The quest of an *ecocide* under EU Law
The international context and prospects under current EU treaties and law

ALFREDO RIZZO*

SINTESI Sono ormai alcuni anni che, a livello soprattutto internazionalistico, viene promossa la costituzione di una tipologia di reato ambientale grave, c.d. ecocidio, modellato sul crimine di genocidio già oggetto della nota Convenzione del 1948. Lo Statuto di Roma istitutivo della Corte penale internazionale è il contesto formale in cui potrebbero essere inseriti i reati ambientali riconducibili al termine in oggetto (ecocidio), sebbene lo stesso Statuto contenga un'esplicita competenza della CPI per i crimini ambientali specificamente connessi solo a scenari di guerra. Nella regione europea, sia la CEDU che l'UE hanno sviluppato una prassi volta a rafforzare la lotta contro gli atti criminali a grave impatto ambientale. Tuttavia, la competenza dell'UE in materia sia di cooperazione in materia penale che di norme ambientali è ancora condivisa con quella degli Stati membri: ciò spiega in larga misura l'attuale direttiva 2008/99 sui reati ambientali, dove le sanzioni per questo tipo di reati sono ancora definiti in termini ampi. Il documento sostiene che in alternativa si potrebbe adottare una fonte giuridica autonoma sull'ecocidio ai sensi dell'art. 83 TFUE.

PAROLE CHIAVE: diritto penale internazionale, Corte penale internazionale, tutela dell'ambiente, Corte europea dei diritti dell'uomo, cooperazione giudiziaria penale dell'Unione europea, diritto ambientale dell'Unione europea.

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

KEY-WORDS: international criminal law, International Criminal Court, environmental protection, ECHR, EU criminal law, EU environmental law

* Expert of EU Law at University of Rome I, "la Sapienza"; member of the European Law Institute (Vienna). This draft relates to a research on *Ecocide* promoted under ELI auspices (dir. Prof. F. Pocar): https://www.europeanlawinstitute.eu/projects-publications/current-projects-upcoming-projects-and-other-activities/upcoming-projects/ecocide/; Researcher at National Institute for Public Policy Analysis (INAPP).

Environmental liability – 2.2.6.1. Individual right to appeal against EU legislation – 2.2.7. Criminal liability for infringement of environmental standards – Some (preliminary) conclusions

Introductory remarks.

The following chapters, albeit with the aim of focusing on relevant EU rules on the topics under study, will give also a fast overview of the international framework to which those same rules make reference.

It is firstly wise to recall that a different qualification must be given to the relevant international law rules on the State's responsibility[1], on the one hand, and to the other branch of international law rules concerning the criminal liability of individuals. This will be clarified when comparing the following chapters dealing with the ways in which environmental protection issues are tackled under, on the one hand, international law rules and institutions (including some international treaties dealing with issues of environmental protection, such as the Aarhus Convention), and, on the other hand, under the current competencies conferred on the International Criminal Court, being the latter specifically competent on the prosecution of crimes that are relevant under same ICC Statute (being the Court's competences forged under relevant treaty rules, that is to say, the Statute itself)[2].

The "duality" of international jurisdiction on those issues has been assessed by the same International Court of Justice (ICJ) in its judgment on the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*[3], where the Court referred to those *parallel* systems (that is to say, with no exclusive effects of one on another) as a "duality of responsibility". This dual system has also been recognized by the Rome Statute itself, whose article 25.4 expressly states that "[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law".

The scenarios of Second World War and the post-war ones (together with the well-known nuclear threat) have favored a progressive awareness of the need to tackle specific acts committed at the level of both

[1] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries: text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected. On these articles, among the vast literature, J. CRAWFORD (ed.), *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries,* Leiden, 2002; J. CRAWFORD, *The International Law Commission's Articles on State's responsibility, A restrospective,* The American Journal of International Law, 2002, p. 874; Vv. *Assessing the work of the International Law Commission on State Responsibility,* European Journal of International Law, Vol. 13, 2002, No. 5; more recently, with a focus on the European region, A. SACCUCCI, *La responsabilità internazionale dello Stato per violazione strutturale dei diritti umani,* Napoli 2018, in part. pp. 11-16.

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

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

the States and of other actors with particularly serious consequences for the international community as a whole, including some with specific environmental implications. No one can deny, in fact, that in modern law the protection of the environment is even more felt as indissolubly connected to the protection of every living being[4].

