018, p. 93. On interaction between environmental standards and IIL, see E.U. PETERSMANN, *Human Rights and International Economic Law,* in Trade Law and Development, India, 2012, Vol. 4 no. 2 in part. at pp. 299-300. F. FRANCIONI, *International Human Rights in an Environmental Horizon,* The European Journal of International Law, 2010, p. 41; ID., *Realism, Utopia and the Future of International Environmental Law*, European University Institute Working Paper, 11, 2012; this branch of international law has become even more significant for the Union after the Lisbon's reforms T. FECAK, *International Investment Agreements in EU Law,* Amsterdam, 2017.

[45] January 26th 2019 Cordella et autres c. Italie, Appl. 54414/13 and 54264/15, A. RIZZO, *La Corte di Strasburgo decide il caso Ilva, ovvero: quando la negligenza dei governi mette a rischio la salute delle persone,* in *L'effettività dei diritti alla luce della giurisprudenza della Corte europea dei diritti dell'uomo di Strasburgo,* www.diritti-cedu.unipg.it and G. D'AVINO, *La tutela ambientale tra interessi industriali strategici e preminenti diritti fondamentali,* in A. DI STASI (ed.), *CEDU e ordinamento italiano. La*

protecting the environment that the State should have implemented in the areas around Ilva industries located in the Taranto province. In this case the Court didn't only applied broader evolutionary criteria (such as the concept of "community welfare"), assessing a consolidated situation of absence of adequate interventions along a time period considered objectively too extensive and, as such, fit to worsen in a particular way the living conditions of the individuals concerned. The ECtHR, in the Cordella judgment, noted also that the steady negligence on the part of public authorities in protecting some basic individual rights implies as such a breach of the "due diligence" obligation, considering how such obligation has widened the range of international duties binding the States. In fact, the latter should – particularly in cases of environmental protection through the protection of private and family life – implement more extensive preventive measures from a both substantial and a temporal point of view, in order to provide individuals with a satisfactory protection from future and/or even only potential dangers for health as a component of the protection of human life. This is the result of a correct reading of articles 2 and 8 ECHR when applied to environmental protection issues: in fact, the scope of the protection in this sector, under same ECHR, is not limited to most serious cases where the protection of environment is required for an effective protection of human life, but it extends to a meaning of environmental protection that is broader substantially and in time, in order to prevent (according to abovementioned *precautionary* principle, e.g., via adequate environmental assessment procedures) even future and possible threats to peoples' well-being. It could then be reckoned that due diligence, being wider in scope and generally pertaining to international law issues, is implemented in the "European legal space" via the precautionary principle, which explicitly inspires, as we have seen above, EU approach to environmental policies. In the same Cordella and others decision, the Strasbourg Court condemned Italy also for infringement of art. 13 ECHR, as the internal remedies aimed at dealing with the environmental degradation created by Ilva industries over the years have proved inapt with the view of meeting effectively same individuals' essential needs inherent to their living conditions and health.

In the Onerylidiz v. Turkey the Court tackled with environmental protection through the lens of the protection of the individual right to life and the right to effective remedy[46], in a particularly serious case where minimum safety and environmental standards had been breached (in that case, the Court dealt with an explosion due to the dispersion of methane gas produced by the decomposition of waste left abandoned in the municipal streets of a town in Anatolia which caused the death of several of the applicant's relatives).

It can be summarized here that, in one (more limited) category of cases, where a "probable at the limit of certainty" risk for the health of the applicants emerges, the Strasbourg Court connects the right to a healthy environment to the protection of human life (Article 2 ECHR), as such representing a core standard in the human rights protection

giurisprudenza della Corte europea dei diritti dell'uomo e l'impatto nell'ordinamento italiano, Padua, 2020, p. 709.

[46] Judgment of 18 June 2002, App. 48939/99. In addition see judgment of 2 March 2008 in the Budayeva case and Others v. Russia, app. nos. 15339/02, 2166/02, 20058/02, 11673/02 and 15343/02.

system. In other cases, this risk cannot be considered as fully reached and the Court nevertheless considers an only "probable" or even "presumed" risk for human health and well-being[47]: in this second (more frequent) kind of situation, it is the Court's view that the damage to human health should be prevented or otherwise stigmatized by tracing the protection of the right to live in a healthy environment under the protection of private and family life pursuant to art. 8 ECHR.

One should not elude, anyway, that environmental protection is not formally enshrined in the ECHR as an autonomous title for individual protection. Awareness at the institutional level is anyhow raising on the existence of a strict interrelation between effective protection of fundamental human rights and the environment as the context where individuals are put in a condition to effectively enforce these rights. On this, a recent statement from the Council of Europe's Parliamentary Assembly[48], under p. 1, has clearly stated what follows: "*The United Nations states in its Environment Program that "human rights cannot be enjoyed without a safe, clean and healthy environment; and sustainable environmental governance cannot exist without the establishment of and respect for human rights". This relationship between human rights and the environment is increasingly recognized, and the right to a healthy environment is currently set out in over 100 constitutions worldwide. Despite this, the United Nations High Commissioner for Human Rights has estimated that at least three people a week are killed protecting our environmental rights, while many more are harassed, intimidated, criminalized and forced from their lands*".

Notwithstanding this raised awareness also at the political/institutional level, a problem exists for the definition of an individual right to get environmental protection, with specific reference to the existing connections between the quite evolutionary Strasbourg Court's address and the still vague wording of current article 37 of the Charter of fundamental rights of the European Union (CFREU, see *infra*). In this respect, ECtHR case-law clearly plays a quite significant role in the development of this topic even in the more specific context of the European Union. In fact, the boundaries of EU competence in environmental domain, also in the light of the subsidiarity principle, could no longer represent an insurmountable impediment to the possibility (or a true obligation) for the same EU Court of Justice to consider the protection of the environment as a true right worthy of protection in the same EU legal system.

Inter alia, mentioned obligations presumably (or effectively) pending on EU institutions would exist also on the basis of the doctrine on the *equivalent level of protection*, according to which within the European Union a level of protection of a fundamental right must be at least "equivalent" to that already guaranteed in the system

[47] ECtHR of 10 January 2012 Di Sarno e o. v. Italy, App. 30765/2008, see C. CONTARTESE, *La sentenza Di Sarno c. Italia: un ulteriore passo avanti della Corte di Strasburgo nell'affermazione di obblighi di protezione dell'ambiente*, in *la Comunità internazionale*, 2013, p. 135; G. D'AVINO, *Il diritto di vivere in un ambiente salubre*, in A. DI STASI (ed.), *CEDU e ordinamento italiano. La giurisprudenza della Corte europea dei diritti dell'uomo e l'impatto nell'ordinamento italiano,* Padua, 2016, p. 820.

[48] Resolution 2400 (2021), *Combating inequalities in the right to a safe, healthy and clean environment*, https://pace.coe.int/en/files/29523/html.

created by the ECHR[49]. On this, the so called "horizontal rules" in the same CFREU could lend some guidance with the view of expanding same express boundaries under article 37 of the Charter, specifically when comparing the level of protection established, respectively, in the EU legal system and in other international legal systems, such as that established under same ECHR[50].

2.2. The EU

In its landmark judgment of 13 September 2005[51], the Court in Luxembourg annulled a framework decision of the European Union on environmental liability adopted on the basis of Articles 29, 31 (e) and 34 (2) (b) of the European Union Treaty in the pre-Lisbon edition[52], affirming the correctness of the choice of art. 175 European Community Treaty (now art. 192 Treaty on the Functioning of the European Union, TFEU) as the legal basis for a subsequent directive. In its reasoning, the Court refers first of all to art. 47 of the EU Treaty previous Lisbon Treaty, concerning the establishment of the principle of supremacy of the EC Treaty on the EU Treaty, for the simple reason of precedence of the obligations imposed by EC Treaty on the same parties of both treaties (and this also by way of derogation to relevant rules in the Vienna Convention on the Law of the treaties)[53]. European Commission noted that the approach followed by the Court in this case "*is a*

[49] According to this doctrine it is necessary to verify that within the European Union a level of protection of fundamental rights at least *equivalent* to the level already offered in the ECHR be granted, ECtHR judgment of 30 June 2005, *Bosphorus Airways v. Ireland*, app. 45056/98 (see previous case-law on international immunity regimes due to bodies or agents of an international organization, e.g., the European Space Agency, ECtHR judgment of 18 February 1999, app. 26083/94, Waite and Kennedy v. Germany as well as app. 28934/93, Beer and Regan v. Germany, of same date), E. CANNIZZARO, *Sulla responsabilità internazionale per condotte di Stati membridell'Unione europea: in margine al caso* Bosphorus, in *Rivista di diritto internazionale*, 2005, p. 762; for an overview under EU law, L. DANIELE, N. PARISI, A. GIANELLI, A. BULTRINI, S. AMADEO, P. SIMONE, *La protezione dei diritti dell'Uomo nell'Unione europea dopo il Trattato di Lisbona*, in *Il Diritto dell'Unione Europea*, 2009 p. 645.

