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The Individual Right to a Healthy Environment: Empowering Environmental Victims Before the ECtHR and the CJEU. A comparative analysis.

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INDEX

The individual Right to a Healthy Environment: an introduction

The individual right to a healthy environment is located at the intersection between two different branches of international law: human rights and environmental law. Since they have been developing independently from each other and in different historical times, the contact points between the two domains have long been unclear. The mutual interdependence of environmental protection and full enjoyment of universally recognized rights has widely been acknowledged by the international community. The first international legal document that formally acknowledged such interdependence between those two aspects is the Stockholm Declaration of 1972, the outcome document of the United Nations Conference on the Human Environment. It reads: *"Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being*[1]*".* The closer recognition of the right at hand in a international soft-law instrument is enshrined in the 1992 Rio Declaration, which reads: "*Human beings ... are entitled to a healthy and productive life in harmony with nature*[2]*".* However, no universal human rights treaty or declaration has ever formally enshrined it[3]. Despite this, said right has been endorsed by more than 100 legal systems across the world and all of the Human Rights Regional organizations[4].

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[1] United Nations Environment Programme (1972). *Stockholm Declaration: Declaration on the Human Environment - Environment Law Guidelines and Principles 1*. Principle 1

[2]Rio Declaration on Environment and Development. (1992). *Environmental Conservation*, *19*(4), 366–368

[3]Knox, J. H., & Pejan, R. (A c. Di). (2018). *The Human Right to a Healthy Environment*. Cambridge University Press. https://doi.org/10.1017/9781108367530

[4]See especially, article 24 of the African (Banjul) Charter, article 38 of the Arab Charter on Human Rights and Article 11 of the San Salvador Protocol (the Additional Protocol to the American

Some legal scholars rely on such a widespread recognition, to argue that it already qualifies as a custom of International Law[5]. Nevertheless, to do so, as pursuant to Article 38 of the ICJ Statute, the right in question shall show *"evidence of general practice accepted as law"*. Although the criteria of generality and *opinio juris* appear to be met, the requirement that the custom must also be consistently practiced remains the weakest point of this argument. On the opposite side of the spectrum[6], there are those that argue that since the widespread recognition of the Right to a Healthy Environment has only ever occurred through soft-law instruments, such a recognition cannot be assumed to override the importance of practice, thereby failing to qualify it as an international custom[7]. In the words of Prosper Weil, there is no reason to argue that *"by dint of repetition, non-normative resolutions can be transmuted into positive law through a sort of incantatory effect: the accumulation of non-law or pre-law is no more sufficient to create law than is thrice of nothing to make something"*.

The latter is the approach this thesis upholds since, in legal practice the Right to a Healthy Environment has been way too rarely applied to qualify as a fully-fledged customs of international law[8]. This, however, does not imply that soft-law recognition of said right has

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Convention of Human Rights. An exception shall be found in the European Convention of Human Rights, since it does not explicitly recognises the Right to a Healthy Environment, but it enforces it rather effectively. See Chapter 1 of the thesis.

[5] See Knox, J. H. & UN. Human Rights Council. Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment (A c. Di). (30). *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H. Knox: Mapping report*. UN. https://digitallibrary.un.org/record/766887

[6] For a deeper insight into those two opposite stances, see *Rodríguez-Garavito, C. (2017). A human right to a healthy environment? Moral, legal and empirical considerations. - Cerca con Google*. (s.d.). Recuperato 24 maggio 2025, da https://www.google.com/search?q=Rodr%C3%ADguez-Garavito%2C+C.+(2017).+A+human+right+to+a+healthy+environment%3F+moral%2C+legal+and+empirical+considerations.&oq=Rodr%C3%ADguez-Garavito%2C+C.+(2017).+A+human+right+to+a+healthy+environment%3F+moral%2C+legal+and+empirical+considerations.&gs_lcrp=EgZjaHJvbWUyBggAEEUYOdIBBzY5MWowajeoAgCwAgA&sourceid=chrome&ie=UTF-8

[7] For a deeper analysis, see Weil, P. (1983). Towards Relative Normativity in International Law? *American Journal of International Law*, *77*(3), 413–442. https://doi.org/10.2307/2201073

[8] See as an example *Inter-American Court of Human Rights (2017) Advisory Opinion OC-23/17 of 15 November 2017: Environment and Human Rights. - Cerca con Google*. (s.d.). Recuperato 24 maggio 2025, da https://www.google.com/search?q=Inter-American+Court+of+Human+Rights+(2017)+Advisory+Opinion+OC-23%2F17+of+15+November+2017%3A+Environment+and+Human+Rights.&oq=Inter-American+Court+of+Human+Rights+(2017)+Advisory+Opinion+OC-23%2F17+of+15+November+2017%3A+Environment+and+Human+Rights.&gs_lcrp=EgZjaHJvbWUyBggAEEUYOdIBBzQ1M2owajeoAgiwAgHxBfhEfUZ-_tIf8QX4RH1Gfv7SHw&sourceid=chrome&ie=UTF-8

had no effects in practice, especially in human rights law. Though little to none enforcement of the right at hand is possible, the "greening" interpretation of already existing and consolidated human rights is a result of the growing importance of environmental concerns in soft-law. This provides an environmental dimension to rights that are traditionally non-environmental. So then, why is it important to recognize and enforce a stand-alone justiciable right in the first place, when it can be indirectly enforced through other rights? The greening of existing rights only marginally solves the issue of lack of enforcement.

As highlighted by the "Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment"[9], the majority of obligations that States have officially declared to commit to are mainly procedural, consisting of duties to carry out environmental assessments, make environmental information available to the public, actively promote public decision making as well as provide access to justice and legal remedies in case of harm. In terms of substantive obligations, on the other hand, they enjoy a wide margin of discretion whereby international standards of environmental protection shall be merely taken into due account[10]. This variety of national and regional standards ultimately results in a right that is rather inconsistently perceived and enforced across the world. A universal recognition of the Right to a Healthy Environment could reverse this trend.

In the first place, it would codify a definition of the right as well as of the obligations that would directly derive their bindingness from it. Though there seems to be scholarly consensus that a universal right to a healthy environment shall entail the protection of an environmental minimum, no definition of such environmental minimum has been agreed upon. Additionally, universal recognition would allow for better legal certainty across the globe, given the universally recognized coercive power of human rights when invoked by an environmental victim before a court[11]. Though we are far from universal recognition, more and further scholarly debates on the emergence of said right are needed to assess the state of the art of its enforcement across the world, nationally and regionally, as well as to clarify the legal concerns it might pose.

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[9] See footnote n. 5
[10] Ibidem
[11] See footnote n. 6

This work aims, though at a small scale, to do precisely that. Through a comparative analysis of the ECtHR and CJEU jurisprudence, it will assess the extent of recognition and enforcement of the right to a healthy environment within the European region and the Union respectively. The relevance of our comparative analysis lies in the fact that it compares two rather similar legal systems – in terms of shared democratic values, legal traditions and 27 overlapping Contracting Parties – yet structurally rather different. While the ECtHR is a regional human rights court, the CJEU is the Union institutional Court, whose jurisdiction in environmental cases is determined by the compliance with EU environmental standards. This comparison is particularly valuable since it assesses the effectiveness of each of the judicial systems. By examining how a human-rights based approach contrasts with a framework focused on state obligations under Union environmental law, our research will offer insights into the potential benefits of adopting a human-rights approach to environmental rights and, in turn, universally recognizing the Right to a Healthy Environment.

Our work will be structured as follows. The first chapter will investigate the recognition and enforcement of the Right to a Healthy Environment within the European Court of Human Rights, with a particular focus on the admissibility requirements and the existing justiciable rights that alleged environmental victims may rely upon in case of environmental harm. In a parallel fashion, the second Chapter will concern the state of the art within the Union legal system, with an additional section on the administrative remedies available to natural persons, alternatively to the legal ones. In the conclusive remarks, we will take care of directly comparing the two systems and we will forward proposals, concluding that further cooperation with the two bodies would be commendable, due to the complementarity of the judicial remedies they offer, in full compliance with their judicial independence and autonomy[12]. Ultimately, we will conclude arguing that a human-rights to environmental and international law guarantees an effective enforcement of environmental rights, making the recognition of the right to a Healthy Environment all the more imperative.

[12]Opinion of the Court (Full Court) of 18 December 2014. Opinion Pursuant to Article 218(11) TFEU. Opinion Pursuant to Article 218(11) TFEU Case Opinion 2/13. (ECJ 2013). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62013CV0002

Chapter 1:

Recognition and Enforcement under the ECHR

INTRODUCTION

This chapter will explore the extent to which the European Convention of Human Rights (ECHR) recognises and the European Court of Human Rights (ECtHR) enforces the right to a healthy environment, with a particular focus on the latter's jurisprudence. As a human rights Court, the ECtHR adopts a human right approach to environmental law, though lacking explicit recognition of the right under scrutiny. Therefore, an analysis of the Court's practice will enable to gauge the effectiveness of a human right approach to the individual right to a healthy environment, even in the absence of provisions enshrining it. We will start by assessing the accessibility requirements as a preliminary step before accessing judicial remedies. We will then review all of the relevant articles within the Convention that may have been invoked or interpreted in relation to environmental rights. Contextually, we will also look at the respective case law for each right, to ultimately conclude that the right in question plays a role within the ECHR legal order exclusively thanks to the legal practice of the ECtHR. We will furthermore assess the effectiveness of every legal remedy available as well as evaluating, through text analysis and case law, the advantages and drawbacks of every ECHR provision a natural person may choose to invoke before the Court, when seeking justice for an environmental right violation. We will finally assess the extent to which reparations for damages ruled by the Court are an effective instrument for compensation of the victim or merely a preventative tool for states that are reluctant to comply with the treaty obligations. We will conclude by arguing that the lack of recognition of an individual right to a healthy environment under the ECHR legal order is widely compensated by the wide access to justice and substantive legal remedies at the disposal of natural persons, who are victims of environmental rights violation.

The Court's jurisprudence is particularly significant for our research because, as a human rights court, the ECtHR naturally adopts a human rights-based approach to environmental issues. In our comparative analysis between a human rights court and an institutional court, the ECtHR stands out as the ideal case study—not only because of the similarity in values and legal outlook it shares with the second court we have selected, but also due to the regional proximity and comparable legal cultures of the countries involved. Choosing these two courts helps minimise external differences, allowing us to focus more precisely on the variation in legal approaches. Another important reason why the ECtHR's role matters is the wide membership of the Council of Europe. Since the Convention applies to a large number of countries, the standards set by the Court can have far-reaching effects. Given that environmental protection is a global issue, it is essential to uphold high and consistent standards across jurisdictions. The ECtHR's jurisprudence, therefore, has the potential to influence not just individual member states, but the broader international approach to environmental human rights.

The European Convention for the Protection of Human Rights and Fundamental Freedoms is an international treaty signed by the 46 (as of the day when the paper is being written) members of the Council of Europe. The document enshrines civil and political rights and freedoms as well setting up an enforcement and judicial framework that binds all of the High Contracting Parties to their treaty obligations. The judicial body in question is the European Court of Human Rights, on which our research will primarily focus. The reason why this is relevant for our research purposes is that as a human rights court, it naturally has a tendency to adopt a human-right approach to environmental law. This implies that the Court's reasoning is inherently centered on the rights and interests of the individual, rather than abstract environmental protection standards alone. Such an approach is reflected in the ECtHR access to justice, exclusively limited to individuals (either legal or natural persons) willing to initiate a proceeding against a contracting State to the Convention that has allegedly violated the person's right. The asymmetric layout of the legal proceedings afford a position of privilege to individuals[13]. This is an unicum in International Law[14] which reserves access to international justice to individuals that are not arguably full subjects of international

[13]The opposite will be said for the CJEU.
[14] If we disregard International Investment Arbitration, since the ICSID convention explicitly allows for States initiating legal proceedings against an investor.

law[15]. By nature, the Court exclusively welcomes asymmetric proceedings[16] in which only individuals are entitled to initiate a legal action against a contracting State to the Convention that has allegedly violated their rights. The opposite scenario is not permitted. As a result, natural and legal persons are privileged individuals under the jurisdiction of the ECtHR. This incentivises environmental victims to initiate proceedings, thereby ensuring access to justice. Moreover, the broad scope and high volume of environment-related cases provide a solid basis for analyzing the Court's approach.

Nevertheless, in the list of rights and freedoms enshrined by the Convention, no right to a healthy environment can be found. Though not at present recognized by the ECHR, the European Court of Human Rights, has acknowledged that access to such a right is functional to the full enjoyment of the rights which are included in the Convention. More specifically, from case law, it emerges that an environment conducive to well-being shall be "sound, quiet and healthy[17]". Though this does not amount to a fully fledged right, it can often result in a positive obligation for High Contracting Parties. Lopez Ostra v Spain[18] was the first ruling where the ECtHR came to this conclusion, officially declaring that the failure of the State Party concerned to guarantee environmental protection was at the basis of a rights violation. The applicant's home was located a few metres away from a highly polluting waste-treatment plant. Since those circumstances were making her life conditions unbearable, she filed a complaint claiming that Spain had breached her right to respect for private and family life[19]. In its judgement the Court held in favour of the applicant, since *severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely.*[20] It argued that Spain had failed to strike a balance between the economic interest of the territory and the individual right of

[15]Korowicz, M. S. (2010). The Problem of the International Personality of Individuals. In *International Legal Personality*. Routledge.

[16]Helfer, L. R. (2008). Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime. European Journal of International Law, 19(1), 125–159. https://doi.org/10.1093/ejil/chn004

[17] *MANUAL ON HUMAN RIGHTS AND THE ENVIRONMENT (3rd edition)—Human Rights Intergovernmental Cooperation—Www.coe.int*. (s.d.). Human Rights Intergovernmental Cooperation da https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/-/manual-on-human-rights-and-the-environment

[18]López Ostra v. Spain. (1994). HUDOC. https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-10606%22]}

[19]Council of Europe (1950) *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, 4 November 1950, .https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:eu_human_rights_convention

[20] See footnote n. 18

the applicant. In sum, Spain's inaction in the field of environmental protection constitutes state interference with the right of private and family life.

The reasoning in the case Lopez and Ostra reflects a glaring example of the ECtHR's approach to the right to a healthy environment. Since a healthy environment is deemed to be a necessary precondition for the enjoyment of other recognised rights, though not afforded the status of fully-fledged right, it is often implemented indirectly. This phenomenon, commonly referred to as the "greening" or "proceduralization" of ECHR rights, means that the right to a healthy environment is often not enforced on its substantive merits. Instead, the ECtHR assesses whether relevant procedural environmental obligations have been met before examining the substance of the alleged rights violation, when such procedural issues are relevant to the case[21].

There are multiple reasons that make the ECtHR highly powerful in terms of environmental law enforcement. First of all, its holdings are highly flexible, since its interpretations often follow an evolutive approach. As a matter of fact, the Convention is deemed to be a living instrument. Therefore, the Court is not bound by previous decisions, but can pivot to accommodate social and environmental changes that occur in the system within which it operates. This has enabled it to apply a human rights-based approach to environmental law, even though environmental rights are still not formally recognized. Secondly, its holdings are broadly effective. Though they are only formally binding on the parties concerned by a particular dispute, they informally bind all the other High Contracting Parties. This means that, while the judgement of the Court has to be literally applied by the state involved in the proceeding with measures and instruments established by the Court, it is binding to the other parties, with the measures and instruments left to their scrutiny. Compliance with set standards is in any case assured by the states' reluctance to be brought before the court and found liable. This means that the ECtHR judgements are de facto binding on 46 states. Harmonization of these many country's environmental policies is arguably what is needed to solve a global-scale phenomenon like environmental protection[22]. Finally, it is the only court that allows for the enforcement of an individual right to a healthy environment. While the

[21]Krstic, I. (2015). Procedural aspects of article 8 of the ECHR in environmental cases: The greening of human rights law, p. 170-189, from https://doi.org/10.5937/AnaliPFB1503170K

[22]Niska, T. (s.d.). Climate Change Litigation and the European Court of Human Rights—A Strategic Next Step? Auhgust 2020, August 2020The Journal of World Energy Law&Business 13(4), 331–342. https://doi.org/10.1093/jwelb/jwaa028

European Court of Justice sets high standards for admissibility of natural persons[23], the ECtHR admits cases from natural or legal persons whose rights have been breached by a State Party . The flexibility, the scope and the comparatively easy access to natural persons are the traits that make the ECtHR judgements, an effective legal remedy for environmental rights protection. On the downside, it also has to be acknowledged that, with great institutional weight comes a crucial responsibility. The ECtHR will have a positive impact in so far as it sets high minimum environmental protection standards. In the opposite case, there would be a general regulatory race to the bottom across all of the signatory states[24].