A cornerstone for international criminal law has been represented by the adoption of the *Convention on the Prevention and Punishment of the Crime of Genocide* (CPPCG), where, however, that same crime was not clearly defined. The features of the ban internationally sanctioned via the CPPCG led to the depiction of a list of acts progressively defined as true international crimes finally detailed in the Rome Statute 1998, establishing the International Criminal Court. According to Lay and others[5]: "*Genocide and ecocide address different forms of harm: one is directed at social groups, the other at the dependence of humanity upon eco-systems. They can both result in similar amounts of death and destruction, and potential prosecution rests upon both criminal and human rights jurisprudence. At this juncture what is essential is the moral recognition that ecocide should be an international crime, and that resultant processes are set in motion for its incorporation into law*"[6].

As we will see, considering the entry into force of the Rome Statute at the end of last century, above actions and their related outcomes can achieve the same relevance of criminal acts when committed by physical persons[7]. Though above definitions (among the many others that might have been chosen and quoted here) are sufficiently indicative of the contents of the topics under study, a fragmentation between several juridical systems at the different levels (international regional and national) is not supporting

[4] This has been made clear in particular, but not only, in the Euratom treaty, see in part. under art. 30 (Nuclear safety). Jean Monnet's Euratom system was in fact designed with a view to ensuring the maximum institutional and political growth of the same Coal and Steal Community born in Paris 1951 and therefore aimed above all at the political and economic consolidation of Western Europe countries in a long-term perspective. The central argument promoted by Monnet, which certainly had not neglected the general objectives established in the U.N. Charter, revolved around the need to avoid any possibility that the atomic structures present on the European continent after Second World War could be converted for purposes of atomic weapons production, E. B. HAAS, *The uniting of Europe: political, social, and economic forces, 1950-1957* , U.S.A., 2004, pp. 303 ss. On same topics, see recently the Council Directive 2013/59/Euratom of 5 December 2013 laying down basic safety standards for protection against the dangers arising from exposure to ionising radiation, and repealing Directives 89/618/Euratom, 90/641/Euratom, 96/29/Euratom, 97/43/Euratom and 2003/122/Euratom, OJ L 13 17.1.2014.

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

[6] The same authors mention relevant literature according to which: "*ecocide is the extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished"* (P. HIGGINS, *Eradicating ecocide: laws and governance to prevent the destruction of our planet,* London, 2010; see also L. NEYRET, *Des écocrimes à l'écocide, le droit penal au secours de l'environnement*, Brussels, 2015, p. 288).

[7] When assessing the relationships between a State and individuals' liability under the Rome Statute, one should not forget the Prof. Ago proposal of a specific provision on that topic in the then draft Convention on the State responsibility (R. AGO, '*Fifth Report on State Responsibility'*, UN Doc. A/CN.4/291 (1976), reprinted in *ILC Yearbook*, 1976, vol. II, Part Two). In this Report, Article 19 of the Ago project read as follows: *1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached. 2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime. 3. Subject to paragraph 2, and on the basis of rules of international law in force, an international crime may result, inter alia, from: (…) d. a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas* (emphasis added). *Any internationally wrongful act which is not an international crime in accordance with paragraph 2, constitutes an international delict.*

progress towards a common standard on what *ecocide* is or should be and what kind of legal consequences it should entail[8]. While a certain progress has been achieved at the international level (at least theoretically), the debate seems still poorly developed at some regional levels, e.g. the EU one, due also to the still less integrated framework between the criminal legislations at the EU level and at the level of EU member States, where every single constitutional tradition must be taken in due account in particular when considering issues of criminal law (and this notwithstanding the quite developed normative framework on cooperation on criminal law matters under the same Treaty on the functioning of the European Union).

1. General framework under international law standards

Several international law rules and tools prove an emerging right for anyone to benefit from a "safe" environment as an international binding rule confirming both the State's and individuals' international liability in cases of damages for wrongful practices implemented by both private or public actors with a negative environmental impact also, and in particular, whenever such impact has "extra-boundaries" effects. It still remains to be seen whether a true ban and a crime under general international law exist in relation to some specific activities performed by the States and other actors, whenever such activities are apt to cause serious harm and damages to the environment.

1.1. Rules on the State's behavior

1.1.1. General international law

Under relevant international law principles and rules a general duty of compensation has been assessed for cases where behaviors of both public and private actors are apt to cause harms or true damages with cross-borders (or beyond-borders) effects [9]. A growing trend is however acknowledged towards the establishment of a true duty under international customary law forcing the State to keep a safe environment both abroad and inside own national borders. In recent times, this trend has been confirmed also by a relevant case-law of the International Court of Justice by means of an extensive understanding of treaty law rules related to both the State's international liability and more specific environmental protection standards [10].