[50] For a more cautious views, C. AMALFITANO, *General Principles of EU Law and the Protection of Fundamental Rights*, MA, USA, 2018, in particular (e.g. p. 62 and ff.) when it comes considering other CFREU "horizontal" provisions, e.g., those aimed at stressing the autonomous character of EU law also in cases where it would be possible to extend ECHR effects to less stringent CFREU provisions (e.g., in cases of "principles" under art. 52(3) CFREU, so called "homogeneity clause").

[51] Case C-176/03, *Commission v Council*, I-7879, A. MIGNOLLI, *La Corte di giustizia torna a presidiare i confini del diritto comunitario. Osservazioni in calce alla sentenza C-176/03*, in *Studi sull'integrazione europea*, 2006, p. 327; F. JACOBS, *The Role of the European Court of Justice in the Protection of the Environment*, in *Journal of Environmental Law*, 2006, p. 185; R. PEREIRA, *Environmental Criminal Law in the First Pillar: A Positive Development for Environmental Protection in the European Union?*, in *Energy and Environmental Law Review*, 2007, p. 254.

[52] Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law (OJ 2003 L 29, p. 55).

[53] On art. 47 EUT pre-Lisbon reforms see also CJEU of 12 May 1998, C-170/96, *Commission v. Council*, I-2763 and R. MASTROIANNI, *Commentary on Art. 47 EUT*, in A. TIZZANO (ed.), *Trattati dell'Unione europea e della Comunità euroea*, Milan, 2004, p. 167.

functional approach (…). The possibility for the Community legislator to provide for measures in the criminal field derives from the need to enforce Community legislation"[54].

In a subsequent case[55], the Court further emphasized the difference between the identification of the European Community's competence to regulate criminal aspects of environmental protection and the actual competence of Community itself to establish the kinds and levels of penalties (always under relevant criminal law and procedural criminal law) applicable in cases of violation of environmental standards, being such competence clearly not ascribable to the European Community in the period prior to the Lisbon Treaty. In the light of this, an overview of relevant treaties' rules on the Union's competence in the criminal law area might be useful.

2.2.1. Relevant context under EU criminal law

Under the Lisbon reforms, Art. 83, paragraph 2, TFEU, in particular, highlights that the possibility for the Union to adopt directives establishing minimum measures aimed at defining crimes and related sanctions can emerge only if this proves to be "essential" for the effective implementation of a Union policy in an area subjected to legislative harmonization. In this case, an EU legislative act (directive) aimed at regulating topics with a criminal law meaning can be adopted with the same legislative procedure (ordinary or special) followed to implement the regulatory framework aimed at achieving the aforementioned harmonization in the relevant sector (e.g., the various kinds of "ecological" crimes listed in the directive 2008/99[56], see *infra*, corresponding to issues of environmental protection pursued at EU level by means of *parallel* acts based on the relevant TFEU rules on environmental protection). Some interpretative problems, however, stem from the need to verify the "essential" character of a legal source dealing with criminal law matters in order to "effectively implement" an EU policy[57].

For the sake of completeness, and also with the view of underlying the relevance given under the Lisbon reforms to these topics, one should not forget the *emergency brake*

[54] See COM (2005) 583 final, Communication from the Commission to the European Parliament and the Council on the consequences of the (abovementioned) Court's judgment of 13 September 2005. Indeed, ever since the *Simmenthal* case (of 9 March 1978, 106/77, ECR 1871) the Court of the European communities evidenced the need that EC law obligations (when stemming from an EC directly applicable act, e.g., a regulation) be implemented at the national level also by means of criminal law acts (C. AMALFITANO, *Commentary to art. 83 TFEU,* in A. Tizzano (ed.), *Trattati dell'Unione europea,* 2014, part. at p. 905).

[55] CJEU 23 October 2007, case C-440/05, Commission v. Council, ECLI:EU:C:2007:625; L. SCHIANO DI PEPE, *Competenze comunitarie e reati ambientali: il "caso" dell'inquinamento provocato da navi,* in P. FOIS (ed.), *Il principio dello sviluppo sostenibile nel diritto internazionale ed europeo dell'ambiente,* Naples, 2007, p. 463.

[56] Of 6 December 2008, OJ (2008) L 328.

[57] In general, L. SALAZAR, *Commentary to articles 82, 83 and 84 TFEU,* in C. CURTI GIALDINO (ed.), *Codice dell'Unione europea, operativo,* 2012, p. 918; S. PEERS, *Mission accomplished. EU Justice and Home Affairs Law after the Treaty of Lisbon,* in *Common Market Law Review*, 2013, p. 661; C. AMALFITANO, *Commentary to articles 82, 83 TFEU,* in A. TIZZANO (ed.), *Trattati dell'Unione europea,* Milan, 2014, p. 870.

and an *accelerator* mechanism foreseen under articles 82(3) and 83(3) TFEU (respectively, on approximation of some aspects of criminal procedure and on approximation of criminal offences and sanctions in some areas of criminal law listed at article 83 nn.1 and 2). The sensitiveness (both legal and institutional) of those aspects is proven in particular by the mentioned *emergency brake* – that is, the possibility for a Member State to oppose a draft legislative act that would "affect fundamental aspects of its criminal justice system", by submitting the question to the European Council – for which a specific declaration (n. 26) has been adopted in order to allow the Council of the EU to intervene in cases where one Member States decides to opt-out a directive to be adopted according to mentioned TFEU's provisions. Under same declaration, it is also foreseen the chance for any Member State to ask the Commission to examine the situation under art. 116 TFEU (that is to say, with the chance of adopting a directive aimed at eliminating distortions of competition created by the differences among member states' legislative frameworks[58]).

It is also wise to recall that the scope of EU action on criminal law has always been different than that of other areas of EU action and legislation. Leaving aside the issue of Member States' duty to transpose in their own legislation an EU directive, this kind of source, to which EU makes particular recourse in the area of criminal law (see *infra*), is in general fit to force the member states in the achievement of same directive's goals. This issue is different from that of selecting which, among an EU directive's provisions, might perform *direct effects* in the national legal system, e.g. in cases where directive's provision(s) is(are) apt to grant or to improve individual rights/freedoms not foreseen or not adequately protected by a corresponding national legislation. On the opposite, EU directives' provisions aimed at improving the cooperation among member states in the area of criminal law (in the context of the Area of Freedom security and justice, AFSJ, specifically devoted to this kind of cooperation, see Chapter 4 in Title V TFEU) cannot be begged by national authorities or judiciaries in order to restrict individual rights[59].

Under a different perspective, the *Pupino* case[60] has been particularly clear in indicating that one of the main EU legislation's goals in the criminal law area is that of increasing and deepening, as far as possible, the protection of victims of crimes. In the EU Court's view, although the EU did not have exclusive competence in the relevant legislative field, priority should have been accorded to some provisions of the framework

[58] On this provision, see *ex multis* A. ARENA, *Commentary to art. 116,* in A. TIZZANO (ed.), *Trattati dell'Unione europea,* Milan, 2014, p. 1274.

[59] CJEU of 11 June 1987, case 14/86, *Pretore di Salò,* ECR p. 2545 at para. 20 and CJEU of 8 Oct. 1986, case 80/86, *Kolpinghuis Nijmegen BV,* ECR p. 3969, P. CRAIG, G. DE BURCA, *EU Law. Text, cases and materials*, Oxford, 2010, p. 85; J RIDEAU, *Droit Institutionnel de l'Union Européenne,* Paris, 2010, p. 197, E. CANNIZZARO, *Il diritto dell'integrazione europea,* Turin, 2020, p. 141; R. ADAM, A. TIZZANO, *Manuale di diritto dell'Unione europea,* Turin, 2021, p. 182; U. VILLANI, *Istituzioni di diritto dell'Unione europea,* Bari, 2020, p. 313.