1.1 Access to justice

As a human right court, the ECtHR exclusively has jurisdiction over legal proceedings initiated by individuals about a State breach of one or more of their fundamental rights against the Contracting Party in question. Differently from institutional, supranational or international courts[25], the individuals' incomplete subjectivity under international law does not hinder their access to justice. Access to a legal remedy before any court is conditional upon fulfillment of two distinct criteria: the Court shall have jurisdiction to rule over a particular case and it has to deem it admissible. Normally, the jurisdiction test is carried out as a preliminary step, because, in case of lack of jurisdiction, the Court would lack the competence to assess the applicant's admissibility altogether. The following subparagraphs will explore them thoroughly.

1.1.1 The Jurisdiction of the ECtHR

Jurisdiction is a legal concept that defines authority of the court to hear and rule cases. In the case of the ECtHR, the Court has Kompetenz-Kompetenz: it is left to the discretion of the

[23] See Chapter 2, paragraph 2.1 on Standing
[24]See footnote 22
[25] See chapter 2, paragraph 2.1, on Standing, for a comparison with the European Court of Justice

court to determine its jurisdiction over a particular case[26].The test for determining whether a Court has or lacks jurisdiction is a fourfold test:

a. Jurisdiction ratione Materiae
b. Jurisdiction ratione Personae
c. Jurisdiction ratione Temporis
d. Jurisdiction ratione Loci

The jurisdiction ratione materiae refers to the subject matter of the case filed before the Court. Pursuant to article 32 of the Convention, the Court only has jurisdiction over cases concerning beaches of rights and freedoms specifically enshrined in the Convention as well as in its Protocols. The jurisdiction ratione Materiae is of particular importance in our assessment. Due to the growing number of environmental cases brought before the ECtHR, there is a general tendency to overemphasize environmental harm, often at the expense of the underlying human rights violation. This was the case in Kyrtatos v. Greece 2003. In this case, the applicants alleged that the destruction of a nearby wetland and surrounding ecosystem due to unauthorized construction violated their rights under Article 8 (right to respect for private and family life) and Article 1 of Protocol No. 1 (protection of property). They argued that the environmental harm caused by the authorities' failure to prevent illegal construction infringed their rights. Since the court found that the severity of the environmental harm caused by the State party was not sufficient to engender a human rights violation, it declared that the Court did not have jurisdiction over that case, despite environmental harm having occurred. The Court can only intervene in environmental cases insofar as environmental harm results in a human rights violation, and shall not do so in any other case.

Secondly, the jurisdiction ratione personae refers to the Court's authority to determine who can bring a case to the court and whether the applicant has in fact standing to do so. It shall not be mistaken with the admissibility criteria since unlike the type of jurisdiction in question, the admissibility concerns the case rather than the applicant. Those entitled to lodge a complaint before the court can be natural persons, NGOs or a group of individuals who are

[26]ECHR, Art. 32

victims of an alleged human right violation and have exhausted all other national remedies[27]. The applicants shall not be State parties (or state authorities) or any of the admissible persons mentioned above engaging in actio popularis. In the ECtHR, a natural or legal person wanting to file a complaint towards a state due to environmental harm they have undergone should prove that they are directly concerned by said harm. To do that, the applicant must demonstrate that there was a clear and specific obligation on the institution to take the action in question. They also have to prove that this failure has a tangible impact on their legal situation. Finally, the harm in question shall be sufficiently severe to enable themselves to qualify as victims[28]. Though, by letter of the law, only direct victims are able to lodge a complaint, legal practice has proven the contrary[29], making space for indirect[30], potential[31] and future[32] victims. The existence of legal venues for those kinds of victim profiles is crucial for environmental rights cases. Indirect victims are often concerned by article 8 ECHR cases, often triggered by environmental harm. Indeed the right to respect of private and family life is one that often touches the applicants as well as close relatives living with them. Potential victims are also safeguarded by the Court, since according to previous case law, the State is under a positive obligation to protect the rights of its citizens from real and immediate risk[33],

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[27] Murillo Saldías and Others v. Spain, ECtHR Application No. 76973/01, Admissibility Decision of 28 November 2006, from https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-2963%22]}. In this particular environmental case, three of the applicants were declared inadmissible since they had failed to exhaust all available national remedies.

[28] Kyrtatos v. Greece, ECtHR, Application No. 41666/98, Judgment of 22 May 2003, from AFFAIRE KYRTATOS c. GRECE. In this case, the applicant was not eligible precisely because the alleged violation was not severe enough to qualify him as a victim of environmental harm. This case was dismissed.

[29] Acconciamessa, L. (2022). Equality in the Access to the ECtHR—Filling Procedural Gaps Concerning Locus Standi and Representation of Extremely Vulnerable Individuals, In *More Equal than Others?* (pp. 237–268). https://doi.org/10.1007/978-94-6265-539-3_12

[30] Çakici v Turkey [GC] ECtHR , App. No. 23657/94, Judgment of 8 July 1999, paras 98–99, from https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-58282&filename=001-58282.pdf&TID=thkbhnilzk

[31] Monnat v Switzerland, ECtHR, App. No. 73604/01, Judgment of 21 September 2006, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-76947%22]}

[32] Soering v the United Kingdom, ECtHR App. No. 14048/88, Judgment of 7 July 1989; https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-57619&filename=001-57619.pdf&TID=wabnsfwvac

[33] De Sadeleer, N. M. (2012). Enforcing EUCHR Principles and Fundamental Rights in Environmental Cases (SSRN Scholarly Paper No. 2293314), p- 39-74. Social Science Research Network. https://papers.ssrn.com/abstract=2293314

even when such risk is uncertain[34], in compliance with the precautionary principle[35]. Finally, future victims should also be taken into account when considering the implications of current state failure to guarantee adequate environmental standards for the future generations[36].

The third type of jurisdiction is the jurisdiction ratione Temporis which refers to the court's authority to hear cases based on the timing of the alleged events. The ECtHR has jurisdiction to hear a case only from the date the Convention was ratified by the Contracting Party concerned. This means that complaints about human right violations that occurred any earlier than that set date, cannot be addressed by the ECtHR. The only exception to this, is the jurisdiction by virtue of the existence of a continuous breach of a human rights violation. Such an exception can be effectively exemplified by the case Burdov v. Russia[37]. Mr. Burdov participated in emergency operations following the Chernobyl nuclear disaster, which led to significant health issues due to radiation exposure. Russian courts acknowledged his entitlement to compensation and benefits. However, the authorities failed to execute these judgments, leaving Mr. Burdov without the awarded compensation. Despite Russia's later accession to the European Convention on Human Rights, the ECtHR ruled that the failure to enforce a domestic court judgment was a continuous violation of the applicant's rights, highlighting that the breach persisted even after Russia's formal commitment to the Convention. This meant that the Court had jurisdiction despite ratione temporis.

The fourth and last type of jurisdiction is jurisdiction ratione loci which refers to a court's authority to hear cases based on the geographical location where the alleged events occurred or where the parties are situated. This means that in theory, the ECtHR has jurisdiction

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[34] Urgenda Foundation (on behalf of 886 individuals) v The State of the Netherlands (Ministry of Infrastructure and the Environment), First instance decision, HA ZA 13-1396, C/09/456689, ECLI:NL:RBDHA:2015:7145, ILDC 2456 (NL 2015), 24th June 2015, Netherlands; The Hague; District Court. (2015, giugno). https://opil.ouplaw.com/display/10.1093/law:ildc/2456nl15.case.1/law-ildc-2456nl15

[35] Asselbourg and 78 Other and Greenpeace Luxemburg v. Luxemburg, Decision of 29 June 1999, para. 1, https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-5647&filename=001-5647.pdf&TID=ihgdqbxnfi

[36] Segger, M.C., Szabó, M. & Harrington, A.R. *Intergenerational Justice in Sustainable Development Treaty Implementation: Advancing Future Generations Rights through National Institutions | Faculty of Law*. , 1st edn, Cambridge University Press, New York. https://www.law.cam.ac.uk/intergenerational-justice-sustainable-development-treaty-implementation-advancing-future-0

[37] Burdov v. Russia, *Application No. 59498/00*, Judgment of 7 May 2002, European Court of Human Rights (ECtHR), https://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=001-60449&filename=CASE%20OF%20BURDOV%20v.%20RUSSIA.pdf

exclusively in the territory of the 46 States that are contracting parties to the Convention. However, there are exceptions[38]. The Agostino Duarte v Portugal and 31 other respondent States dealt precisely with extraterritorial jurisdiction. Six applicants born between 1999 and 2012 accused Portugal as well as other 31 states of inadequacy of the measures taken to achieve the agreed 1.5 °C temperature increase limit. The applicants argued that they were much more vulnerable than previous generations and complained about the future impacts the actions of the respondent States would be conducive to. The Court dismissed the case, claiming it lacked jurisdiction ratione loci, since the list of defendant states comprised non-Contracting Parties to the Convention.

1.1.2 Admissibility

In an analysis of the level of enforcement of the Individual Right to a healthy Environment, assessing the admissibility grounds of an application is crucial to understand to what extent the legal venues and remedies offered by the courts are accessible. Admissibility entails a threefold test. In order for the case to be considered admissible to the legal proceeding, all of the admissibility grounds have to be met simultaneously. This means that the procedure and the substance of the case have to be ruled admissible and the Court has to have jurisdiction over the case.

The admissibility ground based on procedural requirements encompasses a range of criteria, from formal conditions—such as the obligation to cooperate with the Court and to refrain from using offensive language or submitting manifestly vexatious applications—to more substantive ones. Among the most significant procedural conditions, there exists the requirement to exhaust all available and effective domestic remedies before applying to the European Court of Human Rights (Article 35 ECHR and Protocol No. 15). This reflects the principle of subsidiarity, whereby national courts must be given the first opportunity to address alleged violations. Applicants are expected to pursue an appropriate remedy and raise their complaint at least in substance before their national courts, even if they do not explicitly invoke the Convention. If multiple adequate remedies exist, using one may suffice to meet

[38] Al-Skeini and Others v. the United Kingdom, Application No. 55721/07, European Court of Human Rights, Judgment of 7 July 2011, from https://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=002-428&filename=Al-Skeini%20and%20Others%20v.%20the%20United%20Kingdom%20[GC].pdf

the requirement. Additionally, the application to the ECtHR shall be submitted within four months of the final domestic judgment. Additional procedural bars include the prohibition of anonymous applications—although the Court may choose not to disclose the applicant's identity publicly—and the principle of res judicata, which prevents the Court from considering matters that have already been examined or are pending before another international body. Together, these criteria ensure the proper functioning of the Court and prevent abuses such as forum shopping or obstruction of proceedings.

The test of admissibility on the ground of the substantive merits contemplates two reasons for dismissal of the filed case: the application is either manifestly ill-founded or the alleged violation does not in fact cause any relevant disadvantage to the applicant. The latter is the most relevant for the scope of our research. In order for a case to be considered admissible before the Court, the applicant has to be a victim of certified victim-status. In order to qualify for victim-status, a potential applicant has to be able to comply with the requirements listed in article 35.3.b ECHR, which reads:

"The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that… the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits."

This means that the victim is an applicant having suffered significant disadvantage and an alleged breach of human rights, that can be ruled on at later stages of the proceeding.

In environmental rights cases, it is crucial to establish a clear causal link between the environmental harm and the specific rights guaranteed by the European Convention on Human Rights (ECHR), such as the right to life (Article 2) or the right to private and family life (Article 8). Courts will assess whether the alleged environmental harm directly interferes with these rights or if the impact is too indirect or minor to justify legal action. That said, different categories of cases and different judicial remedies invoked have different admissibility thresholds. For instance, among environmental rights cases, climate change litigations are those that have the highest standards in terms of admissibility threshold[39].

[39] *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* App No 53600/20 (ECtHR, Grand Chamber, 9 April 2024), from https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7919428-11026177&filename=Judgment%20Verein%20KlimaSeniorinnen%20Schweiz%20and%20Others%20v.%20Switzerland%20-%20Violations%

1.2 Legal remedies

There are several different categories in which environmental rights cases can be classified[40], ranging from the types of environmental pollution involved in the case, to the biological impact to nature and humans of the harm in question. Different categorizations on different grounds can have different kinds of advantages. The most useful for our purpose is a categorization based on the legal basis invoked. Since environmental rights as such are not formally recognized by the Convention, using such categorization enables us to spot any recurring pattern in the Courts' legal practice and jurisprudence and to assess which legal basis is the most effective, depending on the various circumstances of each case.

In this paper, we will limit ourselves to 6 legal bases since they are the most used in environmental rights cases. We will leave out of our analysis Article 11 since it has been invoked in such cases only twice and it only marginally deals with environmental protection as such. Once analyzed, we will realize just how Article 8 is the One which can most effectively enforce environmental human rights, despite having only a few hints to environmental protection in its text. This is because, its broad scope and potential application fill any blank spots intrinsic to other potential legal bases, which normally tend to be more rigid for reasons we will explore in the following subpagraphs[41].

20of%20the%20Convention%20for%20failing%20to%20implement%20sufficient%20measures%20to%20combat%20climate%20change.pdf

[40]Gulyaeva, E.E. 2022, "THE RIGHT TO A BALANCED AND HEALTHFUL ECOLOGY IN THE LEGAL FRAMEWORK OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS AND CASE LAW OF THE ECtHR", Revista Opinião Jurídica, vol. 20, no. 33, pp. 103-134, https://doi.org/10.12662/2447-6641oj.v20i33.p103-134.2022

[41] See footnote n. 21

1. 2.1 Article 2 of the Convention: Right to life.

Contrary to common belief, the right to life is one of the legal bases that is the least relied on during an environmental violation litigation in the European Court of Human Rights. In total, it has been invoked 4 times, only 2 of which had a favourable outcome to the plantiff[42].

Article 2 of the Convention reads as follows:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for *which this penalty is provided by law.*

(...)

This article imposes two distinct and clear obligations on the Contacting Parties. The duty to protect human life and that

This article only applies in cases where life is at risk. The positive obligation of the State to protect the right to life can either be of preventative or procedural nature. The preventative obligation imposes a State intervention in case of predictable events that might endanger the right to life, whereby a "a legislative and administrative framework[43]" has to be actively put in place. The procedural type of obligation, on the other hand, requires an *"adequate response, judicial or otherwise"*[44] from the State, both for the demised victim and for their relatives –indirect victims of the infringement– once the breach has occurred. Such investigation should be prompt and, in the case of dangerous activities, the public authorities might also be required to prosecute the criminal offenders[45].

In terms of environmental cases like those that we are analyzing in this paper, there are two envisageable circumstances determined by previous case law, where article 2 could trigger the above-mentioned positive obligation on the part of the state. Article 2 applies in environmental cases either when dangerous activities are performed which pose foreseeable

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[42] See footnote 17.
[43] Öneryildiz v. Turkey, No. Application no. 48939/99 (ECtHR [GC] 30 novembre 2004), para. 89. https://hudoc.echr.coe.int/eng?i=001-67614
[44] Ibidem, paragraph 138.
[45] This however, does not require the public authorities to have all of the criminal sentences result in conviction. The positive obligation would be seen as complied with if the subjects responsible for the criminal offence are persecuted, according to the ruling in Budazeva and Others v. Russia, judgment of 22 March 2008, paragraph 44.

risks to the life of the individual[46] or when a natural disaster jeopardizes the life of the population. In the first case, the extent of the State's positive obligations will be determined by a multitude of factors, but mainly dictated by the harmfulness of the dangerous activity. In the second one, it will consist of preventing loss of life to the extent to which it is in the power of the public authorities to do so. Normally, since natural disasters are *"as such, beyond human control"*[47], the Margins of Appreciation the States enjoy (i.e. their ability to comply with obligations in the manner they most see fit), are much wider than those that apply in case of dangerous activities. The minimum requirement expected from a State undergoing a natural emergency is that of *"holding ready appropriate warning and defence mechanisms*[48]*"*. The adequacy of the measures put in place in the case of dangerous activities are to be ultimately ruled on by the Court[49]. Regulating a serious breach to human rights, such legal basis can under exceptional circumstances even lead to criminal prosecution.