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[8] F. POCAR, *The International Proliferation of Criminal Jurisdictions Revisited: Uniting or Fragmenting International Law?,* in H. Hestermeyer, D. König, N. Matz-Lück, V. Röben, A. Seibert-Fohr, P-T. Stoll, and S. Vöneky (eds.), *Liber Amicorum Rudiger Wolfrum, Coexistence, cooperation and Solidarity,* Brill-Nijhoff, 2012, p. 1705 .

[9] See the 1969 Brussels Convention on the Compensation for damages related to hydrocarbons' pollution establishing the International Oil Pollution Compensation Fund, IOPCF. It is wise to recall the international law doctrine and practice inspired to Polluter Pays Principle (PPP) now clearly established under same art. 192 TFEU. This principle relates to a strict liability criterion, see Court of Justice of the EU, CJEU, of 24 June 2008, C-188/07, *Commune de Mesquer v Total France SA and Total International Ltd*., I-4501). On those issues see T. SCOVAZZI, *Sul principio precauzionale nel diritto internazionale dell'ambiente,* in *Rivista di diritto internazionale*, 1992, p. 699, N. DE SADELEER, *Liability for Oil Pollution Damage versus Liability for Waste Management: The Polluter Pays Principle at the Rescue of the Victims*, in *Journal of Environmental Law*, 2009, p. 299, N. DE SADELEER, *The Polluter-pays Principle in EU Law – Bold Case Law and Poor Harmonisation*, in *Pro Natura. Festskrift til H.-C. Bugge* (Oslo: Universitetsforlaget) 2012, p. 405, J. ADSHEAD, *The Application and Development of the Polluter-Pays Principle across Jurisdictions in Liability for Marine Oil Pollution: The Tales of the 'Erika' and the 'Prestige'*, in *Journal of Environmental Law*, 2018, p. 425, and, in wider terms, R. GIUFFRIDA, F. AMABILI (eds.) *La tutela dell'ambiente nel diritto internazionale ed europeo,* Turin, 2018.

[10] See, among others, Advisory Opinion of 8 July 1996, *Legality of The Use by A State of Nuclear Weapons,* ICJ Reports 1996 and Judgment of 25 September 1997, ICJ Reports 1997 s.c. *Gabčíkovo-Nagymaros* case. See also Judgment of 20 April 2010, *Pulp Mills on the River Uruguay,* ICJ Rep. 2010 p. 14. For some, the latter decision lacks consideration of pre-emptive aims pursued under the precautionary principle, particularly relevant in cases of environmental damages with trans-boundary character. For an overview on those and other relevant cases (with a

The International Court of Justice [11] had a chance to provide a clear position and affirming a prohibition under customary law with specific reference to the threat that atomic weapons entail for the natural environment. On this, the ICJ clearly stated what follows: "[…] *the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment"*[12]. Following above provisions and comment[13], the same ICJ reached the following conclusions (para. 31 *Legality of Nuclear weapons* decision): "[…] *Taken together, these provisions embody a general obligation to protect the natural environment against* widespread, long-term and severe environmental damage (emphasis added)*; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals. These are powerful constraints for all the States having subscribed to these provisions*". To sum up, the State bears a triple-obligation: 1) a *general obligation* to protect the environment against "widespread, long-term and severe" environmental damages; 2) a general ban to make recourse to methods and means of warfare apt at causing same abovementioned kind of damages, 3) a general ban to make recourse to same methods under previous point 2 by way of reprisals. While points 2 and 3 above are related to specific circumstances where environmental damages might occur in a warfare context, point 1 clarifies that States bear a general obligation to protect the *environment of other States or of areas beyond national control* from activities *within their jurisdiction and control*, but only whenever such activities entail a threat of "widespread, long-term and severe" damages for the environment of the other State (this threat is characteristically originated by the envisaged use of nuclear weapons)[14].
Again, under general international law rules, it is wise to recall that, during the draft of UN Articles on State's international responsibility (in the International Law Commission early works on this[15]), the ban

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specific focus on the environmental protection issues), see F. FRANCIONI, *Realism, Utopia and the Future of International Environmental Law,* European University Institute Working Paper, 11, 2012, F. FRANCIONI & C. BAKKER, *The Evolution of the Global Environmental System. Trends and Prospects in the EU and the US,* in F. Francioni & C. Bakker (eds.), *The EU, the US and the Global Climate Governance,* New York, 2016, pp. 15 and 31.

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

[12] See at para. 29 of mentioned ICJ adv. Opinion 1996.