[60] CJEU 16 June 2005, C-105/03, I-5285. C. LEBECK, *Sliding Towards Supranationalism? The Constitutional Status of EU Framework Decisions after Pupino*, German Law Journal, 2007, p. 501, E. HERLIN-KARNELL, *In the Wake of Pupino, Advocaten voor de Wereld and Dell'Orto,* in *German Law Journal*, 2007, p. 1147.

decision on the position of victims in criminal proceedings, that is, a source envisaged in the pre-Lisbon regime which was not directly applicable as such and whose provisions couldn't perform direct effects in national legal orders. EU Court has make aims pursued by the framework decision (that is to say, the protection of particularly weak individuals affected by crimes) prevail and, to this end, resorted to the "sincere cooperation" criterion, currently foreseen at art 4 (3) TEU. In fact, in accordance to that principle (previously foreseen at art. 5 EEC Treaty), the Court of Justice has frequently enhanced the content and the effects of obligations that for same EU Member States result from relevant EU law sources, especially when same content and same effects cannot be clearly inferred from related provisions of that sources. In the Court's words: "*It would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation - requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfillment of their obligations under European Union law - were not binding also in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions*". In conclusion, though concerning a specific source of EU law aimed at protecting particularly fragile individuals (such as those victims of crimes), the cited case gives us a sufficiently clear example of the role played by the Union's Court on those issues, explaining the juridical path that, though under some conditions, leads at giving precedence to EU legislation.

Furthermore, in addition to the general principles of EU law, such as the aforementioned duty of sincere cooperation, judicial cooperation in civil and criminal matters raises many questions relating to the protection of human rights. Same aspects dealing with the interactions between EU criminal policies and law and the relevant human rights that come into play in the same area achieve specific significance when it comes considering the position of those accused or convicted of a crime[61]. Indeed, the main purpose of the European Arrest Warrant (EAW)[62] is that of improving an effective prosecution through member states borders and inside the EU of the crimes listed in the same Framework decision establishing the EAW itself. The CJEU has acknowledged the chance for EU law to restrict some prerogatives enjoyed by individuals under national legislation, if such a limitation is aimed at improving the cooperation among judiciaries

[61] In this context, one should not forget the s.c. *Taricco saga*, CJEU 8 September 2015, case C-105/14, *Taricco,* EU:C:2015:555 and subsequent *revirement* under CJEU 5 December 2017, C-42/17, *M.A.S. e M.B,* ECLI:EU:C:2017:936): *ex multis* C. AMALFITANO, *Da un'impunità di fatto ad un'imprescrittibilità di fatto della frode in materia di imposta sul valore aggiunto?*, in *Quaderni di SIDI Blog*, 2, 2015 p. 561; L.S. ROSSI, *Come risolvere la questione Taricco senza far leva sull'art. 4 n. 2 TUE?*, in *SIDI Blog*, www.sidiblog.org, 2017; P. MORI, *Taricco II o del primato della Carta dei diritti fondamentali e delle tradizioni costituzionali comuni agli Stati membri*, in *Il Diritto dell'Unione europea*, *Osservatorio*, dicembre 2017; R. MASTROIANNI, *La Corte costituzionale si rivolge alla Corte di giustizia in tema di "controlimiti": è vero dialogo?,* in *Federalismi*, 2017, p. 2; L. GRADONI, *Il dialogo fra corti, per finta,* in *Quaderni SIDIBlog*, 2018, p. 5; D. GALLO, *La primazia del primato sull'efficacia (diretta?) nel diritto UE nella vicenda Taricco*, in *Quaderni SIDIBlog,* 2018, p. 48.

[62] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24).

as it is pursued by the EAW itself[63]. In that case, the CJEU examined expressly the compatibility of the EAW system with fundamental rights, particularly in the light of the right to an effective judicial remedy and the right to fair trial set out in Articles 47 and 48(2) of the CFREU. In the CJEU's view, the right of an accused person to appear in person at his trial is not absolute but, to some extent, can be disregarded. The Court further stated that the objective of the Framework Decision on judgments *in absentia* was to enhance procedural rights whilst improving mutual recognition of judicial decisions between Member States and found Article 4a(1) compatible with the Charter.

The main criticism on this decision, apart from more technical aspects specifically dealing with criminal and procedural legislations in different EU Member States (in the case at hand, Italy and Spain), lays on the fact that the Court compared some general requirements of EU institutional framework – such as mutual trust between different national procedural systems and mutual recognition of decisions between different EU Member States' authorities/judiciaries (inspiring as such the EAW mechanism) – with some core procedural rights enshrined in the Charter of fundamental rights of the European Union. This aspect has been reexamined and clarified further by the same Court in Luxembourg in a subsequent case[64], when, specifically on the *mutual trust* principle, the Court had the chance to clarify what follows: "*… the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. …Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental*

[63] CJEU 26 February 2013. C-399/11, Melloni, ECLI:EU:C:2013:107; P. MORI, *Autonomia e primato della Carta dei diritti dell'Unione europea,* in G. NESI, P. GARGIULO (eds.), *Luigi Ferrari Bravo. Il diritto internazionale come professione*, 2015, p. 169. The CJEU clarified that "*once a person convicted in absentia was aware, in due time, of the scheduled trial and was informed that a decision could be handed down if he did not appear for the trial or, being aware of the scheduled trial, gave a mandate to a legal counsellor to defend him at the trial, the executing judicial authority is required to surrender that person, with the result that it cannot make that surrender subject to there being an opportunity for a retrial of the case at which he is present in the issuing Member State*". Under Italian procedural law it is impossible to appeal against judgments *in absentia*: consequently, Mr. Melloni, who should have been rendered by the Spanish judiciaries to the Italian ones via an EAW adopted by the Spanish authorities, requested that the execution of the EAW be made conditional upon Italy's guaranteeing the possibility of appealing against that judgment.

[64] Opinion 2/13 of 18 December 2014, on the accession of the EU to the ECHR (see supra) 191-192. In a more recent decision, the CJEU examined more in detail the conditions allowing a review of a decision enacting the EAW across different EU member States. In the Court's view, the issuing of a surrender decision of anyone convicted for a crime listed in the EU decision establishing the EAW, can be suspended or denied only when there is *"(…) objective, reliable, specific and properly updated information showing there to be systemic or generalised deficiencies in the conditions of detention"* in the prisons of the Member State to which the authority that issued that request belongs. Such condition is satisfied when the surrender of the criminal might result in an infringement of art. 4 of the CFREU on the prohibition of *inhuman or degrading treatments* (CJEU 15 October 2019, C-128/18, *Dorobantu*, ECLI:EU:C:2019:857, see *ex multis*, N. LAZZERINI, *Gli obblighi in materia di protezione dei diritti fondamentali come limite all'esecuzione del mandato di arresto europeo: la sentenza Aranyosi e Căldăraru,* in *Diritti umani e diritto internazionale*, 2016, p. 445; S. MONTALDO, *A New Crack in the Wall of Mutual Recognition and Mutual Trust: Ne Bis in Idem and the Notion of Final Decision Determining the Merits of the Case*, in *European Papers*, 2016, p. 1183; V. CARLINO, G. MILANI, *To trust or not to trust? Fiducia e diritti fondamentali in tema di mandato d'arresto europeo e sistema comune di asilo,* in this *Journal*, 2019, p. 64.

rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU".

This rests among one of the crucial and most controversial aspects of current EU law and integration process, and also as far as the chance of strengthening environmental protection in the EU legal system and between EU member states is concerned. Indeed, it should be envisaged the possibility that an environmental crime equal to *ecocide* be included among criminal acts for which all existing procedural means such as the EAW shall be of essential support for an effective prosecution of same crimes across EU[65].

Few words can be spent on current *new* position of UK as a non-EU member State. After the end of a transitional period in 2020, with specific reference to the application of current regulation on the European Arrest Warrant[66], some have submitted a three-case scenario:

1. A 'surrender agreement' could be concluded between EU and non-EU countries as it was adopted between EU/Schengen zone countries and the EU as such, on the one hand, with Norway and Iceland, on the other hand[67].