Though when appropriately applied, Article 2 of the Convention yields significant results, it is easy to use it inappropriately, especially when dangerous activities are at stake. Specifically, it imposes a high burden of proof for the applicant to show that there is a direct and causal link between the dangerous activities they are suing the State for and their endangered life because of it. It is, in fact, hard to prove that irreversible damages to health are causally endangered by an external factor. This was the case in L.C.B. v. the United Kingdom. The applicant's father had been exposed to radiation when working on nuclear tests during the Cold War. The applicant, who contracted leukemia, claimed that the state had failed to warn the family of the risks of having children, following radiation-exposure of one parent. Though we do not hold records of workers' radiation exposure, the Court still ruled that the applicant had failed to show proof of her father's radiation-exposure and a direct causal link between her father's radiation exposure and her suffering from leukemia.

In terms of natural disasters, a direct causal link has to be proven to exist between a faulty administration and the infringement of the victim's rights. This was the case in Budayeva and Others v Russia. The applicants were all dwellers of a town which had been highly exposed to mudslides following heavy rainfalls for over a century. They filed the complaint against

[46] Öneryıldız v. Turkey [GC], paragraph 73; L.C.B. v. the United Kingdom, paragraphs 37-41.
[47] Budayeva and Others v. Russia, judgment of 22 March 2008, paragraph 135.
[48] Ibidem
[49] Budayeva and Others v. Russia. Final Judgement, No. Applications nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR 20 marzo 2008), para 134-135 https://hudoc.echr.coe.int/fre?i=001-85436

Russia, following the death of many of their relatives. The Court found that the Russian administration had failed to take preventative measures. Existing dams were fundamentally compromised by a mudslide episode the year before the natural disaster and the administration refused to finance their maintenance. Furthermore, even during the emergency, the State failed to warn of the coming mudslide and to organize on-the-spot assistance. Furthermore, the State also failed to carry out a judicial inquiry. All of the deaths following the natural disasters were classified as due to natural accidents.

To conclude, Article 2 of the ECHR, while foundational in safeguarding the right to life, is not an ideal instrument for protecting environmental rights due to its limited application to cases where life is at risk, which makes it reactive rather than preventative, as it requires death or irreversible health damage to have occurred before it can be invoked. Additionally, it requires a high burden of proof, which makes it frequently inapplicable to environmental cases.

1.2.2 Article 8 of the Convention: Right to Private and Family Life

Article 8 of the ECHR is the most widely used legal basis for environmental cases. It reads as follows:

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*

2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

We will first proceed by analyzing the wording. The court has attributed the terms “private and family life” and “home” a clear and specific meaning. The most significant landmark ruling used to define those notions was Branduse v Romania 2009[50]. The case concerned a

[50] Brânduşe v. Romania, 2009. Application no. 6586/03. European Court of Human Rights, Judgment of 7 April 2009, paragraph 64, from https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-158156&filename=001-

detainee serving a prison sentence in a cell, complaining about the bad odours coming from a rubbish tip close by. Here, the court defined the home to be protected from state interference as "espace de vie" (i.e. living space), a physically defined area, where private and family life develops. Therefore, since the cell corresponded to his living space, there had been an article 8 violation.

Furthermore, it is worth focusing on the word "interference". The way the article reads might suggest that the right to private and family life is merely a negative right, i.e. as long as the State does not intervene within the boundaries of the home, no violation can be found. In fact, the Court established that "*...protecting the individual against arbitrary interference by public authorities (...) may also imply in some cases an obligation on public authorities to adopt positive measures designed to secure the rights enshrined in this article*[51]", especially when a private third party threatens the individual's well-being. In such case, the Contracting Party is responsible for regulating and reducing the impact of the private actor's interference, in a way that makes it compatible with the possibility of enjoying such a right[52]. The court established that there is no such difference in substance between interpreting a violation as an arbitrary intervention or a failure to comply with positive obligations[53].

Then, how to determine whether a violation of article 8 has occurred in practice? The Court usually makes use of at least two separate tests. The first one assesses whether a causal link can be proven to exist between the activity of concern and the alleged negative toll it took on the victim. And the second answers the question of whether such negative impact is above a certain minimum threshold of harm to the victim. The first requirement is relatively easy to fulfill, especially in comparison with the required burden of proof required by other legal bases (e.g article 2 of the Convention), both for the broad scope of article 8 and for the absence of proof of direct cause. A reasonable link between activity and violation is found more than satisfactory. Furthermore, the test of the reasonable causal link would be corroborated by the existence of procedural failures on the part of the state. Those include failure to provide access to clear environmental information, inclusive of behavioural guidelines in case of dangerous activities[54], to grant access to justice, and guarantee domestic

[51]Guerra and Others v. Italy, No. Application 58135/09 (ECtHR [GC] 19 febbraio 1998), paragraph 58 from: https://hudoc.echr.coe.int/eng?i=001-58135
[52] Deés v. Hungary, 2010. Application no. 2345/06. European Court of Human Rights, Judgment of 9 November 2010, from: https://hudoc.echr.coe.int/eng?i=001-167828
[53]See footnote n. 51, paragraph 60
[54]ibidem

regularity. The more a state fails to fulfill those procedural obligations, the more likely it is for the Court to find a strong enough causal link. The latter obligation has grown in importance over these last few decades. For instance, a glaring example on how decisive this factor is can be found in Hatton and Others v UK[55]. The complaint was filed by English citizens living nearby Heathrow airport, claiming that the airport noise at night time would negatively affect the applicants' sleep quality, thereby taking a negative toll on their daily life. While the Chamber delivered a favourable judgement to the plaintiff, acknowledging a violation of the private and family life of the applicants, the Grand Chamber maintained that a fair balance had been struck between the individual human right and the collective competing interest of economic growth. The ultimate reasons that the Court mentions to support such holding was the following: *"Differently from the previous environmental jurisprudence, they found that no irregularity within the government activity, differently from the illegality of the powerplant construction in Lopez Ostra and the failure to make environmental information accessible in Guerra and Others"*. Had the government committed an irregularity in the national environmental framework, regardless of the seriousness of the harm, arbitrary unduly state interference would have been found[56]. This also shows that the proportionality principle is also widely used when assessing the fairness of the balance struck between individual rights and collective interests.

The second test about the seriousness of the harm has to be assessed on a case-by-case basis. Whilst there are not particularly high thresholds (e.g. to be sufficient, environmental harm does not even need to result in side-effects in the victims' health) minimum harm to human rights specifically is an non-derogable requirement. Without it, the criterion ratione Materiae for assessing the jurisdiction of the Court to rule on a case would not be complied with. As a human rights court, the ECtHR does not hold a naturalistic approach to environmental protection, but merely indirectly promotes it, since the environment is functional to human beings[57]. A glaring example of this is the case of Kartyros v Greece[58]. The applicant claimed

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[55] Hatton and Others v UK [GC], No 36022/97, s 88, ECHR 2003-VIII, from https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-61188&filename=001-61188.pdf&TID=soudeazyxk#:~:text=The%20case%20originated%20in%20an%20application%20(no.%2036022/97),Richard%20Bird%20and%20Mr%20Tony%20Anderson%20(%E2%80%9Cthe%20applicants%E2%80%9D).

[56] See footnote 21

[57] Theil S. Towards the Environmental Minimum: Environmental Protection through Human Rights. Cambridge University Press; 2021, from: https://www.lcil.cam.ac.uk/towards-environmental-minimum-environmental-protection-through-human-rights-dr-stefan-theil

[58]Kyrtatos v. Greece, No. Application n. 41666/98 (ECtHR 22 maggio 2003). https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-4866%22]}

that urban development had jeopardized the scenic beauty of the landscape in which he lived. The case was therefore predictably dismissed.

The case of Tatar v Romania[59] is remarkable when addressing another principle the Court never fails to take into account when ruling on environmental rights cases claiming breaches of Article 8 of the Convention: the precautionary principle. The plaintiff of the case, living in the town of Baia Mare, in the proximity of a gold ore, accused Romania of not fulfilling its positive obligations. The zone where the applicant resided was often contaminated by pollutants due to gold-extracting activities and an ecological accident struck the town in 2000. Neither before nor after the accident, did the Romanian authorities actively prevent, spread out information or relocate those dwellers. The Court established that independently from the accident, Romania should have acted a fortiori to prevent such a predictable ecological tragedy from happening, in accordance with the precautionary principle. This principle, first enshrined by the Rio Declaration[60], obliges states to take preventive measures to protect individuals from serious and irreversible environmental harm, even in cases of scientific uncertainty.

1.2.3 Article 10 of the Convention: Freedom of expression

The article reads as follows:

1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. […]*

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and

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[59] *Tătar v Romania* App no 67021/01 (ECtHR, 27 January 2009), from https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=002-1736&filename=002-1736.pdf&TID=ihgdqbxnfi

[60] See footnote n. 2

are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence,or for maintaining the authority and impartiality of the judiciary.

It is worth analyzing the phrasing of this article. What immediately stands out in comparison to the previous articles we have discussed so far is the word freedom. This confidently enables us to forward the argument that, differently from the above mentioned articles, the state has a wider margin of negative obligations, than it has positive obligations. The latter only arises under limited and highly specific circumstances, which we will look into further.

Paragraph one contains in fact not one but two freedoms: the one of imparting information and ideas, which is the traditional definition of freedom of expression and the one of receiving information and ideas, which also falls within the category of freedom of expression since it is what enables to share in turn information and ideas. The first freedom will be referred to as active freedom of expression, while the latter as passive freedom of expression. This will help us differentiate whether the applicants are the source or the recipients of the information. We will make sure to provide one environmental rights case for both types of freedom of expression.

The case Steel and Morris v the United Kingdom[61] raised issues relating to the active freedom of expression. The two applicants were English environmental activists that were carrying out a small-scale campaign against McDonald's, criticizing the company's detrimental environmental impact. McDonald's sued the two applicants for libel. The legal proceeding lasted just under a year and the two applicants did not receive any form of legal aid by the United Kingdom. The European Court of Justice, on the basis of article 10, argued that failing to provide any form of legal aid to the applicants, could engender a "*chilling effect of the general interest in promoting the free circulation of information and ideas about the activities of powerful commercial entities."* This is a positive obligation which the United Kingdom should have fulfilled based on article 10, but it only arose under those limited and specific circumstances. This is because, differently from articles 2 and 8 which are preventive, article

[61] Steel and Morris v. the United Kingdom, *no. 68416/01*, ECHR 2005-II, from https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-68224&filename=CASE%20OF%20STEEL%20AND%20MORRIS%20v.%20THE%20UNITED%20KINGDOM.docx&logEvent=False

10 is more of a reactive right[62]: while the former two require a minimum level of at least procedural measures put in place by the state to ensure that human rights are not breached, article 10 is really only triggered when an infringement of the right to active freedom of expression has already occurred.

The right to receive information as guaranteed from article 10 of the Convention is not widely used as a legal basis for environmental rights cases. Or, more accurately, it is often relied on inappropriately, since the Court has never ruled an environmental case in favour of the applicant on the basis of article 10. The most fitting example for this inappropriate use of such right is the case of Guerra and Others v Italy[63]. The applicants lived near a chemical factory classified as high environmental risk, as proven by the many accidents that had occurred before the case was filed. The State had never addressed the issue and was sued for failure to act. Aside from article 8, the applicant relied on article 10 to forward the accusation that the State had failed to provide key environmental information about the dangerous activity. Such knowledge, the applicants claimed, would have enabled them to assess the risk of their living conditions and to act upon it. What is interesting is that, while the right to receive key environmental information was recognized by the Court, it was considered to be an expansion of article 8[64] and not interpreted as a positive obligation derived from article 10. This is because, as ruled by the Court, *freedom to receive information under Article 10* cannot *be construed as imposing on public authorities a general obligation to collect and disseminate information relating to the environment of their own motion*[65]. From this judgement, we can therefore conclude that the right to receive information as guaranteed by article 10 of the Convention only triggers a prohibition on the State to intervene when a third party wishes to impart information to an individual.[66]

The rationale behind the Court's preference towards a procedural expansion of the right to respect for private and family life has been broadly discussed by legal scholars. In his concurring Opinion judge Jambrek claimed that article 10 was indeed applicable. He argued

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[62] Malaihollo, M. (2021). 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. *Netherlands International Law Review, 68*(1), 121-155. https://doi.org/10.1007/s40802-021-00188-5

[63] *Guerra and Others v Italy* App no 14967/89 (ECtHR, 19 February 1998), from: https://hudoc.echr.coe.int/eng?i=001-58135

[64] See footnote n. 21

[65] See footnote n. 63

[66] See footnote n. 17

that the wording of the article suggested that a positive obligation was indeed triggered, on the condition that highly affected people like the applicants in the vicinity of the chemical factory, had requested access to such information. In this case, a refusal without valid justification upon request would amount to an infringement of the right to receive information on the part of the State. He claimed that the Court was reluctant to expand the interpretation of article 10 to include positive obligations on the right of the State. However, given that the Court has been generally more favourable to protecting the individual right than the State[67], Acevedo's interpretation aligns better with such a positive pattern. In his view, relying on article 8 avoids the regrettable situation whereby the State would claim to have complied with the obligation, not putting anything into writing and classifying the relevant documents as confidential[68]. Article 8 and 10 have been broadly and narrowly interpreted respectively, as a strategy of the Court to protect individual rights more effectively.

1.2.4 Article 6 and 13: The right to a fair trial and to an effective remedy.

Article 6 reads:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Article 13 reads:

[67]ibidem
[68]Acevedo, M. T. (2000). the intersection of human rights and environmental protection in the european court of human rights. New York University Environmental Law Journal, 8, 437-704.

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

In some respect, those two articles are similar in the field of environmental cases.

By article 6, when an applicant is an alleged victim of some "civil right" violation, he/she should be entitled to a hearing. Now, the Court has never sought to provide a definition of "civil right or obligation". Furthermore, in order for a hearing to be arranged, it is necessary that such civil rights be recognized at the national level. Since, environmental rights are rather narrowly recognized by the signatory countries to the Convention, this might pose problems. Though it is true that it is possible to bring cases before the competent national Court, based on the violation of more generic rights that should be recognized broadly by national constitutions (e.g. the right to health or physical integrity and right to property), no environmental rights protection will occur if environmental damage does not result in damage in property or health. A causal link has to be found between the environmental damage and the violation of such a right. An insufficiently strong causal link would mean that article 6 cannot be relied on before the ECtHR[69].

In the case Zander v Sweden[70], the applicant filed a complaint against Sweden for breaching their civil right to enjoy their well water. It had been contaminated on multiple occasions and the Swedish legal system refused to provide a legal venue to challenge the government's decisions that determined such violation.

By article 13, when an individual undergoes an alleged violation as set forth by the Convention, national remedies (legal or not) should be in place to enable them to challenge such a decision. This article does not prescribe the existence of any particular remedy, since it leaves great Margins of Appreciation to the State Parties to comply with such an obligation. However, when violations of the rights enshrined by article 2 are alleged, compensation for economic and non-economic loss should be in principle available and accessible.[71] This does not however guarantee prosecution or conviction of the third party criminal offenders that

[69] See Balmer-Schafroth and Others v. Switzerland, No. 22110/93 (ECtHR [GC] 26 agosto 1997), paragraph 33, from: https://hudoc.echr.coe.int/eng?i=001-58084

[70] *Zander v Sweden* App no 14282/88 (ECtHR, 25 November 1993), from https://www.stradalex.eu/en/se_src_publ_jur_eur_cedh/document/echr_14282-88_001-1164

[71] See footnote n. 43

contributed or triggered the violation of such right[72]. In Öneryıldız v. Turkey the applicants were survivors of a municipal rubbish tip explosion, which killed 19 casualties. Since the State was aware of the danger the activity implied, the Court ruled a violation of article 2 for failure to take preventative measures. The national authorities were finally accused by the applicant of not duly carrying out their criminal and administrative investigation properly and of being too lenient in sentencing the responsible with low fines and minimum sentences. The Court noted in this case that, insofar as there is a legal or administrative remedy, the outcome of such a remedy cannot be set by a supranational court.