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

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

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

of "massive" pollution had been conceived as an interest for the international community as a whole and the breach of such a ban was meant for the first time as a breach of one basic duty under general international law and as a true *international crime*. Under this meaning, the same draft referred to cases of *massive pollution* of both terrestrial and maritime environment: literally, draft art. 19 (3) (d) included, in the meaning of international crime, inter alia, "*a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas"*.

It can be inferred that an international law crime – entailing as such a ban corresponding to a true ius cogens rule[16] – occurs whenever a State or other international actors [17] had performed one or more actions that are apt at causing massive damages with serious environmental impacts on the international community as a whole. This kind of behavior, qualified as a true act infringing particularly stringent international law rules (ius cogens), is different from other behaviors coming under, on one hand, a wider meaning of State's international liability and, on the other hand, under a wider due diligence obligation equally binding whenever an act of the State (or of other individuals, see infra) is apt at causing quantifiable damages of environmental character[18].

1.1.2. Treaty law

International humanitarian law (IHL) lends some guidance for the definition of an "environmental" wrongful act , based on both general and treaty law rules, though considering how the ICJ expressly stated

[16] P. PICONE, *La distinzione tra norme internazionali di* ius cogens *e norme che producono obblighi* erga omnes, Rivista di diritto internazionale, 2008, p. 5. There are few examples of State behaviors that could be prohibited under ius cogens (ex art. 53 Vienna Convention on the Law of the treaties 1969), for example *non-refoulement*, whenever it entails the risk for the asylum seeker of being subjected to torture or other inhuman or degrading treatment in the state of return., see European Court of Human Rights (ECtHR) decisions of 28 July 1999, Appl. 25803/94, *Selmouni v. France* and of 23 Febr. 2012, Appl. 27765/09, *Hirsi Jamaa and others v. Italy,* see *ex multis* F. LENZERINI, *Il principio di non-refoulement dopo la sentenza Hirsi della Corte europea dei diritti dell'uomo,* Rivista di diritto internazionale, 2012, p. 721.

[17] The position of natural and legal persons as actors in the international law domain has been clearly established by the International Court of Justice in cases of diplomatic protection and related individual rights of foreign persons under the same 1963 Vienna Convention on consular relations (decisions of 27.6.2001 and of 31.3.2004, respectively *La Grand, Germany v. USA*, and *Avena and other*, *Mexican citizens, Mexico v. USA*). On the other hand, when it comes to considering also the obligations of these persons under international law, the Rome Statute establishing the International Criminal Court extends the international responsibility of individuals under a criminal law perspective to different kinds of behaviors (related to genocide and other crimes against humanity). This trend was initiated with the London Statute of 1945 establishing the Nuremberg Tribunals for the Nazi crimes (on this see, more recently, F. SALERNO, *Emergenza, delimitazione e implicazioni degli obblighi di natura solidale in tema di prevenzione e repressione del genocidio,* in F. Lattanzi (ed.) *Genocidio …*, see *supra* note 3, at p. 61 ff.).

[18] Due diligence and the duties connected with the precautionary standards aim at avoiding that the State neglects to intervene for the sake of preventing the long-lasting consequences of an environmental wrongdoing R. PISILLO MAZZESCHI, *"Due diligence" e responsabilità internazionale degli Stati,* Milan, 1989. More recently for an ample overview, M. MALAIHOLLO, *Due Diligence in International Environmental Law and International Human Rights Law: A Comparative Legal Study of the Nationally Determined Contributions under the Paris Agreement and Positive Obligations under the European Convention on Human Rights,* in *Netherlands International Law Review*, 2021. See Principle 15 of mentioned Rio Declaration ("*In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation*") and the EU Commission Guidelines on the Precautionary Principle, COM(2000) 1, see also CJEU of December 22nd 2010 (C-77/09, *Gowan,* I-13533, at p. 75-76), *ex multis,* A. ALEMANNO, *The Shaping of European Risk Regulation by Community Courts*, in *Jean Monnet Working Papers* n. 18, 2008, B. BERTHOUD, *The Precautionary Principle in EU Risk Regulation*, Hamburg, 2014.