2. It is also under discussion that, in the absence of a compromise, UK asks to access the 1957 Council of Europe Convention on extradition[68] (a different international

[65] On the principle of mutual trust (notoriously inspired on the mutual recognition principle, as a general device of the internal market, e.g. CJEU 20 February 1979, C-120/78, *Rewe-Zentral*, Racc. 649, cd. *Cassis de Dijon*), in the relevant AFSJ see *ex multis* C. AMALFITANO, *Mandato d'arresto europeo: reciproco riconoscimento vs. diritti fondamentali? Note a margine delle sentenze Radu e Melloni della Corte di giustizia*, in *Diritto penale contemporaneo*, (dirittopenaleuomo.org); K. LENAERTS, *The Principle of Mutual Recognition in the Area of freedom, Security and Justice*, in *Il Diritto dell'Unione europea*, 2015, p. 525; A. WILLEMS *Mutual Trust As a Term Of Art In EU Criminal Law: Revealing Its Hybrid Character*, in *European Journal of Legal Studies*, 2016, p. 211; D. DÜSTERHAUS, *In the Court(s) We Trust - A Procedural Solution to the Mutual Trust Dilemma*, in this *Journal*, 2017, n. 1, p. 26; P. MENGOZZI, *L'applicazione del principio di mutual fiducia e il suo bilanciamento con il rispetto dei diritti fondamentali in relazione allo spazio di libertà, sicurezza e giustizia*, in this *Journal*, 2017, n. 2, p. 1; E. PISTOIA, *Lo status del principio di mutua fiducia nell'ordinamento dell'Unione secondo la giurisprudenza della Corte di giustizia. Qual è l'intruso,* in this *Journal*, 2017, n. 3, p. 26; L. PANELLA, *Mandato di arresto europeo e protezione dei diritti umani: problemi irrisolti e "incoraggianti" sviluppi giurisprudenziali,* in this *Journal*, 2017, n. 3, p. 5; F. MAIANI, A. MIGLIONICO, *One principle to rule them all? Anatomy of mutual trust in the law of the Area of Freedom, Security and Justice*, in *Common Market Law Review*, 2020, p. 7; S.A. BLOK, T. VAN DEN BRINK, *The Impact on National Sovereignty of Mutual Recognition in the AFSJ. Case-Study of the European Arrest Warrant*, in *German Law Review*, 2021, p. 45; L.S. ROSSI, *Fiducia reciproca e mandato d'arresto europeo. Il "salto nel buio e la rete di protezione,* in this *Journal*, 2021, p. 1.

[66] 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States OJ L 190, 18.7.2002, p. 1.

[67] 2006/697/EC: Council Decision of 27 June 2006 on the signing of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway. Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway OJ L 292, 21.10.2006, p. 1.

[68] European Convention on extradition, 13 December 1957, European Treaties Series No. 24, https://rm.coe.int/1680064587 .

agreement in the context of the Council of Europe system), as it allows accession of non-EU countries to it: as a consequence, UK could become a non-EU Contracting party to the Convention itself[69]. A similar chance is foreseen also under other Council of Europe international agreements related to issues of judicial cooperation on criminal matters[70].

3. In a "worst-case scenario", where no chance for UK of entering an agreement with EU under conditions above exists, an UK legislative act could always be amended or adopted as to allow that a mechanism (to be taken at the national level) such as the European Arrest Warrant be granted to citizens of EU member states, even referring to relevant EU legislation (cooperation in the criminal law area) for that purpose[71].

Conclusively, on the *external* dimension of EU competencies in the field of criminal law, EU runs the specific task of taking part to the fight of crimes with an international character by means of a specific cooperation agreement concluded with the abovementioned ICC in the context of EU Common Foreign and Security Policy's tasks[72]. Following the Kampala Review Conference held on 31 May – 11 June 2010 , the EU updated its Common Position 2003/444/CFSP by adopting Council Decision 2011/168/CFSP on 21 March 2011[73] aimed at 1) advancing support for the Rome Statute by promoting the widest possible participation in it, 2) preserving the integrity of the Statute, 3) supporting the independence of the Court and its effective and efficient

[69] Under article 28(3) of this Convention: "where, as between two or more Contracting parties, extradition takes place on the basis of a uniform law, the parties shall be free to regulate their mutual relations in respect of extradition exclusively in accordance with such a system notwithstanding the provisions of this Convention». As a consequence, following this provision, UK and EU could envisage a "special regime" among them, not in contrast with the same Convention.

[70] E.g., under article 9 of the 1977 European Convention on the suppression of terrorism, the Contracting states can conclude bilateral or multilateral agreements to apply the provisions and principles of the Convention in exam.

[71] On *Brexit* (given the too wide existing literature), *ex multis*, A.F. TATHAM, *Don't Mention Divorce at the Wedding, Darling!: EU Accession and Withdrawal after Lisbon*, in A. BIONDI, P. EECKHOUT, S. RIPLEY (eds.), *EU Law after Lisbon*, Oxford, 2012, p. 128; P. CRAIG, *Brexit. A Drama in Six Act*, in *European Law Review*, 2016, p. 447; M. STEFAN, F. GIUFFRIDA, *Disarming a ticking bomb: Can the Withdrawal Agreement ensure EU-UK judicial and police cooperation after Brexit?*, Center for European Policy Studies CEPS Policy Insight, 2018, 16; M. STARITA, *Il Ruolo del Consiglio europeo nella Brexit,* in *il Diritto dell'Unione europea,* 2019, p. 561; A. ENGEL, *The Impact of Brexit on EU Criminal Procedural Law: a New Down?, European Papers*, 2021, p. 513; C. CURTI GIALDINO, *Prime considerazioni sugli accordi concernenti le future relazioni tra il Regno Unito e l'Unione europea,* in *Federalismi*, Editorial, 10 February 2021.

[72] Agreement between the International Criminal Court and the European Union on cooperation and assistance OJ L 115, 28.4.2006, p. 50. For an overview of issues related to EU external action on Justice and Home affairs, see, *ex multis*, M. CREMONA, *EU External Action in the JHA Domain. A legal perspective*, EUI Working Paper, n. 24, 2008; M. CREMONA, J. MONAR, S. POLI (eds.), *The External Dimension of EU's Area of Freedom, Security and Justice,* Brussels, 2011; F. TRAUNER, H. CARRAPIÇO, *The External Dimension of EU Justice and Home Affairs after the Lisbon Treaty: Analysing the Dynamics of Expansion and Diversification*, in *European Foreign Affairs Review*, 2011, p. 1; J. MONAR, *The External Dimension of the EU´s Area of Freedom, Security and Justice. Progress, potential and limitations after the Treaty of Lisbon*, Stockholm, 2012.

[73] Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court and repealing Common Position 2003/444/CFSP OJ L 76, 22.3.2011, p. 56.

functioning,4) supporting co-operation with the Court and to assist it in implementing the principle complementarity.

In another decision of the Political and Security Committee in the Council (PSC)[74], an Action Plan to follow-up on the abovementioned Decision 2011/168 on the International Criminal Court was adopted[75]. On 25 June 2012, the Council of the EU adopted a Strategic Framework on Human Rights and Democracy with an Action Plan for putting it into practice[76]. Following another Action plan in the meanwhile adopted on 2015[77], and after the appointment of the first EU Special Representative for Human Rights (EUSR) in 2012 and the 2019 Council conclusions on democracy[78], the current High Representative of the EU for Foreign Affairs and Security Policy (art. 18 TEU) submitted a more recent EU Action Plan on Human Rights and Democracy 2020-2024[79] where it is openly denounced a "widespread impunity for human rights violations and attacks on the role of the International Criminal Court" with the resulting acknowledgment of the need that EU external action be strengthened in the relevant field (see page 2 of the Action Plan 2020 on promotion of human rights and democracy).

2.2.2. Environmental protection in the Charter of fundamental rights of the European Union

As far as environmental protection is concerned, but always considering relevant framework on criminal law cooperation, it is worth noting that Art. 37 of the Charter of Fundamental Rights of the European Union (CFREU) reads as follows: "A high level of environmental protection and the improvement of its quality must be integrated into Union policies and guaranteed in accordance with the principle of sustainable development". It would therefore be questionable whether and to what extent such a provision of the Charter effectively enshrines a fundamental human right or whether it is limited to establishing, as it also seems from its wording, a "principle", thus offering a concrete example of the distinction made by art. 52 par. 5 of the Charter itself in the revised version and proclaimed in 2007.

Although Art. 37 CFREU is clearly aimed at founding an un-enforceable individual right. "Principles" enucleated in the same Charter (and to which art. 37 CFREU seems to make reference) are anyway also apt to gain, precisely through their inclusion in the Charter, a deeper political (and even legal) meaning that can be developed via the *acquis*

[74] N. 12080/11 of 12 July 2011.

[75] Complementarity is at the core of the functioning of the Rome Statute (art. 1, see P. SAILS, International Center for Transitional Justice ICTJ, *Handbook on Complementarity, An introduction to the Role of National courts and ICC in prosecuting international crimes,* Austrian Development Cooperation and the EU, 2014).

[76] Luxembourg, 25 June 2012 11855/12.

[77] https://eeas.europa.eu/sites/default/files/eu_action_plan_on_human_rights_and_democracy_en_0.pdf.

[78] https://data.consilium.europa.eu/doc/document/ST-12836-2019-INIT/en/pdf.

[79] 25 March 2020, JOIN(2020) 5 final.

communautaire and CJEU case law, being also apt to be meant, even though potentially, as true individual rights.