1.2.5 Article 1 of Protocol 1: Protection of Property

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

In the context of Article 1 of Protocol No. 1 to the European Convention on Human Rights (ECHR), the term "possessions" is interpreted broadly and autonomously. It refers not only to tangible, existing property but also to certain intangible assets, such as claims, provided that the plaintiff can demonstrate a legitimate expectation of obtaining or enjoying those assets. This concept extends to legal rights and interests, encompassing both rights that are enforceable against specific individuals (in personam) and those that attach to property itself

[72] *Fedayeva v Russia* App no 55723/00 (ECtHR, 9 June 2005), from https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-69315&filename=CASE%20OF%20FADEYEVA%20v.%20RUSSIA.docx&logEvent=False#:~:text=%20The%20case%20originated%20in%20an%20application%20(no.,Mikhaylovna%20Fadeyeva%20(%E2%80%9Cthe%20applicant%E2%80%9D),%20on%2011%20December%201999.

(in rem). In essence, it includes all types of property—movable, immovable, and other proprietary interests[73].

There is a double role that environmental protection can play in the context of the reliance of the said legal basis. Firstly, a lack of environmental protection from the State can trigger this article when the environmental damage interferes with an individual's right to enjoy their possessions. Alternatively, environmental protection can fall under the definition of "general interest" and classify the matter as a legitimate state's violation of the right to property. We will analyse one case for each scenario.

Not only does the first scenario imply an obligation for the State not to intervene, but also a positive obligation to do so, in order to guarantee an environmental minimum standard. The minimum should not be aimed at making the environment "pleasant"[74], but rather at enabling the individual to enjoy his right to property. An effective positive obligation, however, may arise only in a case of dangerous activities, while natural disasters do not require the State to positively intervene. In the case Öneryıldız v. Turkey[75], the State was aware of the hazard undergone by the dwellers in the vicinity of the rubbish tip, and yet failed to carry out any sort of interventions that would have enabled the attainment of the minimum environmental standard. Furthermore, the Court found that there was a direct causal link between the gross negligence on the part of the authorities and the destruction of the applicant's home. This made article 1 applicable to the case. Contrary to this court ruling, in Budayeva v Russia (see supra paragraph on Article 2), the Court held that no breach of article 1 had occurred, since due to the definition of natural disasters, they are beyond human control.

The second scenario can be greatly exemplified by the Fredin v Sweden Case[76]. The applicants were a couple of landowners. In a plot of land they owned, they found a large pit and requested a licence to gravel it. Sweden, on the basis of the Nature Conservation Act refused to grant the licence. The Court established this to be a fully-fledged violation of the right to property as guaranteed by Article 1 Protocol 1. However, the Court acknowledged

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[73]Guide on Article 1 of Protocol No. 1—Protection of property. (2020). 1, from: https://rm.coe.int/guide-art-1-protocol-1-eng/1680a20cdc

[74]See Footnote n. 28.

[75] See supra paragraph 2.4 Article 6 and 13: The right to a fair trial and to an effective remedy.

[76] *Fredin v Sweden (No 1)* App no 12033/86 (ECtHR, 18 February 1991), from https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-57651&filename=001-57651.pdf&TID=thkbhnilzk

that Sweden had acted on the basis of a national act which is, by definition, set up for the general interest. Ultimately, it ruled that the violation was justified, suggesting that the public interest interest, including environmental protection, can in principle override human rights.

In terms of environmental protection, we can conclude that article 1 imposes a positive obligations only in the face of dangerous activities, and negative obligations not to intervene in all other cases, leaving the State a broad Margin of Appreciation. It does, however, acknowledge environmental protection as falling under the general interest, even potentially overriding a fundamental right like the right to property.

1.3. Reparations for damages.

Reparations are the compensations awarded to the victim from a Contracting Party in case where a violation of the victim's right has been found. They are regulated by article 41 of the Convention on Just Satisfaction. Much scholarly debate focuses on reparations, in an attempt to determine their aim.

In the literature there are two prevailing models competing against each other: the victim- and the state-model. The former comes from an individual justice perspective. Such model claims that the victim having undergone "evident trauma, pain and suffering, distress and anxiety"[77] engendered by a State's infringement of their legitimate rights as set by the Convention, should be compensated to restore the same situation the individual would have been in, had the violation not occurred. The state model, on the other hand, supported by constitutionalism, claims that reparations are aimed at incentivizing States to change their behaviour, deterring from misconduct in the future.

Obviously, as a Human Rights Court, the ECtHR has previously declared in case law that it awards compensation based on the victim's circumstances, it appears that the latter model

[77] Barberà, Messegué and Jabardo v Spain, Application n. 10590/83, 13 June 1994, [16], following Ringeisen v Austria, app. 2614/65, 22 June 1972, [21], from https://cambodia.ohchr.org/sites/default/files/echrsource/Barber%C3%A0,%20Messgu%C3%A9%20&%20Jabardo%20v.%20Spain%20[6%20Dec%201988]%20[EN].pdf

should be preferred[78]. Fifkak's empirical analysis goes to show that the victim's vulnerability traits determine only 5% of the reparation amount. The State conduct's traits are able to statistically explain three times as much of the amount. Though the extent of our research does not enable us to carry out a quantitative analysis of the reparations allocated to environmental cases, the finding that the State deterrence is favoured has great consequences for the scope of our analysis. While general environmental protection would most likely be favoured by such a deterrence-focused approach to remedies[79], the emphasis on the individual expected from a Human Rights Court will most likely be overshadowed.

A concrete example of such an argument would be the following. If a State with records of overall good conduct, breaches one of the above mentioned rights, therefore triggering an environmental harm to an economically vulnerable applicant, the latter would not have access to the same reparation that would have been awarded ceteris paribus to an affluent victim whose infringement was triggered by a systematic violator. As a matter of fact, from a constitutionalist perspective, there would be no need to harshly punish a State with good records of conduct, than one who is considered a systematic violator.

Conclusive remarks

The effectiveness of ECtHR judgments in protecting environmental rights lies in their flexibility, broad scope, and relatively accessible nature for individuals. However, an effective enforcement of environmental right is conditional on the establishment by the Court's rulings of a high minimum standard.

Luckily enough, the legal bases at the disposal of environmental victims seem to be interpreted in such a way to adequately protect their environmental rights. Despite the lacking recognition of an individual right to a healthy environment, the proceduralization and greening of already existing rights have greatly contributed to environmental rights

[78] Fikfak, V. (2020) 'Non-pecuniary damages before the European Court of Human Rights: Forget the victim; it's all about the state,' Leiden Journal of International Law, 33(2), pp. 335–369. https://doi.org/10.1017/s0922156520000035.

[79] The reason why this would be the case is that preventative environmental measures would be adopted by 47 States trying to minimize the chances of getting sued by a potential environmental victim. This argument has also been put forward by Niska, T.K. (2020) 'Climate change litigation and the European Court of Human Rights - a strategic next step?,' The Journal of World Energy Law & Business, 13(4), pp. 331–342. https://doi.org/10.1093/jwelb/jwaa028.

protection. Such legal bases are rather varied and therefore have varying degrees of success and drawbacks.

Article 8 stands out as a cornerstone, offering broad procedural and substantive protection. While rooted in safeguarding private and family life, the Court's interpretation over the years has greatly enlarged its scope, so as to encompass related rights such as access to environmental information, the protection of property, and the availability of national remedies under Article 13. This expansion in scope ensures that individuals can challenge environmental harm when it substantially affects their well-being, health, or living conditions, effectively bridging gaps in environmental legislation at the national level.

Article 6 complements this by guaranteeing fair trial rights, enabling individuals to seek justice for environmental harm when their civil rights are at stake. Article 1 of Protocol 1 further reinforces this protection, balancing individual property rights and the public interest. Additionally, Article 2 imposes a duty on states to take preventative measures against foreseeable environmental risks to life, and Article 10 empowers public discourse by protecting the right to disseminate and access environmental information. Together, these provisions create a robust framework that enables the ECtHR to effectively address environmental harm through a human rights lens, even in the absence of recognition of the Right to a Healthy Environment.

Though the legal venues that victims can rely on is varied and solid, the same does not go for the reparations a victim can expect from the European Court of Human Rights. Its constitutionalist approach to reparations prompts the Court to use reparations as a means to punish persistent violators, rather than providing compensation for damage incurred by the victims.

To conclude, aside from the inevitable shortcomings, the European Court of Human Rights provides for a solid judicial setting for the Right to a Healthy Environment to be effectively enforced. We will therefore go so far as to say that such the human right approach adopted by the ECtHR shall inform and inspire both the Union and the International levels.

Chapter 2:

Recognition and Enforcement under the CJEU and within the EU

INTRODUCTION

This chapter will explore the extent to which the European Union and the Court of Justice of the European Union recognize and enforce the individual right to a healthy environment. While the ECtHR is an international court, the CJEU is the judicial institution of the European Union, embedded within the EU's supranational legal order. This institutional distinction is crucial: the CJEU's judgments are binding on EU institutions and member states, and its authority is reinforced by the doctrine of the supremacy of EU law over national law[80]. While under the ECHR jurisdiction, the court's rulings are only binding on the parties to the dispute[81], the doctrine of uniform interpretation binds national courts of all the Member States to follow the CJEU's interpretation in other similar cases. This makes our research topic especially relevant, as the potential impact of a strong standard of environmental rights protection is significantly amplified within the EU legal order. However, unlike the ECtHR, the CJEU is not a dedicated human rights court. As a result, it has a structural tendency to prioritize the uniform application and enforcement of EU law rather than focusing primarily on individual rights. Thus, differently from the ECtHR, asymmetric legal proceedings between a natural person and a public entity like a State or a Union Institution prove particularly difficult to initiate. This structural difference provides a valuable basis for comparing the enforcement impact of a human rights–based approach to international law with that of a legal system where human rights are not the primary focus.

[80] Flaminio Costa v ENEL, No. Case 6-64 (ECJ 15 luglio 1964). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:61964CJ0006

[81] See footnote n. 19

The following chapter will be divided into three different subparagraphs. The first one will investigate the legal bases that may arguably amount to the recognition of said right. The second paragraph will assess and evaluate the effectiveness of every legal venue at the disposal of a natural person. Once all of the possible judicial remedies have been explored, the third and last paragraph will focus on alternative administrative remedies. In this regard we will take a detailed look at the internal review mechanism, extended to natural persons by the amendment to the Aarhus Regulation 2021/1767/EU, originally aimed at transposing the 1998 Aarhus convention at Union level. In our conclusions, we will compare the effectiveness of such administrative procedures with the previously mentioned viable legal remedies. Alternative methods to enforcement in court will also be evaluated in terms of adequacy and effectiveness. Upon said assessment, we will be able to determine whether each legal venue is able to serve as an adequate and effective means for enforcement of the right to a healthy environment. Since the focus of our research is on the right to a healthy environment, our focus will revolve around the enforceability of such right before the courts, as opposed to the implementation of the necessary measures to achieve a healthy environment in Europe. This is why directives and regulations will only be touched upon insofar as they concern the respect and the guarantee of such right. Hence, our main focus will be the judgments of the Court of Justice of the European Union.

2.1 Legal bases and definitions

There seems to be a general scholarly consensus that a right to a healthy environment is not formally recognized in the European Union. However, differently from the Council of Europe, where no such a concept can be found unless in case law, the European Union has adopted multiple texts of constitutional nature addressing the importance of environmental protection for the general interest. What we will attempt to do in the following paragraph is to analyse the relevant articles in the Charter of Fundamental Rights and in the Treaty on the Functioning of the European Union. From said analysis we will be able to claim that the right to a healthy environment is a solidarity right at best or a general principle at least, and that as such, lacks direct effect. This makes it of no use to individuals before the CJEU.

The most explicit recognition of the importance of environmental protection in the Union can be traced in the Charter of Fundamental Rights, a legally binding document that consolidates in a single text the fundamental rights and general principles within the Union. It brings together civil, political, economic, and social rights, as well as principles that guide the interpretation and application of EU law. Environmental protection is also included, as pursuant to Article 37. It reads:

"A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development."

What really stands out from the provision is its wording. It is framed in a rather different way to that of a right. While provisions concerning rights normally mention right- and duty-bearers, article 37 is utterly silent on the beneficiary as well as on the parties on which those obligations are binding. That is because, despite the deceiving name, the Charter of Fundamental Rights does not only contain rights, but also general principles. Those are broad policy objectives or normative guidelines that shape the interpretation and implementation of EU law. Unlike rights, they do not grant individuals a direct legal entitlement that can be invoked before a court unless implemented through specific legislation. Environmental protection falls under this category since the general interest of the Union is the most obvious objective of the measure. The fact that environmental protection cannot be construed as being a right has several consequences on its application.

Due to its very nature, it lacks direct effect, due to the vagueness of its provision. This means that it is not enforceable by individuals before courts. Additionally, unlike any other right, it merely imposes negative obligations on duty-bearers. This means that Union Institutions and States would be deemed liable for violation of Environmental Protection as a general principle only if they have acted purposefully against the principle AND with the mere intention of violating such general principle and for no other competing interest[82].

[82] The threshold for enforcement of a right is much lower since the mere failure to act on a positive obligation imposed by said right, would amount to violation.

Since relying on general principles before the Court proved ineffective[83], general principles shall not be enforced, but rather implemented, or better "integrated", as provided by the wording of the article. Based on the interpretation of this word, three differing views on the function and importance that environmental protection should take in EU policy-making exist.

The one that accords a lower level of importance to environmental protection in EU policies is the minimalist interpretation. This adopts a procedural definition to the word integration. According to this view, insofar as some procedural requirements are complied with, the Union can freely pursue its objectives through policy-making. Essentially, integration is considered as a first-order principle and environmental protection something to merely take into account[84]. This view is however debunked by the auxiliary "must" in the provision under scrutiny as well as in article 11 TFEU ("*Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development")*.

On the other extreme of the spectrum is, instead, the Maximalist approach. It advocates for a prioritization of environmental protection over any other policy objective. In fact, this view is challenged by article 7 TFEU, which reads as follows: *"The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers."* This article rules out any potential hierarchy among the policies of the Union, which means that environmental protection cannot be held to arbitrarily override other Union interests and objectives[85].

The theory of environmental integration serves as a valid compromise solution between the two extreme views. It argues that environmental integration should be pursued systematically in parallel with other EU policy objectives, pertaining to other sectors of the Union interest[86].

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[83] Case C-399/12 Piller v. Germany [2013] EU:C:2013:625. Here the plaintiff attempted to rely on article 37 of the Charter of Fundamental Rights, but the Court ruled that the latter lacked direct effect.
[84]Kramer, L., & Orlando, E. (s.d.). Principles of Environmental Law https://www.e-elgar.com/shop/gbp/principles-of-environmental-law-9781785365652.html
[85]Knudsen, J. K., & Lafferty, W. M. (2016). Chapter 13: Environmental policy integration: the importance of balance and trade-offs (pp. 337–368). https://doi.org/10.4337/9781784714659.00021
[86] Sjåfjell, B. (2014). *The Legal Significance of Article 11 TFEU for EU Institutions and Member States* (SSRN Scholarly Paper No. 2530006). Social Science Research Network. https://papers.ssrn.com/abstract=2530006

This is also confirmed by the fact that in article 11 TFEU (see above) the auxiliary "shall" which is normally present in the Treaties to designate positive obligations on EU Institutions or Member States, is replaced by the weaker "must".