that relevant sources concerning this branch of law (see *infra*) are an expression of *"intransgressible principles of customary international law*" [19].
The 1949 Fourth Geneva Convention's Article 53 [20] explicitly bans any deliberate or indiscriminate destruction of property belonging to individuals or "the State, or to other public authorities", while Article 147 bans "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly." Even more clearly, 1977 Protocols to the Geneva Convention [21] ban any warfare action causing "superfluous injury or unnecessary suffering" or "widespread, long-term and severe damage to the natural environment", including indiscriminate attacks on civilians and civilian infrastructure, and protects civilian infrastructure critical to the survival of civilian populations. Under 1977 Protocols, military actions are also banned each time they are apt to cause so called "collateral damages" to civilian objects and to noncombatants, when such damages are disproportionate by comparison with the military aims of the same actions. The same concept (utilized under the Rome Statute establishing the International Criminal Court, see infra) of "widespread, lasting and serious" damages caused to the environment are also mentioned under articles 35 para. 3[22] and 55[23] of Protocol I to the Geneva Convention. On the other hand, private and public law entities' liability (in the widest meaning above, then outside the strict meaning of a true *ecocide*) for environmental damages caused in a foreign State can be assessed "internally" by same national judiciaries, those of both the State where such public and private entities have been established and keep their main legal premises and those of the State who suffered from those illicit behavior's effects, particularly in the light of the "polluter pays" principle established under UN Rio Declaration[24] . This principle is now well-established under same EU legal system: in fact, EU's public policies are particularly attentive to environmental issues that, since the Treaty of Amsterdam's reforms at the end of 90s last century, are one of the major topics under same EU's competence (though if included among the competences that EU "shares" with its Member States, see art. 4 n. 2 e TFEU). In this context, it is wise to recall that sustainable development, as a basic standard

[19] See p. 79 of advisory opinion of 8 July 1996, *Legality of The Use by A State of Nuclear Weapons,* ICJ Reports 1996, quoted *supra* note 9, as recalled by advocate general P. Mengozzi, in his opinion of 18 July 2013, on case C-285/12, *Aboubacar Diakité,* ECLI:EU:C:2013:500, at p. 26.

[20] The Geneva Conventions of August 12, 1949, on the protection of civilian persons in time of war, International Committee of the Red Cross, Geneva, p.153.

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

[22] "*3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment*".

[23] "*1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population. 2. Attacks against the natural environment by way of reprisals are prohibited",* see *ex multis,* E. GREPPI, *Diritto internazionale umanitario dei conflitti armati e diritti umani: profili di una convergenza*, in la Comunità internazionale, 1996, p. 473, N. RONZITTI, *Diritto internazionale dei conflitti armati,* Turin, 2014; F. NAERT, *International Law aspects of the EU's Security and Defense Policy, with a Particular focus on the Law of Armed Conflicts and Human Rights,* Bruxelles, 2009; A. RIZZO, *Profili giuridico-istituzionali della politica di difesa e Sicurezza comune dell'Unione europea,*in *il Diritto dell'Unione europea*, 2016, p. 285.

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

(entailing also non-environmental policy objectives, and including socio-economic issues as well as issues of health policy at a global dimension) for the states, is enshrined under principles 3 and 4 of mentioned Rio Declaration and is also mentioned in articles 3 par. 5 and 21 par. 2 d Treaty on the European Union (TEU, in terms of relations with the rest of the world and specifically the European Union's external action) and in the Preamble to the Treaties [25].

At the international treaties level, with a particular reference to the definition of the precautionary principle as a core element of environmental law and related proceedings[26], articles 4 and 5 of the Aarhus Convention of 25 June 1998[27] require all public bodies of a State to collect and make environmental information available to those who have requested it. In case of non-compliance to such requirement, the following art. 9 agrees that "anyone who has a sufficient interest […]" is entitled to submit a judicial appeal in order to achieve the information requested[28]. It should be noticed that, in addition to the observation that regulation 1367/2006 is a source of "legislative" rank of the European Union ex se endowed with the requirement of direct applicability in national legal systems[29], it grants also some of the "classic" procedural rights foreseen by the European Convention on Human Rights and Fundamental freedoms (fair trial and right to an effective remedy under articles 6 and 13 reproduced in the Charter of fundamental rights of the EU, see in part. Art. 47). On those issues it is also of particular relevance to take

[25] As far as EU is concerned, see under p. 5 of the Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, of 1 February 1993 concerning a Community program of policy and action in favor of the environment and sustainable development - Political and action program of the European Community in favor of the environment and sustainable development (OJ 17 May 1993, C 138, in part. p. 12): "*In the report of the World Commission for the Environment and Development (Brundtland), sustainable development is defined as a development that meets current needs without compromising for future generations the ability to meet your needs* ".

[26] Principle 15 of mentioned Rio Declaration and EU Commission Guidelines on the Precautionary Principle, COM(2000) 1, CJEU 22 December 2010, *Gowan,* C-77/09, I-13533, see *supra* note 18.