However, the fact remains that the Court has not been particularly inclined to depart from the content of art. 52 par. 5 of the Charter, according to which the provisions of the Charter encompassing principles "can be implemented by legislative and executive acts adopted by institutions, bodies, offices and agencies of the Union and by acts of Member States when they implement Union law, (...) [e] may be invoked before a judge only for the purpose of interpreting and checking the legality of said acts". In particular, following the relevant case-law[80] the fact that the "principles" require, in order to be operational, regulatory and organizational interventions of the Union and its Member States clearly emerges from the expression "*promote its application"*, contained in art. 51, no. 1, second sentence, of the Charter[81], also related to the "principles" under same art. 52 para. 2 of the Charter.

Finally, we have already seen in the previous chapter relating to the jurisprudence of the ECtHR how a recent trend in this Court would allow that the limited scope of application of art. 37 CFREU is also read in a broader sense by the EU Court of Justice itself, so that, even at EU level, individual rights related to environmental protection are recognized in the widest possible sense and in accordance with the relevant jurisprudence of the ECtHR.

Going beyond the boundaries of a contentious provision such as art. 37 of the CFREU, one should not forget how environmental law under current TFEU and related legislation has consistently progressed and become a core objective of most of EU policies. Besides, environmental protection is a true transversal aim of any of the EU activities, as it can be inferred also from the main general provisions of the TEU (in part. under art. 3 para. 3, with explicit reference to sustainable development goals and a "high level" of environmental protection and improvement of its quality).

It is also wise to check the two main legislative tools that are concretely and broadly aimed at an enforcement of the same environmental protection in the EU, that is to say: a) the legislative tool designing a general framework for an environmental liability, based on the classical "civil law" remedy of compensation for damages occurred in the relevant sector (environment), b) the legislative tool designing an individual liability under

[80] See CJEU Judge Trstenjak's conclusions in the case C-282/10, Dominguez, ECLI: EU: C: 2011: 559. Essentially in the same sense - albeit with some further problematic profile regarding specifically the possibility that, e.g., the rule under art. 26 of the Charter (regarding the protection of the disabled) be meant, alternatively, as a "right" or as a "principle" pursuant to art. 52 par. 5 of the Charter itself - see CJEU of May 22nd , 2014, case C-356/12, *Glatzel*, ECLI: EU: C: 2014: 350. N. LAZZERINI, *Commentary on Art. 52*, in R. MASTROIANNI, O. POLLICINO et A. (eds.), *Carta dei diritti fondamentali dell'Unione europea*, Milan, 2017, p. 1076; C. AMALFITANO, *General Principles of EU Law and the Protection of Fundamental Rights*, MA, USA, 2018; B. NASCIMBENE, *Carta dei diritti fondamentali, applicabilità e rapporti fra giudici: la necessità di una tutela integrata*, in *European Papers*, 2021, p. 81.

[81] According to this provision: 'The provisions of this Charter apply to the institutions, bodies, offices and agencies of the Union (...) as well as to the Member States exclusively in the implementation of European Union law. Therefore, the aforementioned subjects respect the rights, observe the principles and promote their application …'.

criminal law. Though the second legislative tool (directive on criminal law liability) is obviously more strictly related to the need to assess the definition of a true *ecocide* in the EU legal system, it is also wise to briefly assess firstly the main features of the other legislative tool, considering its character as a remedy of general scope, envisaged as such also in most of contemporary legal systems.

2.2.3. Environmental liability and individual right to appeal against EU legislation

Beside EU competence on criminal law matters (and also at the level of EU external relations), issues of individual damages occurring from activities with significant environmental impact are also specifically addressed under relevant EU rules of private international law (whose competence is now established under art. 81 TFEU), whenever individuals might claim compensation for damages (including those with a broader character connected to a significant negative change of own life conditions) suffered from private and public entities' behaviors with a meaningful ecological impact with a trans boundary character[82].

On the substance, mentioned Directive 2004/35 establishes a framework for environmental liability – not with a criminal law character – based on the "polluter pays" principle, with the view of preventing and remedying environmental damage. It doesn't apply to activities aimed at the national defense or international security. The Directive aims at preventing and remedying environmental damage and does not affect rights of compensation for traditional damage granted under any relevant international agreement regulating civil liability.

Member States may allow that operators who are not at fault or negligent shall not bear the cost of remedial measures, in situations where the damage in question is the result of emissions or events explicitly authorized or where the damage could not have been known when the event or emission took place. Member States are also invited to report the Commission on the experience gained in the application of this Directive so as to enable the Commission to consider whether any review of Directive itself would be

[82] E.g. arts. 4 and 7 Reg. 864/2007 (on the law applicable to non-contractual obligations, OJ 2007 L 199 p. 40) concerning the individual right to claim damages, including the cases where environmental damages might even just indirectly ensue from bad environmental behaviors committed in a place different from that where same damages have occurred. See also Regulation No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ 2012 L 351 p. 19; F. MUNARI, L. SCHIANO DI PEPE, *Liability for Environmental Torts in Europe: Choice of Forum, Choice of Law and the Case for Pursuing Effective Legal Uniformity*, in A. MALATESTA (ed.), *The Unification of Choice of Law Rules on Torts and Other Non-Contractual Obligations in Europe: the 'Rome II' Proposal,* Padua, 2006, 173; R. BARATTA, *Réflexions sur la cooperation judiciaire civile suite au Traité de Lisbonne*, in G. VENTURINI, S. BARIATTI (eds.), *Nuovi strumenti del diritto internazionale privato. Liber Fausto Pocar,* Milano, 2009, part. p. 11; *ibidem*, M. BOGDAN, *Some Reflections Regarding Environmental Damage and the Rome II Regulation,* p. 75; C. TUO, *Armonia delle decisioni e ordine pubblico,* in *Studi sull'integrazione europea*, 2013, p. 507; K. LENAERTS, *The European Court of Human Rights and the Court of Justice of the European Union: Creating Synergies in the Field of Fundamental Rights Protection*, in *Il Diritto dell'Unione europea*, 2018, p. 9.

appropriate, taking into account the impact on sustainable development and future risks to the environment.

Articles 12 and 13 fix the conditions required to be entitled respectively: a) to submit observations to the competent Authority regarding the existence of environmental damages; or b) to submit legal actions before an independent and impartial public body, for the purpose of reviewing the decisions adopted by the competent Authority. Same Articles 12 and 13 give legal standing to those who "*have a sufficient interest in the decision-making process on environmental matters concerning the damage*" or who "c*laim the violation of a right*", in cases where national law requires it. Obviously, the fundamental elements of these conditions are determined by national legislations, as the directive only requires that a *sufficient interest* of all non-governmental organizations that promote environmental protection exists. It must however be noticed that effectiveness is also required with the view that the procedural means offered at national level are apt to the pursuance of same directive's goals[83].

Finally, the directive restricts its scope where it foresees the chance for national legal systems to grant the right to exercise actions referred to in art. 12 and 13, only in cases where there is a breach of a specific subjective legal situation, whether qualified as a true right or "legitimate interest" (in accordance, in particular, with the Italian legal system).

It remains to be seen whether any individual can ultimately rely on the protection afforded for the correct application of EU law following the relevant EU Court of Justice case law: in fact, as is well known, starting from the *Francovich* and *Brasserie du Pêcheur* judgments[84], the Court affirmed the principle of responsibility of the Member States by requiring them to compensate the damage caused to individuals for any breach of EU law obligations whenever such violations are attributable to any national body, be it legislative, judicial, or executive. Apart from the lack of a clear depiction of a wide right of access to justice under Dir. 2004/35, the EU legal system has anyway bestowed the possibility for individuals to invoke the breach of procedural criteria underlying, in particular, environmental impact assessments procedures, e.g., in cases where, in addition to the suspending remedy or to the duty of restoring the *status quo ante*, the Court has

[83] In a case concerning the "polluter pays" principle the Court has in fact stated what follows: *" Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage must be interpreted as not precluding national legislation which, in cases where it is impossible to identify the polluter of a plot of land or to have that person adopt remedial measures, does not permit the competent authority to require the owner of the land (who is not responsible for the pollution) to adopt preventive and remedial measures, that person being required merely to reimburse the costs relating to the measures undertaken by the competent authority within the limit of the market value of the site, determined after those measures have been carried out"* (CJEU of 4 March 2015, case C-534/15, Ministero dell'ambiente (Italy) v. Fipa Group & others, ECLI:EU:C:2015:140). In general, see N. DE SADELEER, *Environmental Principles from Political Slogan to Legal Rules*, Oxford, 2002 and, much more recently, N. DE DOMINICIS, *L'accesso alla giustizia in materia ambientale,* Padova, 2016, R. GIUFFRIDA, *La responsabilità ambientale nel diritto europeo,* in R. GIUFFRIDA, F. AMABILI (eds.), *La tutela dell'ambiente nel diritto internazionale ed europeo,* Turin, 2018, p. 134.