We can therefore conclude that article 37 CFR, read in conjunction with articles 11 and 7 TFEU, is an important provision and that the mere fact that such a principle has been included in the European Charter of Fundamental rights is rather promising. Though the wording is clear enough to justify ruling out the option of interpreting the right to a healthy environment as an individual right, defining its nature still poses challenges. The absence of a clear-cut distinction between Rights and General Principles condemns it to an ambiguous in-betweenness, since it is unable to be neatly classified within either of these two categories. For the purpose of our research we will assume that it falls in the intersection between a solidarity right and a General Principle. Only patterns in the legal and policy-making practice, will help clarify the matter. As it stands the European ambition to take the lead in environmental protection will possibly prompt it to consider including greening of existing rights and substantive environmental rights as an integral part of its available legal tools[87]. We can therefore argue that while ensuring the General Principle of Environmental Protection does not amount to the formal recognition of the individual right to a healthy environment, it represents a milestone in the recognition process that the ECHR failed to achieve. In terms of recognition, we can therefore confidently argue that the European Union is ahead of the ECHR. The rest of the chapter will be devoted to determining whether the same can be said of Union enforcement.

2.2 Judicial Remedies for Natural Persons

Global legal trends nowadays seem to suggest that environmental and climate litigation are increasing and that the Courts' responses are becoming more and more receptive to the needs

[87] Human Rights and Climate Change: EU Policy Options | Think Tank | European Parliament. (s.d.). from https://www.europarl.europa.eu/thinktank/en/document/EXPO-JOIN_ET(2012)457066

of judicial protection forwarded by citizens[88]. Suffice it to mention the recent successful climate litigation cases in the Philippines and in Columbia[89]. Unfortunately, this does not seem to be the case in the EU. First of all, the CJEU is not a human rights court. This means that if a EU citizen were to lodge a complaint relating to an alleged human rights violation, they would find more use in turning to the ECtHR[90], due to the high threshold of individual and direct concern that the Court of Justice imposes on natural persons[91]. Here, the fact that the general principle of environmental protection cannot be invoked before a court is not the major issue. In order for such ground to be considered as unfounded, natural persons must be admitted to present their case before the Court. Most of the time, however, this does not happen due to issues of standing. Limited access to justice is the major obstacle preventing a natural person from seeking justice in matters of environmental protection at Union level, but it is not the only one. Once the preliminary barrier of admissibility has been overcome, many more are left. As unprivileged actors[92], natural persons will always be at a disadvantage, no matter the legal venue they choose to pursue. The following subparagraph aims precisely at detecting all of the legal hurdles a natural person seeking justice in matters of environmental protection might incur. Those differ depending on the circumstances of the person as well as on the legal remedies they choose to rely on. All of the possible cases will be included in our analysis.

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[88]Bogojević, S. (2020). Human rights of minors and future generations: Global trends and EU environmental law particularities. Review of European Community & International Environmental Law, 29(2), 191-200. https://doi.org/10.1111/reel.12345

[89] *Minors Oposa v. Secretary of the Department of Environment and Natural Resources 33 I.L.M. 173 (1994)—Philippines*. (s.d.). ACRiSL, from https://www.acrisl.org/casenotes/m2ll8m8skjpglk8-83mk2; Bustos, C. (2018, aprile 13). Climate Change and Future Generations Lawsuit in Colombia: Key Excerpts from the Supreme Court's Decision. *Dejusticia*. https://www.dejusticia.org/en/climate-change-and-future-generations-lawsuit-in-colombia-key-excerpts-from-the-supreme-courts-decision/

[90] This claim does not make the need for a CJEU less relevant. As we will explore (see infra), relying solely on the ECtHR would not be enough since it would not allow for holding the EU institutions accountable. As a matter of fact, the ECtHR cannot review the legality of European Union Acts, nor is it their job to review their compliance with the general principle of Environmental Protection. The existence and the responsiveness of the ECtHR would therefore not be enough to prevent some legal loopholes and some judicial vacuums like the one we have just mentioned.

[91] Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/49 (TFEU) art 263(4).

[92] Kucko, M. (2017). The status of natural or legal persons according to the annulment procedure post-lisbon. *LSE Law Review (Online), 2*, 101-119. https://doi.org/10.61315/lselr.17

2.2.1 Standing

The standing can be defined as the legal capacity or right of a person (natural or legal) to bring a case before a court. It determines whether the claimant has a sufficient interest in the matter to justify their participation in legal proceedings. Differently from the European Court of Human Rights, where the only allowed cases are brought by a natural person against a High Contracting Party, those natural persons are in fact non-privileged applicants before Union Courts[93]. The majority of cases brought before the CJEU are either carried out between Member States[94], or between Institutions[95], or between an Institution and a Member State[96]. This is predominantly because, due to their special subjectivity, MS and the Union Institutions are privileged applicants as they easily fulfil their locus standi requirements through their legal personality; natural (and legal persons), on the other hand, fail to do so, since they are thought to be able to rely upon other avenues of justice, mainly national courts.

What is road blocking access to natural and legal persons is the CJEU judgment in the Plaumann case[97]. Plaumann, a German fruit importer, challenged a decision by the European Commission that imposed a customs duty on imports of certain fruits. Plaumann argued that the decision, which was based on the Common Customs Tariff, directly affected his business, and he sought to have the decision annulled. The CJEU deliberated that in order to do so, the person had to be directly and individually concerned, *"by reason of certain attributes that are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the addressee.[98]"* Since the applicant of this case belonged to a category of affected people (i.e. all other German fruit importers), he was not in any way singled out from all other persons. Not only has the Court effectively denied access to these legal avenues for individuals whose interests are affected but it has also held that an alleged violation of a fundamental right does not, by itself, confer locus standi. Needless to say, a violation of a General Principle like environmental protection does not leave room for hope.

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[93] Ibidem
[94] Article 259 TFEU
[95] Article 263 TFEU
[96] Article 258 TFEU when the EU institution sues the MS activating the infringement procedure, and 263 TFEU when the MS attempts to annul a EU act.
[97] Plaumann & Co v Commission of the European Economic Community, No. Case 25-62 (ECJ 15 luglio 1963). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:61962CJ0025
[98] Ibidem, Grounds of judgment para. 1.

The most relevant example of a case that outwardly challenges the Plaumann test is the Carvalho Case, also known as People's Climate Case[99]. The complaint was lodged by multiple families from Portugal, Italy, Germany, Romania, France, Kenya, Fiji and the Simi Youth Association Siminuorra[100] against the Parliament and the Council. They claimed that the Emission Trading Directive[101], 16 the GHG Regulation[102], and the LULUCF Regulation[103], adopted to comply with the Paris Agreement, were in fact inadequate to obtain the 40% GHG reduction that was set out therein. They therefore essentially pointed out a failure of the European Institutions to comply with an international agreement.

In an effort to satisfy the *Plaumann* test, the applicants advanced several compelling arguments aimed at exposing the extent to which the test limits access to effective judicial remedies. They contended that climate change, as a global phenomenon, cannot be said to affect a limited and clearly defined group of individuals directly and individually. In their view, the *Plaumann* test was excessively narrow and effectively rendered the legislative package they were challenging immune from judicial review[104]. To support their claim, they invoked Article 47 of the Charter of Fundamental Rights of the European Union, which enshrines the right to effective judicial protection. They argued that relying on national courts was virtually impossible, as such courts only have jurisdiction to annul national administrative decisions and cannot challenge or invalidate EU legislative acts. Moreover, initiating parallel proceedings in multiple national jurisdictions would have entailed significant financial and procedural burdens, given the varying rules of procedure across Member States[105].

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[99] Order of the General Court (Second Chamber) of 8 May 2019. Armando Carvalho and Others v European Parliament and Council of the European Union. Case T-330/18. (GC 2018). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62018TO0330

[100] ibidem

[101] *Directive 2018/410—Amendment of Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814—EU monitor*. , from https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vkmt6uqpauy7

[102]Regulation (EU) 2018/842. (s.d.). [Policy Document]. European Environment Agency. Recuperato 26 maggio 2025, da https://www.eea.europa.eu/policy-documents/regulation-eu-2018-842

[103] Regulation—2018/841 of the European Parliament and the Council, 30th May 2018, from https://eur-lex.europa.eu/eli/reg/2018/841/oj/eng

[104] See footnote n. 99

[105] Ibidem

The applicants also claimed that they were individually affected by the legislative acts, asserting that climate change impacts everyone in uniquely different ways[106]. However, the General Court remained largely unpersuaded by both this argument and the broader critique of the *Plaumann* test. It reasoned that accepting such claims would effectively dismantle the standing requirements established under Article 263 TFEU. Granting locus standi to anyone potentially affected by climate change, the Court noted, would risk placing an unmanageable burden on the EU judiciary. Nonetheless, the Court acknowledged that natural persons could still access the CJEU through the preliminary ruling procedure under Article 267 TFEU. While this is technically true, the Court's response overlooked the considerable procedural shortcomings of that route, particularly its reliance on national courts' discretion to refer questions and the practical obstacles it poses for individuals seeking a direct and effective remedy[107].

Though the Carvalho case might appear as an outright defeat for alleged environmental victims, it was a landmark case in Environmental Union Law, since the judgement brought to the surface a legal vacuum. It is impossible for a natural person to rely on any legal venue in case of failure to comply with a statutory obligation. Additionally, there is little hope that any other privileged applicants would bring an action against such a failure. No EU institution stands to gain from doing so, and even the most diligent Member State is unlikely to initiate annulment proceedings against an act that imposes minimal demands on its domestic system. We have therefore established how hard it is for natural persons to seek justice before a European Court. The rest of the paragraph will instead deal with the challenges a person might incur aside from standing requirements.

2.2.2 Legal venues

This section is entirely devoted to the available legal remedies that may be functional for vindicating and enforcing a right to a healthy environment. Every subparagraph will ensure to analyze the wording of all the possible provisions a natural person may choose to rely upon

[106] Ibidem, para. 31
[107] see Paragraph 2.2.4 Preliminary Rulings: 267 TFEU

whilst providing practical examples of possible applications in the sphere of environmental protection. Their focus will be that of assessing whether those legal bases are effective judicial remedies for natural persons.

2.2.2.1 Infringement Procedure: 258 TFEU

This legal basis is designed to challenge infringement on the part of MS before the Court of Justice. Though this mechanism does not provide individuals with the possibility of accusing their MS before a European Court for its alleged infringement, they have other means to take part and trigger such a legal procedure. The article reads:

> *If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.*
>
> *If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.*

Interestingly enough, we are starting the analysis of the legal remedies available to individuals with an article that utterly fails to mention natural persons. The role to initiate the legal proceedings lies with the Commission that carries out and investigates the enforcement of EU law within the member States. However, natural persons do play a fundamental but silent role in notifying the Commission on the infringements committed by MS.

Before delving into the complaint system and the extent to which such a procedure can play a role in terms of citizens' wellbeing and right to a healthy environment, it is important to understand what an infringement consists of. Infringements can occur if the MS fails to communicate to the Commission that it has successfully implemented EU Directives; If the MS transposes incorrectly or incompletely a EU Directive into the national legislative system; If they have failed to apply in practice the newly implemented EU Directive. The first two cases concern procedural aspects of infringement, the latter a substantive one.

The Commission's task to hold the Member States into account is put to the test by different challenges depending on the reason for failure to act. Assessing those challenges is key since they in turn restrict the Commission's ability to act upon the notifications of natural persons. It is therefore valuable to briefly illustrate the extent of the Commission's intervention in the last two cases of failure to act[108].

Incorrect Transposition

This is much harder to notice, because it demands a substantial knowledge and understanding of the ins and outs of the EU Directive in question. Additionally, MS tend to get away with it by using previous legislation that hardly ever aligns and fulfils the requirements of the newly passed Directive[109]. Furthermore, oftentimes the full implementation of a EU directive requires multiple pieces of legislation in many different areas to pass. This is particularly true for Environmental Directives which have a tendency to be highly cross-sectional. However not even the most diligent of MS would admit that it has failed to correctly transpose a Directive in all the different areas that a Directive would require and for the Commission it is all the more hard to carry out such an assessment[110].

Failure in Practice

One of the most challenging aspects of enforcement is identifying when a Member State has failed to implement an EU directive in practice. While the Commission is responsible for ensuring compliance, it often faces difficulties in distinguishing between

[108] The non-communication failure to act is relatively unproblematic for the Commission since in the 80s it has carried out a standardization system for tackling this infringement. The first step the Commission follows is a preventative step. Two months in advance of the passing of a directive it sends a formal letter to every MS. 6 months before the deadline a second formal letter is filed to limit the number of infringement of newly passed directives.

[109] see Opinion of Mr Advocate General Van Gerven Delivered on 25 September 1990. Commission of the European Communities v Italian Republic Case C-360/87. (ECJ 1987). https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:61987CC0360
and Commission of the European Communities v Federal Republic of Germany, No. Case C-131/88 (ECJ 28 febbraio 1991). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61988CJ0131

[110] Krämer, L. (2017). European Environmental Law: A Comparative Perspective. Routledge. https://doi.org/10.4324/9781315255958

incorrect transposition—where national legislation does not fully align with the directive—and failures in practical application. A clear example is the Environmental Assessment Directive: if a Member State does not conduct an environmental assessment for a specific project due to gaps in national legislation, is this a failure of transposition or an issue of non-application? This ambiguity complicates enforcement actions. The European Court of Justice has taken a strict approach to such failures, as seen in a 1990 case concerning the Drinking Water Directive. Belgium had argued that financial and technical challenges delayed compliance, but the Court ruled that practical difficulties could not justify a failure to meet EU obligations.

Complaint System

Now, all of the challenges that we have illustrated thus far get in the way of the Commisson's duty to enforce EU law by triggering the infringement procedure as well as on the Institution's responsibility to respond adequately to complaints lodged by natural persons. In fact, it is on such complaints that the Commission relies when assessing whether a Member State has incurred an infringement under EU law. The opportunity to file a complaint before the Commission makes the whole accountability system more efficient and responsive, and equips natural persons with an additional platform to express potential environmental damages that they might have undergone. As we will see, this is far from being a system of human rights protection, since it is ultimately concerned with MS' compliance more than individual issues being solved. However this new forum affords them with some advantages that might contribute, though minimally, to enforcing their right to a healthy environment in the Union.

Looking at it in more detail, it is easy to realise that the Commission is not the best-placed to assess the extent of compliance and infringements across MS. The citizens, on the other hand, are in a rather privileged position since they are capable of closely scrutinizing how the MS operate. This is why the Commission relies on a system of notification. This has been originally developed in order to tackle issues related to the Internal Market[111], but slowly but surely other types of complaints have

[111] Ibidem

also been welcomed. Specifically, over the years the cases of environmental complaints have increased exponentially in number[112], as shown in the table below:

Table 2 Complaints Registered by Commission 1982–90

	Environment	All sectors
1982	10	352
1983	8	399
1984	9	476
1985	37	585
1986	165	791
1987	150	850
1988	216	1137
1989	465	1195
1990	480	1252

Source: Table 1 op.cit.

This process, which takes place through the EU Pilot scheme[113], is rather advantageous for the complainants who are natural persons. It is straightforward and free of charge, which makes it convenient for citizens to get involved[114]. Additionally, the number of complaints received per country and per issue, together with the data related to the complaints that have been followed up in the preliminary procedure as well as in legal proceedings before the Court, have been published. This makes the system relatively transparent. For further transparency, the Commission also has a duty to notify complainants when their complaint has been successfully received and to communicate whether it has been acted upon. Once the complaint is filed by the individual, it is not only received by the Commission but also by the concerned Member State. This allows for a feedback system and puts the individual and the Member State addressed by the complaint in direct contact. Finally, there are no requirements

[112] Ibidem, Table 2
[113] *EU Pilot dialogue | Single Market and Competitiveness Scoreboard*. (s.d.). Recuperato 26 maggio 2025, da https://single-market-scoreboard.ec.europa.eu/enforcement-tools/eu-pilot_en
[114]Kingston, S., Heyvaert, V., & Čavoški, A. (2017). European environmental law (1st ed.). Cambridge University Press. https://doi.org/10.1017/9781139044202

regarding the content of the complaint. This means that even if the citizen filing the complaint has not been personally harmed by the alleged infringement of the Member State, they are still eligible to submit it.