[27] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters "(ECE/CEP/43, 25 June 1998, United Nations Economic Commission for Europe). At the Community level, Regulation (EC) no. 1367/2006 of the European Parliament and of the Council, of 6 September 2006, on the application to Community institutions and bodies of the provisions of the Aarhus Convention on access to information, public participation in decision-making processes and access to justice in environmental matters (OJ of 25 September 2006 n. L 264) aimed at regulating the three pillars of the Aarhus Convention (access to information, participation in decisions-making, access to justice).

[28] On Article 9(3) Aarhus Convention – according to which "*(...) members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment"* – , the same Court of Justice of the EU stated that *"(...) that article does not contain any unconditional and sufficiently precise obligation capable of directly regulating the legal position of individuals and therefore does not meet those conditions. It follows that that provision cannot be relied on before the EU judicature for the purposes of assessing the legality of [Article 10(1)] of Regulation No 1367/2006 on the application of the provisions of the Aarhus Convention to Community institutions and bodies",* CJEU 13 January 2015, cases C-401/12 P, C-402/12 P, C-403/12, *Council and Others v. Vereniging Milieudefensie and Others*, ECLI: EU: C: 2015: 4. On this, it is wise to recall that Aarhus Convention has been also opened to Regional International Organizations (REIO): see the relevant European Community's declaration of accession to Aarhus Convention https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=_en#EndDec.

[29] see e.g., CJEU 14 December 1971, case 43/71, *Politi v. Ministry of Finance* Rec. 1039 and of 10 October 1973, case 34/73, *Variola v. Finance Administration* Rec. 981.

into account the transparency principle and the duties of any national public authority related to the individual right to a fair administration (art. 41 of the Charter) (on those aspects see further in this paper)[30]. It is also wise mentioning that the same Aarhus convention wording has clearly inspired some of the provisions of Directive 2004/35/EC on environmental liability [31] : indeed, under art. 5 of the directive any "operator" (be it a private or a public body under the same directive's definitions) has a duty to provide *preventive* information of any *imminent* threat to the environment. Furthermore, considering the somehow vague wording of most of the Aarhus Convention's provisions, with the view of granting the fullest possible achievement of the same convention's aims in the EU legal system, article 6 of directive n. 2003/4/EC[32] provides a sufficiently wide possibility for individuals – named as the "public", that is to say, "(…) *one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups concerned*" (see under art. 2 n. 6) – of taking swift actions before a judicial or administrative body, independent and impartial, in the event that the applicant has received from the requested public entities a reply considered as not suited to meet main transparency requirements. These procedural requirements are of specific relevance under same EU legal system, as we will see further in particular as for the issues related to the regulatory framework on an environmental liability under same EU law.

1.2. Rules on individuals' behavior and responsibility

With specific regard to the characters of the perpretrator(s) of an *ecocide*, under the effects of the Statute of Rome establishing the International Criminal Court (see the abovementioned art. 25.4, expressly bestowing that the States' responsibility may co-exist with that of individuals for crimes coming under same Statute's purview), such kinds of behaviors with similar effects, whenever committed by individuals, achieve specific relevance under Rome Statute. Indeed, the new international crime to be tentatively put under ICC jurisdiction would be related to "[acts] *or omissions committed in times of peace or conflict by* any senior person within the course of State, corporate or any other entity's activity *which cause, contribute to, or may be expected to cause or contribute to serious ecological, climate or cultural loss or damage to or destruction of ecosystem(s) of a given territory(ies), such that peaceful enjoyment by the inhabitants has been or will be severely diminished. 2. To establish seriousness, impact(s) must be widespread, long-term or severe. In this context, the perpetrator might be considered* "[a senior]

[30] The need of a balance between the Aarhus Convention's provisions and the EU Regulation 1367/2006 was raised by the EU General Court (of 14 July 2012, *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht v. European Commission*, T-396/09). In particular, that Court underlined that *"the validity of Regulation No 1367/2006, on the application of the provisions of the Aarhus Convention to Community institutions and bodies may be affected by the fact that it is incompatible with that convention"*, *ex multis,* R. MASTROIANNI, *I limiti all'accesso del giudice dell'Unione per l'impugnazione di atti confliggenti con accordi internazionali: una nuova "fortress Europe"?,* in A. Tizzano (ed.), *Verso i 60 anni dai trattati di Roma. Stato e prospettive dell'Unione europea,* Torino, 2016, p. 179; N. NOTARO & M. PAGANO, *The Interplay of International and EU Environmental Law,* in I. Govaere & S. Garben (eds.), *The Interface between EU and International Law,* Oxford, 2019, p. 151.

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

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

person within the course of State, corporate or any other entity's activity in times of peace or conflict" (emphasis added) [33].