[84] Judgments of 19 November 1991, in case 6/90 and 9/90, I-5357 and 5 March 1996, in case C-46/93, and C-48/93, I-1131. The Court also reiterated the principles set out in these judgments on 8 October 1996, in case C-178/94, I-4895, extending the compensation for civil damage to cases of loss of profit.

provided the possibility of inflicting compensation on public or private companies in favor of any damaged individuals[85].

The CJEU has additionally found a general right of information and participation of individuals in decision-making processes on environmental matters. Furthermore, that same Court has raised the degree of judicial protection in the environmental sector, particularly in favor of environmental associations, recognizing a widespread right to judicial review particularly in the field of environmental impact assessment proceedings, appointing on national judiciaries (and this also under the terms of art. 19 par. 2 TEU) the function of intervening, according to the relevant procedures and instruments of national law, also against legislative acts that ratify situations where related procedures imposed under European Union law are infringed[86]. More generally, EU law on environmental protection can affect national procedures and procedural tools aimed at awarding effectiveness on the protection in question, providing for an extensive understanding of the relevant criteria of legitimacy and interest to act in order to guarantee the widest individual access to justice in this field. It can be recalled, for instance, how under art. 16 of Directive 2008/1/EC of 15 January 2008, on integrated pollution prevention and reduction[87], EU Member States must grant suitable procedures (including those implementing the precautionary principle) apt at offering "*members of the public concerned*" an effective access to justice "*to challenge the substantive or procedural legitimacy of decisions, acts or omissions subject to the provisions on public participation established by this Directive*" provided such applicants "*a) have a sufficient interest or b) claim the violation of a right, in cases where the administrative procedural law of a Member State requires this condition*"[88].

In the different perspective of challenging European Union acts, including those

[85] CJEU 20 October 2011, case C-474/10, *Seaport*, ECLI:EU:C:2011:681 and CJEU January 7, 2004, case C-201/02, *Delana Wells*, I-723, in particular, pp. 66 and 70, the Court clearly establishes the obligation for States to compensate for the damage caused by the failure to implement the environmental impact assessment procedures, on the assumption that a general obligation for the Member States of the Union exists to remove unlawful consequences of a breach of EU law (see ex multis, 19 November 1991, joined cases C-6/90 and C-9/90, *Francovich and Others*, n. 24 above, part. paragraph 36 and Court of Justice of 5 March 1996, *Brasserie du Pêcheur SA*, joined cases C-46/93 e C-48/93**,** n. 24 above, on this see an abundant literature, *ex multis*, F. FERRARO, *La responsabilità risarcitoria degli Stati per violazione del diritto dell'Unione*, Milan, 2012; U. VILLANI, *Istituzioni di diritto dell'Unione europea,* Bari, 2020, p. 368.

[86] On environmental impact assessment proceedings, see Directive 2014/52/EU of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, *OJ L 124 of 25.4.2014, p. 1. In the light of this directive, the vice-President of CJEU has recently reiterated, in the context of an action for interim measures under art. 279 TFEU, that* damages to the environment and human health are generally *"irreversible since, more often than not, damage to such interests cannot, by reason of its nature, be eliminated retroactively"* (Order of 21st May 2021, C-121/21, Czech Republic v. Poland, ECLI:EU:C:2021:420). This statement dealt with a case of serious deterioration in the level of the affected groundwater and of various consequences arising from the lack of a supply of drinking water for the populations concerned that could not be remedied at a later date.

[87] OJEU of 29 January 2008, L 24.

[88] As regards the possibility for representative bodies to enjoy the right to appeal in the context of the regulations on environmental impact assessment and those relating to the conservation of natural habitats, cf. CJEU 12 May 2011, C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen e V. v. Bezirksregierung Arnsberg*, I-3673.

insisting on environmental (or other public policies') standards, and also under a general accountability requirement that is binding on same EU as a supranational actor, one should recall that CJEU has strictly interpreted the individual right to appeal against EU acts of general scope in accordance with art. 263 par. 4 TFEU[89], confirming the duty for individuals to prove, in such cases, that a general act of the EU affects them "individually" and "directly"[90]. In brief, an attempt exists at EU level to broaden the individual right to challenge EU acts, that is to say, by allowing a path looking into the true (*substantial*) effects of an EU act – be it legislative (e.g. regulations or directives) or of any other kind (including *sui generis* acts) –, beyond the effects formally fixed under the same provision (the act must be of individual and direct concern). This is only partially achieved under current art. 263 para. 4 TFEU wording: in fact, while, on one hand, that provision refers to *acts* in the broadest meaning when considering the individuals' right to challenge them, on the other hand, the same provision reaffirms the abovementioned requirements (be it of individual and direct concern) in order to assess if an individual is effectively entitled to challenge the act in question (be it general in scope or not addressed to those who claim to be damaged by it)[91]. This is of particular significance for cases where an EU act deals with environment or other subjects that, directly or not, impinge on public health and public safety aims.

Though if inspired to the precautionary principle, EU law sources can in some cases infringe other individuals' (e.g. private companies) interests of a mainly economic kind. For this, EU law provides two other main avenues: *1)* on the one hand, the legality (under same art. 263 TFEU meaning) of an EU act could be challenged before a national judiciary and, in that context, the same question can be raised by such judiciary before the same EU court via a preliminary question under art. 267 TFEU: this avenue presumes that the national judiciary is invested of the relevant controversial matter via the infringement of a national act implementing the relevant EU act[92]; *2)* anyone presumably damaged by an EU act can submit an action for damages according to current articles 268 and 340 (2) TFEU, though this different kind of action is conceived as autonomous and

[89] See judgments, having the same date, of the CJEU 13 January 2015, cases C-401/12 P, C-402/12 P, C-403/12, *Council and Others. v. Vereniging Milieudefensie and Others*, ECLI:EU:C:2015:4 and cases C-404/12 P, C-405/12 P, *Council and Others. v. Stichting Natuur en Milieu and a*., ECLI:EU:C:2015:5.

[90] See, among many others, CJEU of 27 Febr. 2014, case C-132/12P, *Stitching Woonpunt and others*. In a quite relevant case dealing with reforms of the individual right to challenge an EU act under mentioned art. 263 TFEU, advocate general Jacobs underlined what follows: "[under art. 263 par. 4 TFEU] … *an applicant is individually concerned by a Community measure where the measure has, or is liable to have, a* substantial (emphasis added) *adverse effect on his interests"* Opinion of Mr. Advocate General Jacobs delivered on 21 March 2002, *Unión de Pequeños Agricultores v. Council of the European Union*, C-50/00 P, I-6677.

[91] See EU Court of Justice of 3 october 2013, C-583/11P, *Inuit Tapiriit Kanatami and Others v. Parliament and Council*, ECLI:EU:C:2013:625, in part. 56: "*Given the reference to 'acts' in general, the subject matter of those limbs of Article 263 is any European Union act which produces binding legal effects (…). That concept therefore covers acts of general application, legislative or otherwise, and individual acts. The second limb of the fourth paragraph of Article 263 TFEU specifies that if the natural or legal person who brings the action for annulment is not a person to whom the contested act is addressed, the admissibility of the action is subject to the condition that the act is of direct and individual concern to that person*".

[92] See on this Advocate general Jacobs' conclusions of 21 March 2002, *Unión de Pequeños Agricultores v. Council of the European Union*, C-50/00 P, I-6677, in part. para. 102.

of a general character in conformity with the *neminem laedere* principle, applicable as such to any kind of act, including any act adopted by EU institutions, be it of a legislative character or not[93].

In the case of the associations and interest groups, though considered as more widely entitled to take action in order to challenge the negative feedbacks of an EU legislative act on the public and/or on specific groups of EU citizens or populations, a steady case-law has listed three alternative conditions for this kind of action to be considered admissible under same art. 263 par. 4 TFEU: *1)* when same associations or interest groups enjoy a series of procedural rights; *2)* where their members are also concerned by the EU legislative source at stake; *3)* where the association or interest group as such is affected by same EU act[94].