In the event that the Commission decides to follow up with the preliminary procedure set out under Article 258 TFEU and is successful in its claims, the Court may impose a lump sum or penalty payment on the Member State if it fails to comply with the judgment. This gives Member States an incentive to implement the Court's ruling swiftly, thereby making them more responsive in rectifying their infringement[115]. Finally, provided that the Commission is successful in its claim for infringement against the defendant Member State, this opens national legal venues for the individual to seek compensation before domestic courts for the State's breach of EU law[116].

Despite the many advantages, there are also several downsides. The Commission is not bound to act upon such complaints as it retains full discretion in deciding whether to initiate the preliminary infringement procedure. As a result, a complainant whose complaint has not been followed up by the Commission cannot in turn acquire legal standing for a potential action for failure to act under Article 265 TFEU, merely on the basis of having filed an individual complaint. In other words, a complaint that has not been addressed by the Commission does not afford standing to individuals. Not only is the Commission not bound to act, but its discretionary power cannot be reviewed by the Court[117]. This means that, even if the Commission fails to act despite the urgency of the infringement or regardless of the number of complaints received per country, its decision to pursue one infringement over others cannot be subject to judicial review. This can be problematic. The publication of data related to environmental complaints has shown that the Commission does not act proportionally to the number of complaints received. Instead, it bases its decisions on approximated levels of Member State compliance. This indicates that the focus lies not on the individual complainant, but rather on general Member State performance. While this may be inevitable given the Commission's mandate to ensure enforcement across Member States, it can be detrimental to individual interests and rights. Additionally, the Commission may

[115]Prete, L., & Smulders, B. (2010). The coming of age of infringement proceedings. Common Market Law Review, 47(1), 9-61. https://doi.org/10.54648/COLA2010003
[116] Ibidem
[117] Commission of the European Communities v Kingdom of Belgium, No. Case C-471/98 (ECJ 5 novembre 2002), see paragraph 32, .
https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:61998CJ0471

accumulate a backlog of complaints and, in practice, address them with significant delays. This can be especially problematic for victims of environmental harm. Ultimately, the complaint system is an essential step in triggering the infringement procedure and provides a channel for individuals to voice environmental grievances. However, it primarily remains a mechanism aimed at ensuring state compliance, rather than a direct instrument for protecting individual rights. It is entirely left to the discretion of the Commission to decide to follow up on an individual complaint and such decision is not justiciable before the Court. Furthermore, the challenges that the different kinds of failure to act constitute a further hindrance getting in the way of the Commission task to adequately respond to individuals submitting a complaint. This means that while natural persons' concerns are taken into account, a balance of legal, political and economic interests of the Commission are the prevalent reasons for the Commission's decision to act upon an individual complaint claiming infringement of EU law.

2.2.2.2 Annulment of an Act: 263 TFEU

Article 263 TFEU sets out the legal procedure which enables the CJEU to review the legality of a Union act, and to declare it void in case where the act is found to be unlawful. The article reads as follows:

> *The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties*

(...)

> *Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.*

The above paragraph has undergone changes introduced by the Lisbon Treaty. Specifically, pre-Lisbon, the third limb of the paragraph was not there (i.e. the section concerning regulatory acts)[118]. According to legal scholars at the time, this addition was functional to engender a relaxation of the locus standi[119], since the only requirement mentioned is the direct (and not the individual) concern. This means that post-Lisbon individuals were given the chance to rely on article 263 TFEU under the following circumstances:

a) If an act was addressed to the applicant
b) If an act is of direct and individual concern to the applicant without being addressed to them
c) If a regulatory act without any implementing measure is of direct concern to the applicant.

Though case a) is relatively straight forward, to define the terms in b) and c), analyzing how their constituent elements have been construed in case law is essential.

For case b), the interpretation of individual concern has been provided in the section above[120]. To briefly address it here, if the potential applicant is unable to prove that a particular Union act affects them in such a way that singles them out from all other potentially affected persons, then they cannot claim to have individual concern. Direct concern refers specifically to the tangible impact a particular Union act has on an individual's legal status or situation, without intermediary steps of implementation by national authorities[121]. In litigation, if an applicant is challenging an act that is not addressed to them and fails to prove that they are individually concerned, then the assessment of the direct concern is not carried out. As a matter of fact, all the conditions are necessary and need to be simultaneously complied with, in order for the applicant to be granted standing[122].

Moving onto case c), as a preliminary step, it is necessary to define what a "regulatory act" is. Since this term is not defined in the Treaties, again we are obliged to rely on

[118] Art 230 TEC
[119] Kornezov, A. (2014). locus standi of private parties in actions for annulment: Has the gap been closed? Cambridge Law Journal, 73(1), 25-28. https://doi.org/10.1017/S0008197314000130
[120] See supra, paragraph 2.1 on Standing
[121] Anonymi Viotechniki Kai Emporiki Etairia Kataskevis Konservon - Palirria Souliotis AE v European Commission, No. Case T-380/11 (GC 12 settembre 2013). https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62011TJ0380
[122] See footnote n. 119.

case law. In the Inuit Tapiriit Kanatami case[123], the General Court deliberated that the acts that are "*of general application apart from legislative acts"* can be considered regulatory acts. In appeal, the Court of Justice agreed with this definition, referring to the travaux préparatoires of the Constitution for Europe. As a matter of fact, the drafters did not want a democratically legitimate act like legislative ones to be challenged through *actio popularis*. But what makes an act a legislative act? The procedure whereby it is enacted. Only acts adopted through a non-legislative procedure can be challenged, since they are of regulatory nature.

Now, positioning this analysis within the context of our research, Environmental Union Acts are hardly ever addressed to natural persons. This, therefore, makes us rule out scenario a). Additionally, as shown by the above-mentioned People's Climate Case, it is particularly hard to prove that an environmental Union Act affects a potential applicant in a way that fulfills the requirement of direct and individual concern[124]. This is because the environment and, in turn, environmental policy is something that affects everyone. As of now, we can therefore confidently rule out scenario b).

As for scenario c), the barrier to access is slightly easier since the requirement of individual concern is lifted. What is therefore left to prove for the applicant to the Court of Justice is their direct concern and the regulatory nature of the challenged act. Specifically, quite a few environmental Union acts happen to be delegated acts by article 290 TFEU. These acts are aimed at delegating specific powers from the European Parliament and the Council to the European Commission. Now, in order to understand whether these particular acts can be challenged by individuals provided the existence of direct concern, under article 263 TFEU, it is important to clarify whether delegated acts fall under the scope of regulatory acts of said article.

For this, the case Tilly-Sabco v Commission[125] comes in rather handy. Tilly-Sabco, a French poultry producer, challenged a delegated act adopted by the European Commission, on the basis of article 263 TFEU. Though directly concerned, the legal question that emerged was whether the act that he was challenging was in fact a

[123] Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union, No. Case C-583/11 P (ECJ 3 ottobre 2013).
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62011CJ0583
[124] See supra, paragraph 2.1 on Standing
[125]Tilly-Sabco SAS v European Commission, No. Case C-183/16 P (ECJ 20 settembre 2017).
https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62016CJ0183

regulatory act. The Court confirmed it was, classifying delegated acts as a subsection of regulatory acts. This means that as long as the direct concern has been proven, an environmental delegated act can be judicially reviewed by the CJEU, even when the case is brought by an unprivileged applicant like a natural person. So then, where does the issue lie? All environmental Union Acts specifically, even those of regulatory nature, will most likely entail some sort of implementing measure[126]. Now, preliminary rulings regulated by article 267 might be of use when challenging implementing measures, but multiple hurdles shall be overcome to access this procedure (see infra). All of this might pose a hurdle to the enjoyment of effective judicial protection, enshrined in Article 47 of the Charter of Fundamental Rights, if there are no other indirect legal procedures to challenge said acts.

2.2.2.3 Failure to act of the Union: 265 TFEU

This is the provision that is currently in place for addressing any situation where the European Union had an obligation to act but has failed to do so. Also known as the provision for Failure to Act, it is one of the very few ways to hold Union institutions accountable. The article reads:

"*Should the European Parliament, the European Council, the Council, the Commission or the European Central Bank, in infringement of the Treaties, fail to act, the Member States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have the infringement established. This Article shall apply, under the same conditions, to bodies, offices and agencies of the Union which fail to act.*

The action shall be admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within two months of being so called upon, the institution, body, office or agency concerned has not defined its position, the action may be brought within a further period of two months.

[126] See footnote n. 119

Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion".

Natural and legal persons have to comply with the same requirements of individual and direct concern as by article 263. However, not to repeat ourselves, we will here gliss over the issue of standing, and swiftly move to analyse all of the necessary demanding steps of the procedure. The scarce chances of being acknowledged standing, paired with the hurdles of the content of the provision, greatly limit the effectiveness of the judicial remedy under scrutiny for individuals.

In order to constitute the illegal inaction, it is necessary to identify a legal imperative to act. Now, in order to understand the purpose of this provision it is necessary to define the term "illegal inaction". The term "inaction" is the antonym to "action". While "action" can be defined as the adoption of a legal act[127], inaction is the non-adoption of a legal act[128] that was supposed to occur according to a specified legal basis[129]. Now institutions can either fail to adopt a legal act via silence, in other words, without addressing the issue, or via a negative act, or refusing to act. This distinction is crucial in determining the scope and the potential application of this legal basis. In fact, refusal to act from a EU institution cannot be challenged before the CJEU pursuant to article 265 TFEU, but rather to article 263 TFEU[130]. The legal basis is therefore only valid provided that the institution has committed illegal inaction via silence.

Furthermore, the steps to follow if an applicant has the intention to bring an action for failure to act are rather daunting and long, making it an ineffective judicial remedy for many applicants needing to bring environmental cases with pressing urgency[131]. The lengthy process is motivated by the fact that the steps to bring an action for illegal inaction are

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[127] European Commission v Ryanair Ltd, No. Case C-615/11 P (ECJ 16 maggio 2013), paragraph 39 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62011CJ0615

[128] Opinion of Mr Advocate General Capotorti Delivered on 11 July 1979. GEMA, Case 125/78. (ECJ 1978), paragraph 5, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61978CC0125&qid=1745678415067

[129] Order of the Court of First Instance (First Chamber) of 29 September 1997. Société Anonyme de Traverses En Béton Armé (Sateba) v Commission of the European Communities. Public Procurement https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:61997TO0083

[130] See paragraph 2.2.2 on Annulment Act

[131] See footnote n. 119

divided into two main procedures: the preliminary procedure (which consists in inviting the Institution to act) and the procedure for failure to act (i.e. the actual legal proceeding before the CJEU). The reason we have decided to include them in our analysis is that they shed light on the imbalance in the power dynamics between the Union institutions and natural persons, clearly skewed in favour of the former. The requirements and procedures individual applicants must comply with are significantly more burdensome than those faced by the institutions, making the unprivileged status of the individual applicant particularly apparent.

Preliminary procedure.

The applicant has to present an invitation to act to the concerned institution, usually in the form of a written letter[132]. This is crucial when initiating a legal proceeding against a Union Institution since the validity of such a legal document is one of the tests performed by the CJEU to assess the admissibility of the plaintiff. If this legal document is vitiated by invalidity, it will compromise the natural person's standing altogether. Now, said invitation to act will be considered admissible only after a "reasonable time" has passed by the time the alleged failure to act has occurred[133]. This window of time has never been defined by the Court's jurisprudence, nor is it specified by the provision. What is clear, however, is the content that the invitation to act has to include. This legal document the natural person is in charge of submitting is subject to a long list of requirements of what shall and shall not entail.

According to the Court's established jurisprudence, several mandatory elements must be included in an invitation to act under Article 265 TFEU, exemplifying the procedural burden placed on natural persons seeking to hold EU institutions accountable. The letter must clearly specify the legal measure that the institution in question was expected to adopt, as well as identify the legal basis that would have supported such an action. It must also demonstrate how the institution's failure to act constitutes a breach of EU law. Furthermore, the applicant must explicitly state that the invitation is being made pursuant to Article 265 TFEU, and must

[132] As established in paragraph 32 of Nuovo Campsider v Commission of the European Communities, No. Case 25/85 (ECJ 6 maggio 1986).
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61985CJ0025.
This is however less effective for the applicant, since it would be hard to prove to court that an oral invitation to act has in fact occurred.

[133] Kingdom of the Netherlands v Commission of the European Communities, No. Case 59-70 (Europski sud 6 luglio 1971).paragraph 19,
https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX:61970CJ0059

indicate their intention to initiate an action for failure to act should the institution fail to take a position within the prescribed time limit.

Crucially, the scope of the invitation determines the admissibility of any subsequent action before the Court. All measures the applicant intends to request in their formal action must be clearly stated in the original invitation. Any demands made at a later stage that were not included in the initial request will be deemed inadmissible by the Court of Justice. This requirement underscores the strict procedural framework governing actions for failure to act and highlights the legal precision expected of individuals wishing to pursue such remedies.

The Institution shall respond to the invitation to act with a definition of position. By word of law, the time window for the Institution to reply is 2 months. If the Institution fails to provide a definition of position after the established timeline, the applicant would be deemed admissible to lodge the complaint for failure to act before the CJEU. In practice, however, the 2-month time limit is to be considered a starting point for the applicant to lodge the complaint, rather than as the final deadline for the concerned institution to define its position[134]. As a matter of fact, the concerned institution can always send a a definition of position, even once the legal proceeding for failure to act has already been initiated[135].

Contrary to the requirements imposed for the invitation to act, there are none in terms of the contents included in the Institution's definition of position. This means that a definition of content wherein it is stated that the institution has decided to delay its action or even that the Institution refuses to act is deemed to be a valid enough definition of position[136]. Therefore, in already initiated cases for failure to act, a delayed definition of position wherein the institution refuses to act would be welcomed by the Court and the case rejected as inadmissible. The only cases based on this legal basis that have favoured the position of the applicants, are therefore those wherein the EU institution has either utterly failed to define its position or it has responded to the invitation to act with an inconclusive and ambiguous statement, where it was not clear whether it had decided to act or not.

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[134]Daukšienė, I., & Budnikas, A. (2014). Has the action for failure to act in the european union lost its purpose? Baltic Journal of Law & Politics, 7(2), 209-226. https://doi.org/10.1515/bjlp-2015-0008

[135] Order of the Court (Second Chamber) of 13 December 2000. Société de Distribution Mécanique et d'automobiles v Commission of the European Communities. Case C-44/00 P. (ECJ 2000), paragraph 83, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62000CO0044

[136]European Parliament v Council of the European Communities, No. Case 13/83 (ECJ 22 maggio 1985), paragraph 25, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:61983CJ0013

Procedure for failure to act

Once those steps have been complied with, the legal proceeding can be carried out. The preliminary procedure above, however, has fundamentally changed the scope of the legal basis and therefore of what has to be decided before the Court. As a matter of fact, the holding the CJEU has to express need not answer the question of whether the institution has failed to act, but has to rather express itself on the extent to which the institution in question has successfully defined its position[137].

Since natural persons are particularly discouraged to bring a case of general interest (like environmental cases) before the Court of Justice due to the above-listed hurdles to standing and the administrative and financial burden they would have to undergo, we will take the case of Föreningen Svenskt Landskapsskydd v. European Commission (Case T-346/22) to exemplify how the number of requirements imposed to the applicants always ends up favouring the EU institution. The applicant, a Swedish environmental protection association, challenged the European Commission's rejection of their request for an internal review concerning Sweden's Integrated National Energy and Climate Plan (NECP) under article 263 TFEU after accusing it of failure to act on an invitation to carry out such internal review, based on article 265 TFEU. Both claims were declared inadmissible by the Court. Specifically, the claim of the applicant that the Commission had unlawfully failed to act was motivated by the fact that, when sending the invitation to internally review the NECP, had failed to specify that it was an invitation to act as part of the preliminary procedure for failure to act[138]. Furthermore, the Court ordered the association to bear the cost of the two proceedings for itself and for the Commission[139].