State and individuals' liability under the definition above is related to both objective and subjective elements required in order that a criminal behavior be qualified as true ecocide. In fact, while civil law liability (see infra) is made of three main elements that must occur together (intent or fault, the damage and the causal link between the harmful act and the damage), in order that an *ecocide* takes place the presence of the psychological element (so called *mens rea*) is normally required. Indeed, also strict liability arises under awareness (even in a widest meaning) of conducting a certain kind of activities, such as, transport or management of hazardous wastes (on this, reference should be made to the management of any good or wastes coming from atomic nuclear sources, see infra on relevant Euratom rules). So, similarly to strict liability (for which willingness or fault, damage and causal link must be proved together), an *ecocide* arises only if the awareness on the perpetrator's side (intent), together with the severity and long-lasting characters of same act's effects, are (or can be) sufficiently proved[34].

With regard to the behavior of some kinds of legal persons (e.g., multinational companies), a recent practice named "corporate social responsibility" (CSR) requires that such companies take preventive measures apt to prove compliance with some general standards in the States of investment. Some conditions are thus established for responsible corporate behavior that companies must adopt in terms of industrial relations (socio-labor standards), protection of human rights and compliance with health and environmental standards (also according to the relevant impact assessments of industrial activities). Thus, in an investment agreement signed between a state and a large multinational company, it would be possible to foresee specific guarantees of protection – such as the investor's right to resort to arbitration for any dispute with the host State rather than lodging an action before the courts of the latter – to the fulfillment of relevant corporate standards. Some consolidated guarantees recognized to investors could then be subjected to the condition that same investments comply with certain minimum socio-environmental standards imposed by the State that hosts the investment at issue. Such a practical approach could, for example, limit the effects of agreements involving significant, if not truly massive, negative environmental implications of e.g. extractive activities on the foreign company's side, including, inter alia, cases of massive land acquisitions (land grabbing) performing negative environmental impacts on the use of land [35].

1.3. The Rome Statute establishing the International Criminal Court

The Rome Statute is a treaty that created the International Criminal Court, adopted on 1998 and become effective on 2002. The International Criminal Court (ICC) is an international tribunal that has jurisdiction

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[33] *Ecocide Law*, MISSION LIFEFORCE, https://perma.cc/L326-S4KA .

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

[35] *Ex multissimis,* T. FECAK, *International Investment Agreements in EU Law,* Amsterdam/l'Aia, 2016; F. ORTINO & P EECKHOUT, *Towards an EU Policy on Foreign Direct Investment*, in A. Biondi, P. Eeckhout & S. Ripley (eds.), *EU Law after Lisbon*, Oxford, 2012, pp. 312 – 327. According to A. NEWCOMBE, *Sustainable Development and Investment Treaty Law*, in *Journal of World Investment & Trade*, Vol. 8, 2007, p. 1, investment treaties (mainly those entailing Foreign Direct Investments coming under the Bilateral Investment Treaties' practice) should comply with the following public policies' requirements : 1) the duty of states to ensure sustainable use of natural resources, 2) the principle of equity and the eradication of poverty, 3) the principle of common but differentiated responsibilities, 4) the principle of the precautionary approach to human health, natural resources and ecosystems, 5) the principle of public participation and access to information and justice, 6) the principle of good governance (including as such the need to respect the rule of law, transparency and accountability and prohibitions on arbitrary and discriminatory conduct).

to prosecute individuals for crimes against humanity, war crimes, genocide and aggression. From this, one can infer that the Rome Statute lists mainly acts forbidden under some existing general international law rules. However, with the view of giving a wider scope and the best applicability to the Statute, many other kinds of acts are listed, some with a more evolutionary character though if always belonging to the *crimes against humanity* group [36]. Currently, 122 countries are State Parties to the Rome Statute and the International Criminal Court [37] .