2.2.4. Criminal liability for infringement of environmental standards under EU law

Directive 2008/99[95] sets some common minimum standards throughout the territory of the Union, also with the view of increasing effectiveness to Police' investigative activities across EU Member States' borders, and with the view of providing assistance both within a Member State and at the level of cooperation between States. To achieve those goals, the Directive moves along two lines: on the one hand, it indicates a series of "illegitimate" conducts to be penalized and on the other hand it introduces the "criminal liability" of legal persons. It foresees therefore a criminal liability as such, leaving no room for choice to the recipient States, regardless of the criminal law system where same Directive must be transposed and implemented. In this perspective, the problem has arisen of compatibility between the criminal liability of legal persons and the criminal systems – such as the Italian one – that follow the *societas delinquere non potest* principle. In fact, the Italian Constitution under its art. 27 first paragraph stipulates that criminal liability is personal, as such pertaining to individuals and consequently excluding it for legal persons' behaviors.

Apart from the very detailed list of criminal behaviors formally covered by the Directive under its art. 3, in order for the conduct indicated above to integrate a criminal offense, the coexistence of three elements is required: *a)* the conduct must infringe EU

[93] See for a case in point (e.g., of an action for both the annulment of an EU act and for compensation of related damages occurred from the same challenged act), judgement of the Court of Justice of the European communities of 26 June 1990, C-152/88, *Sofrimport*, I-2477.

[94] Judgment of the Court of first instance (previous Lisbon reforms) of 30 September 1997, T-122/96, *Federolio v. Commission, European Court Reports 1997 II-1559*, and, for cases particularly dealing with environmental issues, Order of the Court of First Instance (First Chamber) of 9 August 1995, case T-585/93, *Greenpeace v. Commission, European Court Reports 1995 II-2205.*

[95] Of 6 December 2008, OJ L 328.

legislation referred to in Annexes A[96] and B[97] of the same directive; *b)* the presence of the psychological element, necessary for the completion of the crime, corresponding to a willful misconduct or to negligence in the form of gross negligence; *c)* the conduct must cause damage or a concrete danger. For example, with the view of coming under same directive's purview, some acts covered by legislation listed under Annex A (dealing, in general, with waste management rules) must cause damage to air quality or death or serious injury to individuals. Therefore, those listed in the directive are no mere danger or conduct crimes, but are concrete danger or true damage crimes, with the punishment extended (pursuant to article 4) also to anyone who contributed to such crimes by way of instigation, aiding and abetting.

The second important change is exemplified by art. 6 of the directive. According to this provision, legal entities can be held responsible for the unlawful conduct (as set out in the directive) committed "to their advantage" by individuals who hold top positions within the same legal person, and, more precisely: "by any person who holds a prominent position within the legal person, individually or as part of an organ of the legal person, by virtue of: *a)* the power of representation of the legal person; *b)* the power to take decisions on behalf of the legal person; or *c)* the power to exercise control within the legal person"[98].

Following the Directive's approach and reasoning, a responsibility (to which a Member State must attach specific criminal law significance) exists even when there is a lack of surveillance or control by those indicated above, such as to allow the commission of a crime by a person put under authority. Therefore, a liability of an "active" kind can be affirmed for individuals in top positions, but the directive foresees a title of "non-active" causality as well, which can anyway arise when the legal entity achieves an

[96] Annex A to the directive contains the list of Community legislation adopted on the basis of the EC Treaty (now Treaty on the Functioning of the European Union, TFEU) whose violations constitute an offense pursuant to art. 2. Inter alia one can recall Directive 2008/98 on waste, OJ L 312, 22.11.2008, p. 3 and other legislative sources connected to waste management objectives e.g. the directive 2008/1/ EC of the European Parliament and of the Council on integrated pollution prevention and reduction, as well as Directive 2006/118 / EC of the European Parliament and of the Council on the protection of groundwater from pollution and deterioration.

[97] Annex B lists EU legislation adopted on the basis of the Euratom Treaty, the violation of which constitutes an unlawful act pursuant to mentioned Article 2, letter a), point ii). Euratom, formerly EAEC, also assumes exclusive competence, with respect to the Member States, with regard to controls concerning the prohibition of diverting the use of nuclear materials from the civil purposes to which they are intended by the Member States themselves. Rules on nuclear safety are contained in Chapter 3 of Title II of the Euratom Treaty. Directive 2013/59/Euratom of 5 December 2013 establishing basic safety standards relating to protection against the dangers deriving from exposure to ionizing radiation, and repealing Directives 89/618 / Euratom, 90/641/Euratom, 96/29/Euratom, 97/43/Euratom and 2003/122 / Euratom (OJ of 17 January 2014, L 13). As regards the regulations concerning the ban on the marketing of radioactive products, see Reg. 3954/87 (which established the maximum admissible levels of radioactivity for food products and for animal feeds in case of abnormal levels of radioactivity following a nuclear accident or in any other case of radioactive emergency, OJ of 30 December 1987, L 371), on which see Court of Justice in case C-70/88, *European Parliament v. Council*, I-4529, s.c. *Chernobyl II*.

[98] Under art. 2 of the directive a legal person is "any legal entity possessing this status under the applicable national law, with the exception of States or public institutions exercising public powers and public international organizations".

advantage from the criminal act indicated by the directive. Obviously, the liability of the legal person does not prevent criminal action against individuals who may take part in various ways in the commission of the crime.

The core provision of the Directive lays in the general requirement (art. 5) that measures at the national level be effective, proportionate and dissuasive for the aim of fighting the different kinds of crimes listed therein. It is firstly interesting noting the lack, in the EU system, of any reference to the social aim of the criminal legislation as such, that is to say, the general criminal legislation's scope of "educating" criminals in the attempt of granting their social reintegration (art. 27 par. 3 Italian Constitution).

Secondly, the lack of any specification (and the lack of any attribution of competence to the EU institutions for that aim) on the true character of the related penalties (e.g., by indicating a minimum level of the highest penalty) is admittedly based on the need to preserve a principle of *coherence* between the several legislations of EU member States, beside the still less developed institutional framework surrounding EU competence in the relevant field. In fact, notwithstanding the significant changes after the Lisbon Treaty, EU action must still be considered as "required" (see art. 82 n. 2 TFEU) or "essential" (art. 83 n. 2 TFEU), alternatively, when such an action is aimed at "aiding" mutual recognition of decisions or police cooperation for crimes with a trans-boundary dimension, and where the need arises to made an already existing EU legislation (such as that related to the protection of the environment) truly effective by means of approximation of different national legislations. It is also wise recalling that under art. 83 TFEU, EU has a general competence to adopt acts related to so called *Eurocrimes*, that is to say, crimes with a particularly high standard of gravity and with specific transnational character and effects[99]. Some relevant studies on the implementation of directive 2008/99 at the national level have however blamed the relatively strict margin of maneuver for EU in this area. It has been proved, inter alia, that though implementing the same directive, Member States keep significant differences among them, due to the "*undefined legal terms included in the definitions of the criminal offences, combined with the leeway given to Member States when it comes to the liability of legal persons"*[100]. For this, the same Commission has stressed the need of a common understanding of what a criminal conduct is for the sake of same directive's aims and with the view of properly improving judicial cooperation across EU.

Also, one should not forget that under both international and EU law several general principles (e.g. precautionary principle, polluter pays) are well established and shared. In some cases, a debate between the General Court of the EU and the CJEU has proved how such criteria could improve environmental protection at EU level: e.g. the need of a balance between the Aarhus Convention's provisions and the EU Regulation 1367/2006

[99] See recently, L. DANIELE, *Diritto del Mercato Unico europeo e dello Spazio di libertà, sicurezza e giustizia*, Milan, 2021, p. 514.

[100] European Commission Staff Working Document of 28.10.2020, SEC(2020) 373 final - SWD(2020) 260 final, at page 43.

was raised by the EU General Court[101]. This could prove, on the one hand, an increased awareness and readiness at the international and EU levels to improve environmental protection under mentioned general standards, and, on the other hand, the need to carefully consider if a stronger defense of such standards by means of e.g. a strict liability criterion under same EU law would meet the sufficient support at the level of each single government and political actor involved in the decision-making process.

Though if the Union would be able at making some advancement also thanks to what might come from the political debate in the European Parliament (EP), one should consider the following specificities of current Union's competence for the definition of an *Eurocrime*:

- under article 83 TFEU, the EP and the Council are put on an equal footing according to the legislative procedure applicable in this case: this implies per se that relevant views of the governmental side expressed in the Council will play a definite role in the whole legislative procedure;
- the Council, in the scenario under indent above, will adopt its decisions under the majority voting criterion. This is obviously of some support to a shift proceeding in the same Council;
- same art. 83 TFEU foresees the chance that one EU member State makes recourse to an *emergency break*: in a worst case scenario, this might lead to a substantial stalemate and negative outcome of the legislative proceeding as a whole. Under same art. 83 TFEU it is anyway foreseen the chance for some M.S. to initiate a strengthened cooperation on the topics of same legislative act that had not been approved in the Council: in this case, if at least nine EU member states are in favor, the same cooperation might be considered as automatically authorized.