Additionally, in case of a clear definition of position where the institution refuses to act, the applicant has the opportunity to initiate a new legal proceeding, this time relying on the legal

[137] See footnote n. 134.
[138] Föreningen Svenskt Landskapsskydd v European Commission, No. Case T-346/22 (17 aprile 2024), paragraph 91 https://curia.europa.eu/juris/document/document.jsf?text=&docid=284831&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3473008
[139] Ibidem, para 100

basis of article 263 TFEU[140]. This however would mean that a natural person, our research focus, will be required to bear an administrative burden for a double legal proceeding for legal bases 265 and 263 TFEU. This is rather demanding considering that the first legal basis has, as described above, two distinct procedures as well as a double financial burden for two legal proceedings.

That has strongly discouraged natural persons to rely on such a legal basis. This begs the question of the extent to which the European Institutions are willing to be held accountable. Whilst horizontally other institutions successfully manage to hold each other accountable, we can hardly conclude the same thing holds vertically.

2.2.2.4 Preliminary Rulings: 267 TFEU

This article regulates the reference to the CJEU for preliminary ruling. The reason why we have decided to include it in the list and analysis of legal remedies provided in this paper is mainly due to the hurdles to standing that are imposed on natural persons in accessing justice through supranational means. The article reads:

> *The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:*
>
> *(a) the interpretation of the Treaties;*
>
> *(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;*

[140]Advocate General's Opinion - 12 September 2013 Commission v Council Case C-196/12 Advocate General: Bot (ECJ 2012), paragraphs 70-122
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CC0196

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

Before delving into the merits of this legal remedy, we shall start by analyzing its text. The article sets out the procedure of preliminary rulings, fundamental to the principle of cooperation and to the division of duties between national courts and the CJEU[141]. The preliminary ruling procedure can be described as follows: during the course of a national proceeding before a MS Court, a judge realizes that a matter of EU law is relevant to the holding of the national case. Provided he or she is unsure of their interpretation of EU law or the validity of an EU act altogether, the judge shall refer the case to the CJEU. As a consequence of said action, within the CJEU a separate proceeding takes place in order to provide the referring court with an answer based on EU law. Once such an answer is received from the referring national court, the judge is supposed to be adequately equipped to put an end to the proceeding, adhering to the answer of the CJEU, insofar as the matter raised in the question is concerned.

This proceeding has often in the literature been described as "the most important procedure of EU law"[142], since it goes to the heart of EU judicial system, whereby national courts and the CJEU are interlocked[143].

[141]Pasquale Foglia v Mariella Novello, No. Case 244/80 (ECJ 16 dicembre 1981), paragraph 14 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:61980CJ0244

[142] Krommendijk, J. (2020). It takes two to tango: An introduction. European Papers (Online. Periodico), 5(2), 745-754. https://doi.org/10.15166/2499-8249/410

[143] Lenaerts, K. (2007). The rule of law and the coherence of the judicial system of the European Union. In Common market law review (Vol. 44, Number 6, pp. 1625–1659). Stevens.

This procedure is consistently referred to as the keystone of the EU legal system[144], and for good reason. First, it ensures the uniform application of EU law across all Member States. Second, it guarantees judicial protection in any matter where national courts apply EU law. It also reflects the principle of subsidiarity within the judicial sphere[145], as national courts are often better positioned than an international court to assess environmental measures implemented within their own Member States. Their proximity to the specific environmental and administrative contexts allows for a more nuanced and informed judgment. Moreover, given the limited avenues for individuals to access justice directly at the EU level, a procedure that provides them with indirect access is an invaluable tool. For this reason, the Union has been actively working to strengthen judicial protection at the national level.

Firstly, through article 19 TEU, the Union aims at ensuring that national judicial mechanisms be available at the national level[146]. Furthermore, the institutions have been incredibly receptive to the increasing need for judicial remedy for environmental cases. It has, for instance been established that national courts have a legal obligation to refer a national case before the CJEU in environmental matters in a series of decisions, acts and omissions in multiple environmental policy areas, such as water[147], air quality[148] and nature[149]. To compile all of the implications of enhanced access to justice at the national level, the Commission issued a notice on access to justice in environmental matters. Herein, procedural guarantees for NGOs and individuals as well as maximum duration of the procedures were set out, so as to optimise the national procedures under article 267 TFEU[150].

The CJEU itself has been proactive in promoting national pleas for justice when natural or legal persons' cases would be declared inadmissible at Union level since the requirement of individual concern was not fulfilled. This happened in Iberdrola case[151]. The applicant, a Spanish energy producer benefitted from a Spanish corporate tax that was declared by

[144] See footnote n. 12.
[145] For a detailed insight on this, see footnote n. 88
[146] Member States "*shall provide remedies sufficient to ensure effective judicial protection in the fields covered by EU law.*"
[147] Council Directive (No. 91/676). (1991). https://eur-lex.europa.eu/eli/dir/1991/676/oj/eng
[148] Directive—2008/50. (2008). https://eur-lex.europa.eu/eli/dir/2008/50/oj/eng
[149]Directive—92/43—EN - Habitats Directive, from https://eur-lex.europa.eu/eli/dir/1992/43/oj/eng
[150]Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. https://www.eea.europa.eu/policy-documents/communication-from-the-commission-to-1
[151]Iberdrola, SA v European Commission, No. Case T-221/10 (GC 8 marzo 2012). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62010TJ0221

Commission decision illegal state aid and therefore incompatible with EU law. The applicant first brought the case to the CJEU directly. Then, the Court declared it inadmissible due to lack of standing, but explicitly encouraged the applicant to rely on article 267 TFEU, so as to lodge a complaint for the validity of the decision via a national court:

"in the present case, the applicant is not in the least deprived of any effective judicial protection. Even if the present action is declared inadmissible, nothing prevents the applicant requesting the national court, in the course of proceedings before any national court whose existence it alleges, in which pleas are raised putting in issue the absence of a recovery obligation which the applicant enjoys under the contested decision, to make a reference for a preliminary ruling under Article 267 TFEU putting in issue the validity of the contested decision in so far as it finds that the scheme at issue is incompatible[152]".

Nevertheless, the system still presents multiple shortcomings, the first of them being that individuals do not have a right to access preliminary rulings. As it is clear from the legal basis, it falls within the discretion of each national court to decide whether it sees fit to refer the case to the CJEU. There is no exception in existence for all those applicants that have been declared inadmissible before the Court of Justice, since they are not granted automatic access[153].

Furthermore, for judicial remedies to be fully available to natural persons, an assessment of national courts' compliance to obligation of referrals for preliminary rulings should be systematic. In practice, this is far from being the case since there are several instances of abuse of discretionary powers in national courts, which were reluctant to abide by those obligations[154]. Not to mention cases where national courts have declared the holdings of the CJEU ultra vires or in any case incompatible with the European Convention of Human Rights[155]. In order to guarantee effective judicial remedies for all, as proclaimed by article 6

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[152] Ibidem, paragraph 43.
[153]Opinion of Mr Advocate General Jacobs Delivered on 21 March 2002. Unión de Pequeños Agricultores v Council of the European Union. Case C-50/00 P. (ECJ 2000), paragraph 39-44 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62000CC0050
[154] See Smulders, B., & Eisele, K. (2012). Reflections on the Institutional Balance, the Community Method and the Interplay between Jurisdictions after Lisbon. Yearbook of European Law, 31(1), 112–127. https://doi.org/10.1093/yel/yes014
[155] see Komárek, J. (2012). Playing With Matches: The Czech Constitutional Court's Ultra Vires Revolution. *Verfassungsblog*. https://doi.org/10.17176/20170505-090350

ECHR, a form of stricter control on the part of the CJEU over national courts is necessary[156]. As a matter of fact, if Courts are an integral part of the Union judicial system and the guardians, together with the CJEU of the Union legal order, keeping them accountable should be an imperative for the Union.

Aside from this, there are multiple other limitations, specifically relating to the jurisdiction of national Courts. As a matter of fact, they can only raise questions before the CJEU relating to national implementing acts of European Union Acts. This has three crucial implications. Firstly, all the regulations and measures not requiring national implementing measures fall out of the jurisdiction of the court and can therefore not be challenged before the national Court by individuals. Furthrmore, MS Courts are not competent to set aside an EU act as invalid. Thirdly, Interim measures at the disposal of the national courts are limited (though they might be particularly useful for natural persons defending their environmental rights to prevent irreparable harm). Finally, different national courts are receptive and subject to different constitutional traditions that vary to a great extent from country to country. This may undeniably risk jeopardizing uniform application of EU law as well as amplifying inequalities across EU citizens in terms of access to justice for environmental matters.

2.3 Alternative Administrative Remedies

Upon assessment of all the judicial remedies available to natural persons before the Court of Justice, we can quite confidently argue that much still has to be done in order to guarantee access to justice to members of the public that have sufficient interest in defending their environmental rights before the Union or their respective Member State. Particularly, what seems to emerge is a loophole in the mechanisms to hold the European Institutions accountable. As a matter of fact, though mechanisms to hold MS to European Standards are

[156] Komárek, J. (2007). *In the Court(s) We Trust? On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure* (SSRN Scholarly Paper No. 982529). Social Science Research Network. https://papers.ssrn.com/abstract=982529

available (see infra), judicial review of such standards is practically impossible, especially when invoked by a person, whether natural or legal. A tool that is supposed to compensate for such a legal dead end can be found in the Aarhus Convention.

The Aarhus Convention is an international agreement signed by the European Union and its member States in 2005. The UNECE (United Nations Economic Commission for Europe) Convention, on access to information, public participation in decision-making and access to justice in environmental matters[157]. The treaty is responsible for a proceduralization of environmental law and access to justice. Though it can be argued whether the prioritization of procedural environmental rights over substantive ones is an effective solution for better judicial enforcement[158], what we will analyse here is the extent to which the Union and the CJEU have been receptive of the provisions of said international agreement. A monitoring quasi-judicial body called the Aarhus Convention Compliance Committee (ACCC from now on) has been institutionalized by the Convention itself. It is composed of 9 independent experts that are elected at the Meeting of the Parties.

The 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters aims to "*contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being[159]".* By article 9 (3) of the Aarhus Convention, under said international agreement,

"…Where they meet the criteria, if any, laid down in its national law, 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."

[157]Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Treaty Series Vol. 2161). (2001). https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27
[158]Hilson, C. (2018). Substantive environmental rights in the EU: Doomed to disappoint? In S. Bogojević, & R. Rayfuse (Eds.), Environmental rights in europe and beyond (pp. 87-104). Hart Publishing. https://doi.org/10.5040/9781509911127.ch-004
[159] See article 1 of the Aarhus Convention.

Article 9 is one of the main provisions that regulates access to justice in environmental matters. We shall now focus on the analysis of the above cited article to then hone in on the process of Codification within the European Union.

First of all, attention should be paid to the legal subjects that are invited to seek remedies for environmental damage. Those are not referred to "legal or natural persons with direct and individual concern", as it was the case in article 263 TFEU. Rather, the subjects are defined as "members of the public" and no other requirement applies a priori, aside from those set out in the same article, paragraph 2: *Having a sufficient interest or, alternatively, maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition.*

The sufficiency of the interest or the seriousness of the breach of an individual right has to be assessed based on criteria set out by administrative national court. There was therefore no need to show before a court or another competent public authority that the violation of the right or the interest at hand singled the natural person out of the rest of the public.
Pursuant to the Aarhus Convention, ultimately, once these criteria were deemed fulfilled, the concerned member of the public was therefore entitled to a review of the act at hand before a court or an administrative public body. Any other criteria to which those members shall be subject are merely those existing in national law. If there is no legal hurdle under national law against *actio popularis*, no such measure should be adopted.

Given the nature of the Aarhus Convention, the fact that it was an international treaty implied implementation at the Union level for it to be enforceable before European Courts[160].
Hence, a regulation implementing the provisions of the Aarhus Convention was necessary. Though several different directives and regulations were used to implement the obligations of the Aarhus Convention on all of the different parties, the Aarhus Regulation 1367/2006[161] is

[160]Lesoochranárske Zoskupenie VLK v Ministerstvo Životného Prostredia Slovenskej Republiky, No. Case C-240/09 (ECJ 8 marzo 2011).
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62009CJ0240 the CJEU found that the treaty lacked direct effect within the Union since it did not meet the requirements of presiceness and conditionality.
[161] Regulation 2021/1767—Amendment of Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies—EU monitor from
https://www.eumonitor.eu/9353000/1/j4nvk6yhcbpeywk_j9vvik7m1c3gyxp/vlmx6ig2yvzi

what we will be focusing on, since it imposes obligations and standards to EU's institutions, bodies, offices and agencies. But was it an accurate transposition of the obligations of Institutions and rights on the individuals that the Convention set out?

Much literature would argue that that was not the case[162]. Despite implementing the Aarhus Convention, it did it in a rather restrained way. Since by letter of article 9 of the Aarhus Convention, public parties were supposed to have access to either a judicial or administrative review of their case, what the regulation did was to grant the opportunity to all environmental ENGOs[163], to rely on an internal administrative review procedure. This was a clever escamotage to declare that both judicial and administrative remedies were available to the subjects concerned since, had the administrative authority rejected the admissibility of administrative review for whatever reason, the ENGO could have relied on article 263 TFEU. As a matter of fact, an ENGO whose request for internal administrative review has been rejected enjoys standing by virtue of the fact that said act is explicitly referred to it. Does this mean, though, that the obligations laid out in the Convention were actually transposed in the original regulation? No. Though significant progress was achieved, much was still to be done for the Union to be in alignment with Aarhus standards[164]. Rather problematically, only ENGOs challenging an "administrative act" were granted judicial remedies. Natural persons, by nature more vulnerable to breaches in individual interests and rights, were still devoid of any suitable remedy. Furthermore, ENGOs that were challenging an act that did not qualify as administrative were excluded from the regulation. An administrative act by definition of article 10 of the Regulation is *"any measure of individual scope under environmental law, taken by a Community institution or body, and having a legally binding and external effect"*. Now, the fact that the act has to be individual in order to be defined as a challengeable administrative act under the regulation amounted to an additional hurdle to access to justice.

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[162] Schoukens, H. (2014) 'Access to justice in environmental matters on the EU level after the judgements of the General Court of 14 June 2012: between hope and denial?, Nordic Environmental Law Journal, 2014(2), pp. 7–42; Bechtel, S., 2021. Access to justice on EU level: the long road to implement the Aarhus Convention. *Opolskie Studia Administracyjno-Prawne*, 19(3), pp.9-21; Leonelli, G.C., 2021. Access to the EU Courts in Environmental and Public Health Cases and the Reform of the Aarhus Regulation: Systemic Vision, Pragmatism, and a Happy Ending. *Yearbook of European Law*, 40, pp.230-264.

[163] As defined by article 2(5) of the Aarhus Convention, that states that said ENGO shall have existed for at least 2 years and purse the unique interest of environmental causes.

[164] Schoukens, H. (2014) 'Access to justice in environmental matters on the EU level after the judgements of the General Court of 14 June 2012: between hope and denial?, Nordic Environmental Law Journal, 2014(2), pp. 7–42.

What the regulation did was to remove the need for individual and direct concern (which had come in for much criticism under the legal literature), to then add a similarly insurmountable requirement on the nature of the acts that could be contested. Since the majority of environmental acts are of general nature, very few were eligible for review. This meant that the remedies that were provided by the Union institutions via the Aarhus Regulations were de facto ineffective[165]. Additionally, in order for the administrative act to be subject to said internal administrative review, it had to be adopted under environmental Union law (i.e. under legal basis 191 TFEU), and not require any national implementing measures, case that was already judicially covered by article 267 TFEU.

When these matters were raised before the CJEU in *Council and Others v. Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*[166], the Court ruled that the NGOs that had raised a plea of illegality for the incorrect implementation of provision 9 (3) of the Aarhus Convention, could not rely on an international agreement that is not directly effective[167] to request a review of an EU act. Furthermore, on the matter that not enough judicial remedies were offered to individuals, the CJEU claimed that the preliminary ruling procedure regulated by article 267 TFEU offered a viable judicial venue individuals could rely on.