It should then be accurately pondered if at least the mentioned number of national governments (and related political representatives in the EP) would be ready to make recourse to a strengthened cooperation whenever an emergency brake proceeding had been successfully activated. For this, a selection should be made between, on one hand, a EU act on Ecocide inspired to a broader standard (such as the one indicated by the same International Court of Justice Advisory Opinion on the *Legality of The Use by a State of Nuclear Weapons*), and, on the other hand, a EU Ecocide inspired to a strict liability criterion: the choice essentially depends on several factors, including the recent suggestions from the Commission supporting a review of same directive 2008/99 with the aim that a common understanding of ecocide at EU level be reached as swiftly as possible.

While the reasoning above is aimed at grounding the still vague terminology employed in the directive 2008/99 and with the view of assessing the relevant penalties' character, it must be reckoned the fairly limited room left to the supranational level for the aim of compelling the Member States in an area (criminal law) that is apt as such to

[101] CJEU of 14 July 2012, *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht v. European Commission*, T-396/09, ECLI:EU:T:2012:30.

restrict some basic individual rights now affirmed in the same Charter of the fundamental rights of the European Union under the "Justice" chapter (e.g. Art. 49 dealing with legality and proportionality of crimes and penalties). This is among the reasons why in 2012 a group of experts[102] has been charged to monitor the implementation via criminal law of some relevant EU's objectives, including, *inter alia,* the protection of EU financial interests (e.g. art. 325 TFEU): in this communication the Commission has acknowledged that the recourse to criminal law tools for the achievement of some relevant EU law objectives is not always required. Reference to mentioned characters of the penalties foreseen under EU legislation ("effective, proportionate and dissuasive", beside the need to comply with general principles of proportionality and subsidiarity) is now a standard clause in the area of EU criminal law.

Some (preliminary) conclusions

In the light of the above, one must consider the still partial scope of EU powers in the relevant area (criminal penalties), although the abovementioned EU directives' wording on the penalties' character at the national level (effective, proportionate, and dissuasive) lends good guidance in assessing the relevant EU provisions' scope, at the same time affording a margin of maneuver for the national legislatures consistent with the same EU law competence in this field (see art. 4 n. 2 j TFEU, on the "shared" character of EU's competence in the Area of Freedom Security and Justice, AFSJ). Also, good room for construing the effectiveness of national legislation in the EU law perspective is left to both national judiciaries and the same Court of Luxembourg. In this context, a crucial role is played by some procedural tools established under the TFEU (art. 267) such as the preliminary ruling, which is a specific means of cooperation between the different levels of jurisdiction (national and EU). By means of this tool, an increase of integration in the relevant area of law (e.g. penalties for environmental crimes) can be envisaged with the perspective of making the national legislation more and more compliant to relevant EU law aims.

It remains however unclear if the directive on environmental crimes meets the suggestions the Court and other EU institutions submitted in the mentioned case on the Framework Decision on criminal penalties for environmental protection (case C-176/03). In fact, in that case the Court was clear by stating that criminal sanctions were to be considered as necessary for effective environmental protection. It might be debated whether the same directive 2008/99 (beside other sources dealing with similar issues[103]) has met the requirements indicated by the CJEU, considering the many different views in

[102] Commission Decision of 21 February 2012 on setting up the expert group on EU criminal policy, *OJ C* 53, 23.2.2012, p. 9.

[103] Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements OJ L 255 of 30.9.2005, p. 11

the meanwhile raised at the national level on the path towards a more harmonized and stringent EU policy on those topics.

In this context, one should however not forget the different approach followed by EU legislation by comparison to the typical approach followed at the international level. Indeed, the international community (by means of both customary or treaty law rules) aims at affirming general standards regarding the protection of some basic human rights and, together with the definition of those rights, at affirming the corresponding duties on the States to protect those rights. In this case, the international community behaves similarly to a single State, where both general principles and legislative sources stem from a long practice and discussions where different needs and views from civil society, juridical doctrine and the political environment deserve due account. The strong negative feedbacks of second world war with the several infringements of general standards related to the protection of minorities and of some main rights pertaining to the human being, forced the same international community to provide a definition of what a genocide is, as above already mentioned. This is one case – albeit not so frequent – where the international community has acted quite coherently, in particular by means of the International Court of Justice interpretative role.

On the other hand, the EU legal order is based on the crucial qualification as an "autonomous" legal system[104]. This has been made particularly clear in the search of a common standard of protection for refugees in Europe. While the ECHR system does not contemplate cooperation between its Member States, the EU/Dublin legal system essentially envisages administrative cooperation between Member States in the management of asylum applications submitted by non-EU citizens in one EU Member States. The foundations of this system are solidarity and mutual trust between national systems. Though substantially transposing the ECtHR warnings, which was subsequently accepted in full by the same EU Court of Justice and the same EU legislator[105], the relevant Union's legislation (Dublin) aims at specifying the scopes of the Strasbourg case-law for the sake of mutual cooperation between EU Member States[106]. Those different approaches should not be forgotten also in the search for a common standard on Ecocide in the Union.

[104] On this, see in particular abovementioned Opinion 2/13 *accession of the EU to the ECHR*, ECLI:EU:C:2014:2454.

[105] CJEU of 21 December 2011, C-411/10, N.S., ECLI:EU:C:2011:865, which lead to the reform of Art. 3 of the Dublin Regulation 2003 (see, *ex multis*, A. RIZZO, *Note sul diritto dell'Unione Europea in materia di controlli alle frontiere, asilo, riconoscimento di status e protezione sussidiaria*, in *La Comunità internazionale*, 2015, p. 529).

[106] The practical result of this is that of transposing in the same Dublin regulation the ban of *refoulement* established at the international level, though on the basic consideration that legal systems of EU Member States are tied by general principles such as mutual trust and sincere cooperation. For this comparison, see recently C. EECKES, *Integrated Rights Protection in the European and International Context: Some Reflections about Limits and Consequences*, in I. GOVAERE, S. GARBEN (eds.), *The Interface between EU and International Law*, Hart publ., 2019, p. 106 ff.

Some avenues for further development of EU law on those matters could stem from abovementioned EU Action Plan on Human Rights and Democracy 2020-2024[107] where the need to strengthen cooperation between EU and the same International Criminal Court is openly remarked. This might entail also that, in the same EU, new consideration will be offered to *crimes committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land,* as already mentioned by the Office of the ICC Prosecutor[108]. Under this perspective, the tasks of the High representative of the EU (art. 18 TEU) in the context of the EU Action Plan 2020-2024 might help re-launching even at the EU level a more open debate on the pressing needs of environmental protection, today felt as particularly urgent in more and more areas of the world, including Europe.

Thanks to the international context above (Ch. 1 in this paper), Ecocide might also be regulated autonomously in a specific directive which might set a crime stand-alone in the Union. Beyond questions of effectiveness linked to the still limited scope of the Union's competence pursuant to art. 83 TFEU, an opportunity such as this would support harmonization and cooperation between the Union and the international arena in the prosecution of serious environmental offenses. At the same time, while not suited at forcing EU Member States to choose the relevant sanctions, an EU act would in any case push towards closer cooperation between national authorities in criminal prosecution as well as in investigative activities aimed also at preventing relevant offenses committed inside the EU.

ABSTRACT: For some years now, the search for an ecocide has been promoted internationally. The Rome Statute is the formal context where environmental crimes might be inserted, although the Statute itself supports an explicit ICC competence for environmental crimes specifically related to war scenarios. In the European region, both the ECHR and the EU have developed a practice aimed at strengthening the fight against criminal acts with severe environmental impact. However, the competence of the EU with regard to both cooperation on criminal law and environmental standards is still shared with that of the Member States: this explains to a large extent the current Directive 2008/99 on environmental crimes, where sanctions for this type of crimes are still defined in broad terms. The paper submits that alternatively an autonomous legal source on Ecocide might be adopted under art. 83 TFEU.

KEYWORDS: international criminal law – International Criminal Court – environmental – ecocide – EU law.

[107] 25 March 2020, JOIN(2020) 5 final.

[108] Office of The Prosecutor, Policy Paper on Case Selection and prioritisation, https://www.icc-cpi.int/items Documents/20160915_OTP-Policy_Case-Selection_Eng.pdf [https://perma.cc/UY3NC62R], at paras. 40 and 41.