Upon submission of an opinion by the Environmental non-Governmental organization ClientEarth, the Aarhus Convention Compliance Committee has deliberated that Union judicial remedies are not enough to offer effective judicial protection and that the CJEU was showing visible reluctance to comply with provision n. 9 on Access to justice of the Aarhus Convention[168]. Though as a quasi-judicial organ the ACCC does not have any binding powers, it can rely on soft law. This proved particularly effective in the reactions it triggered. As a matter of fact, the Council requested the Commission to submit a study on individual access to justice on environmental matters. Based on that study, the Commission submitted a proposal to the European Parliament and the Council, suggesting for an amendment of the

[165] Ibidem
[166] Council of the European Union and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht, No. Joined Cases C-401/12 P to C-403/12 P (ECJ 13 gennaio 2015). https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62012CJ0401
[167] As already proved by the CJEU in the Slovak Brown Bear case
[168] Findings and recommendations of the ACCC with regard to communication ACCC/C/2008/32, part II, (hereafter 'C32 findings, part II)

Regulation implementing the Aarhus Convention[169]. In 2021, the final version of said regulation negotiated by the Council and the Parliament has finally been approved and entered into force as Regulation 2021/1767/EU.

The main amendments that were implemented in the new Aarhus Regulation so as to correctly transpose the Aarhus Convention concerned the nature of challengeable administrative acts[170] as well as the access of natural persons to the procedure of internal administrative review[171].

2.3.1 Nature of challengeable administrative acts

Under the original version of the Aarhus regulation, only administrative acts that are of individual scope, do not require implementing measures and have been approved on article 191 TFEU as a legal basis could be subject to internal administrative review. All those three requirements have to be simultaneously satisfied. This greatly restricted the scope of application of such an administrative remedy, because the majority of environmental acts are of general nature and application[172].

Hence, the amended regulation now defines a challengeable administrative act as any *non-legislative act adopted by a Union institution or body, which has legal and external effects and contains provisions that may contravene environmental law*[173].

This definition does not impose any of the above-mentioned limitations. For the sake of definitions, non-legislative acts are all of the acts that are not adopted following the ordinary

[169] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Amending Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the Application of the Provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters to Community Institutions and Bodies (2020). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020PC0642

[170] (New Article 2(1)(g) and (f)) b.

[171] New article 11(1a)

[172] Bechtel, S., 2021. Access to justice on EU level: the long road to implement the Aarhus Convention. *Opolskie Studia Administracyjno-Prawne*, 19(3), pp.9-21;Bechtel, S., 2021. Access to justice on EU level: the long road to implement the Aarhus Convention. *Opolskie Studia Administracyjno-Prawne*, 19(3), pp.9-21

[173] New Article 2 (1)

legislative procedure. Additionally, no hint to general or individual scope is mentioned. Finally, the phrase *provisions that may contravene environmental law* makes it clear that there is no need for the act in question to be adopted under the environmental competence of the Union. No matter the legal basis, the mere legal effect of the act of contravening environmental law, makes it administratively reviewable.

2.3.2 Access to natural persons to the procedure of internal administrative review

Paragraph 17 of said amendments reads:

Environmental non-governmental organisations and other members of the public should have the right to request internal review of administrative acts and omissions by the Union's institutions and bodies in accordance with the conditions laid down in Regulation (EC) No 1367/2006, as amended by this Regulation.

This provision outwardly states that not only legal persons like environmental NGOs are entitled to internal administrative review, but any other members of the public[174].

This point is crucial to our discussion, since under the amended regulation, individuals are no longer required to demonstrate their direct and individual concern in order to access a remedy. This however, does not amount to the Commission's acknowledgment of individual environmental rights. As a matter of fact they have been defined as a Frankenstein Monster put together by multiple academics' and ENGOs stances. Nevertheless, individuals have the option to follow two alternative routes to access said administrative remedy, depending on their particular case. One option would consist in lodging a complaint for the "impairment of a right", in the particular case where the individual is "directly affected in comparison to the public at large". Direct concern in this case need not be construed like the Plaumann test in the CJEU rulings, but as a much less burdensome requirement to prove and therefore easier to access. Alternatively, they have the option to demonstrate sufficient public interest. Since the environment by nature falls under the category of solidarity rights affecting the public interest, the amended Regulation ushers in such an opportunity. The criteria to abide by to rely on such a remedy are much more burdensome than the ones set by the first option. First

[174] Paragraph 17, Regulation 2021/1767/EU.

of all, the request shall be supported by at least 4000 signatures of members of the public (legal and natural persons), from at least 5 MS and with at least 250 signatures from each MS. Additionally, the individual has to demonstrate "*sufficient public interest in preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilisation of natural resources, or combatting climate change"*. Finally, forwarding the request implies the individual's financial responsibility of affording their own legal representation either through a lawyer who is qualified to practice in a MS or by the legal representatives of an ENGO[175].

This new remedial venue constitutes much progress in the matter of administrative protection of individuals in environmental matters. This however does not mean that environmental individual rights have been enforced or even recognized, for that matter. There are still multiple hurdles for natural persons to overcome.

First of all, we should point out that the procedures and requirements so far described, are all functional to access an internal administrative review, which has nothing or little to do with a judicial remedy. This does not mean that natural persons are precluded from the option to lodge a complaint before a European Court. They are entitled to judicial remedies insofar as their complaint refers specifically to the rejection of their internal administrative review on the part of the addressed public authority[176]. Individuals are not entitled to initiate an action for annulment of the challenged act under article 263 TFEU, but they are only in a position to lodge a complaint for the rejection of their request for internal review. This means that not only will the plaintiff be unable to challenge the merits of the act directly, but they will also have to limit themselves to the arguments and pleas raised in the request for administrative review. Any other claims raised against the given act and absent in the request for internal review, will be dismissed.

Ultimately, in those kinds of proceedings, the CJEU does not have jurisdiction to set aside the given act directly, but is merely entitled to express its judgement on the inadmissibility of the request for internal review. This is a substantive difference which significantly impacts the individuals' capability to act. In case the CJEU does not uphold the inadmissibility, then the

[175] New article 11
[176]Romito, A. M. (2024). La completezza dei rimedi giurisdizionali nell'ordinamento dell'UE ed il contezioso sul cambiamento climatico. QUADERNI AISDUE, n. 1/2024 (2024), 1–24.

administrative authority would be forced to re-examine the case of the act under review, to then eventually decide to repeal the act.

Though this is a rather effective system to circumvent the issue of standing for EU in environmental matters[177], it is apparent that it does not guarantee the same timeliness response and power the CJEU would have, under legal basis 263 TFEU. Additionally, not only can more lengthy proceedings negatively affect the situation of environmental victims, but they could also require extensive financial means. As a matter of fact there is no established financial aid schemes for applicants lodging complaints before the CJEU for inadmissibility of their request of internal review. Furthermore, the CJEU is ruled by the loser-pays principle[178]. This means that if the natural person were to be declared inadmissible to the proceeding of judicial review, like it was stated by the public authority to which the request was sent, it would be their responsibility to bear the cost. This financial hurdle could amount to a deterrent for potential applicants to pursue the defence of their rights.

Finally, from article 2 of the amended regulation[179], it can be inferred that legislative acts are excluded from the scope of internal administrative review. Though the majority of individual acts are non-legislative, thereby falling under the requirement set out by new article 11 of the New Regulation, this might also restrict the extent of internal administrative review[180].

To conclude the Aarhus Convention and the 2021 Amendment of the Aarhus Regulation represent historic moments in the history of individual access to justice before a supranational court. Though significant improvements have been accomplished since then, much is still to be done to systematically recognise and enforce environmental rights within the Union.

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[177] This issue has been in detailed explored by Grimm, D. (2015). The Democratic Costs of Constitutionalisation: The European Case. European Law Journal, 21(4), 460–473. https://doi.org/10.1111/eulj.12139. Grimm argues that in the majority of MS the standing of natural persons is mentioned in the legislative acts themselves and it is not a prior included in the Constitution, like it happens in the Union. This, he argues, is due to the over-constitutionalism of the Union. As a matter of fact, political matters like standing before a court in a given field, are integrated within the treaty and thereby deprived of their inherent political nature.

[178] Article 134(1) of the Rules of Procedure of the General Court, 2015 OJ L 105/1

[179] See supra

[180] Which does not happen for actions for annulment under the legal basis 263 TFEU.

CONCLUSION

This chapter has assessed all of the available legal and administrative remedies available to natural persons before the CJEU. While the EU legal framework can be deemed to be advanced in terms of formal recognition of the Right to a Healthy Environment and existing administrative remedies to that effect, the accessibility to adequate judicial remedies remains limited. This is not only due to the issue of standing of natural persons before the CJEU, but also to the structural nature of the judicial remedies in place, in principle not designed for unprivileged actors. This engenders a great number of legal loopholes and glitches which hinder the EU institutions accountability and fail to protect the European citizens' rights.

Furthermore, though the alternative administrative internal review introduced after the amendment of the Aarhus Regulation positively contributes to the enforcement of the right under scrutiny, time and financial barriers still get in the way of an effective administrative protection, which is de facto incapable of circumventing barriers to access to justice.

While the paragraph on the ECtHR allows for an understanding of the benefits of the adoption of a human-right approach to international and environmental law, the analysis on the remedies offered by the CJEU and the Union shed light on the lacking judicial protection the non-adoption of said approach implies. To compensate, being an institutional Court, the CJEU can nonetheless rely on a legal network of national courts that are closer to the environmental victims, and therefore better placed to assess the environmental harm they incurred in. We claim, however, that judicial protection through the enforcement of an Individual Right to a Healthy Environment would be sufficiently responsive to all environmental victims' needs.

Conclusive Remarks

Our comparative analysis juxtaposed two different, yet similar judicial systems. The CJEU and the ECtHR share similar democratic values, legal traditions as well as 27 overlapping Contracting Parties that conform their own national system to their norms. The only relevant confounding variable between the two lies in their structural nature. While the CJEU is the Union's institutional and supranational Court, the ECtHR is a human rights court. In this work, we have come to the conclusion that this major difference is the main reason for their gap in enforcement of the Individual Right to a Healthy Environment.

Reviewing the findings of our comparative analysis, the final results are rather clear, but in no way clearcut. The human-right approach applied by the ECtHR is instrumental in addressing and remedying environmental harm carried out to the detriment of an environmental victim. A judicial system that is specifically designed for individual-State disputes of asymmetric nature proves infinitely more effective in enforcing individual rights (even, though indirectly, the individual right to a healthy environment), than an institutional Court like the CJEU, where individual access to justice is the exception rather than the norm. However, the benefit of alternative administrative remedies like the Internal Review Mechanism offered by the Union shall not be undervalued, especially in its preventative nature. While the judicial system is of primary importance in enforcing the right to a healthy environment, it primarily has a compensatory function for an environmental victim that has been or is in the process of undergoing environmental damage. The Union internal review mechanism's compensatory function is further complemented by a preventative function, provided by the option to review "administrative acts or omissions", potentially before the damage occurs. It is therefore apparent that it would be counterproductive to deem one of the legal systems analysed as intrinsically better than the other. A human-right approach to environmental law like the one followed by the ECtHR is crucial but the interconnectedness of the CJEU with administrative bodies and national courts should not be underestimated. We would go so far as arguing that a system that manages to merge both the ECtHR's effective

judicial protection and the Union administrative remedies would be significantly beneficial to the enforcement of the individual right to a healthy environment as well as a first step towards a future recognition as a general principle of international law.

But how could the two systems be integrated? Union accession into the ECHR would be the most straightforward answer. This would allow for accountability not only at the national, but also at Union level. For a series of reasons previously explored[181], rebus sic stantibus, it is practically impossible to hold EU Institutions into account being an unprivileged actor. However, Union Accession into the ECHR would help curb that issue. Like any other Contracting Party to the Convention, natural persons would finally be able to enforce their rights in a Court setting. After Opinion 2/13, which declared accession incompatible with EU Law, such a scenario appears to be rather unlikely in the foreseeable future. One of the main arguments relied on by the Court, among other rather convincing ones, is that accessing the Convention would breach the principle of sincere cooperation enshrined in Article 4(3) TEU between the MS and the Union Institutions as well as among MS[182]. The issue with this argument is that, precisely due to its lacking human rights approach to international law, the Union Court prioritises compliance with general Union principles over fundamental rights enforcement. This is particularly true in the case of the General Principles enshrined by the Charter of Fundamental Rights, like Environmental Protection, that are by nature unenforceable. Equipping the system with an enforcement mechanism like the one offered by the ECtHR, in our view, does not undermine mutual trust and cooperation, but rather, ignites it. Nevertheless, though according to some scholars, a strong political will would be sufficient to effectively resuscitate the option of resuming the negotiations on the Draft Accession Agreement[183], we will proceed to explore more viable options.

An alternative scenario to the option of accession is that of amending the Charter of Fundamental Rights. Specifically, Article 37 shall be worded in such a way to qualify it as a right rather than a General Principle. As pursuant to article 6 (1) TFEU, the Charter has treaty value. Its amendment would therefore require an intergovernmental conference, for

[181] See paragraph 2.2.3 about Failure to act of the Union: 265 TFEU.
[182] See footnote n. 12
[183]For this see proposals forwarded by Morano-Foadi, D. S., & Andreadakis, S. (2015). The EU accession to the ECHR after Opinion 2/13: Reflections, solutions and the way forward. In https://www.europarl.europa.eu/

which a strong political willingness is needed[184]. Despite its institutional hurdles, such a solution would not only allow for enforcement of the Right to a Healthy Environment before the CJEU, but it would also set a precedent in international law, which could, in the long term, pave the way for the recognition and enforcement of such a right as a general principle of international law.

Finally, a more realistic option would envisage a shift in scope in the CJEU interpretation of the rights enshrined in the Charter of Fundamental Rights. Multiple provisions in the Charter mirror those enshrined in the Convention. One glaring example of this is Article 7 of the Charter which only slightly differs from article 8 ECHR which, as previously established, is the most effective legal basis for the judicial protection of environmental victims before the Court[185]. Article 7 reads: *Everyone has the right to respect for his or her private and family life, home and communications.* Taking into account the closeness of this provision to the one enshrined in the Convention, a similar scope of interpretation as the one applied by the ECtHR, shall be applied by the CJEU. In other words, the ECtHR interpretation of Article 8 so as to include as a potential breach of such right shall inform a wider interpretation of Article 7 in the Union legal system. This would qualify as a deliberate and case-by-case decision to be taken by the CJEU on a factual basis, thereby not encroaching on the Court's judicial autonomy as Opinion 2/13 seemed to fear. Additionally, a precedent for this approach can be found in the Varec case[186]. Here, the Court decided to rely on the ECtHR jurisprudence about article 8 of the ECHR to interpret and apply article 7[187]. It shall not be excluded that relying on such an instance, the Court might not engage in wider interpretation based on ECtHR case law. However, the effects of a greening interpretation of Charter Rights shall not be overstated. The fact that a human right is violated in the Union does not allow for a waiver from compliance of standing obligations of direct and individual concern. Coherently with our research findings, despite the fact that adjustments can be put in place, an intrinsically absent human-right approach of the Court of Justice significantly hinders its ability to enforce the right to a healthy environment.

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[184] As pursuant to article 48 TEU, the proposal for an IGC has to be approve by the European Council unanimously. This means that opposition by one of the 27 Member States might result in rejection of the proposal. A valid reason for the European Council to dismiss the proposal is the lack of relevance of the proposed amendment.
[185] See supra, Chapter 1, paragraph 2.2 Article 8 of the Convention: Right to Private and Family Life
[186] Varec SA contre État belge, No. Affaire C-450/06 (Cour de justice février 2008). https://eur-lex.europa.eu/legal-content/FR/ALL/?uri=CELEX:62006CJ0450
[187] Ibidem, paragraph 48.

Yet, this very limitation reaffirms our broader conclusion: that a human-rights-based approach to environmental law is essential. It offers a judicial framework that is not only responsive to environmental degradation but attuned to the realities of environmental victims. As societies grapple with increasingly complex environmental challenges, the law must evolve accordingly. Integrating human rights and environmental protection is not only a legal necessity but a democratic imperative — one that future reforms must earnestly pursue.

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Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies—EU monitor from https://www.eumonitor.eu/9353000/1/j4nvk6yhcbpeywk_j9vvik7m1c3gyxp/vlmx6ig2yvzi

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