It is firstly wise to recall that the ICC jurisdiction to prosecute "environmental" crimes is formally limited to crimes occurring after the Rome Statute was adopted in 1998. However, Article 8(2)(b)(iv) is the only Statute's provision expressly addressing environmental wrongdoings, though if dealing specifically with environmental negative feedbacks of crimes in a warfare scenario. According to the mentioned provision's reading, such crimes can be in fact prosecuted in accordance to the general criteria of the Statute (individual liability) under the following three conditions: 1) if the actus reus is widespread, severe and causes long-term environmental damage, 2) if the actus reus has not been committed as part of a concrete or direct military advantage, 3) if the mens rea of the act was intentional. The provision in questions applies to international armed conflicts or non-international conflicts where there is a protracted armed conflict between the government and armed groups. In addition, the ICC jurisdiction, in this case, is limited to crimes (committed in the abovementioned warfare scenario) occurring within current ICC member states, that are committed as part of a plan or policy or as part of a large-scale commission of such crimes. Moreover, crimes listed at the mentioned Statute's provision must often occur while the armed conflict is pending so that, in order to come under Rome Statute's purview, they should not just follow an armed conflict separately[38]. Article 8 (2) (b) (iv) foresees additionally the possibility of inflicting just criminal sanctions on a willing perpetrator who is fully aware that his actions will cause environmental damage. Under same provision's effects, a perpetrator against whom an action for an environmental crime committed in a conflictual context might be filed, needs to prove that he did not know (lack of awareness) that his actions would have caused a "widespread, long-term and severe" damage entailing a liability with a criminal character. A recent trend (see infra) proves that the awareness of the consequences and of their grave character should still remain among the psychological components of the criminal act in question, at least in a proper criminal law perspective[39].

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[36] International crimes coming under the Rome Statute's purview are the followings: murder, extermination, enslavement, deportation, incarceration, torture, rape, persecution for political, racial and religious reasons and other inhuman acts. Article 7 Rome Statute extends the list to several other criminal acts worthy of being prosecuted at the international level. The same Statute mentions "other inhuman acts" as being "of a similar character [to other crimes against humanity] that are intentionally enacted to cause major suffering or serious injury to the body or mental or physical health to the victims, see D. SCHAFFER, *The International Criminal Court,* in W.A. Schabas & N. Bernaz (eds.), *Routledge Handbook of International Criminal Law,* UK, USA, Canada, 2011, at p. 70 ff.

[37] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute], *The States Parties to the Rome Statute*, International Criminal Court, https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx. *Ex multissimis,* A. CASSESE, P. GAETA E J. RWD. JONES (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, I, Oxford, 2002.

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

[39] A. LOPEZ, *Criminal Liability for Environmental Damages Occurring in times of non-international Armed Conflicts: Rights and Remedies,* in *Fordham Environmental Law Review*, 2006, p. 231.

In the light of the above, practices with severe environmental meanings such as land grabbing can fall under the ICC jurisdiction only if meant as *war* crimes, since land rights in general fall distinctly within national and local legislations scope [40] . This explains an on-going debate around the need to expand the Statute of Rome' scopes particularly in the light also of massive dispossessions of lands perpetrated at the governmental level. On this, one should recall some recent cases such as that of the Rohingya Muslims in Myanmar [41] and that of most of countryside peoples in Cambodia [42] , as particularly qualified cases where a liability emerged on the part of both the States and of individuals placed at the governmental level of those States for decisions and related practices (dispossessions, expulsions) with significant negative feedbacks on the living conditions, basic rights and consequent forced migrations of local populations[43] .
The ICC Prosecutor office has taken on board the modalities through which a crime has been committed in order to consider it included among same prosecutor's investigative activities. For this, several

[40] Rights worthy of protection at the international level relate to a property right deprived of formalistic connotation, but for the concrete use of (and / or the actual need to use) portions of real estate due to own sustenance, nutrition and survival, thus emerging the need for a sufficiently tight connection between material property and concrete exploitation of the relevant goods, as the individual rights in question cannot be concretely satisfied "at a distance" (P. CLAEYS, *The Right to Land and Territory: New Human Right and Collective Action Frame, in Revue interdisciplinaire d'études juridique*, 2015, p. 115). See also 1989 Convention (No. 169) of the International Labor Organization (ILO) conferring on indigenous and tribal peoples a right to self-determination as well as specific human and social standards that should be enjoyed not only by individuals but by certain groups as well, such as tribal peoples (who protect their own customs and traditions) and "indigenous" peoples as such. See also 2007 UN Declaration on the Rights of Indigenous Peoples, in part. under art. 8 para. 2 b) (on this, *ex multis,* P. WISBORG, *Human Rights Against Land Grabbing? A Reflection on Norms, Policies, and Power,* in *Journal of Agricultural and Environmental Ethics*, 2013, pp. 1199; F. MARCELLI (ed.), *I diritti dei popoli indigeni,* Roma, 2015; M. NINO, Land grabbing, *sovranità territoriale e diritto alla terra dei popoli indigeni,* in *Diritti umani e diritto internazionale*, 2016, 185; A. VIVIANI, Land Grabbing *e diritti umani,* in *Diritti umani e diritto internazionale*, 2016, p. 209 .

[41] Council on Foreign Rel., *The Rohingya Crisis* (Dec. 7, 2017), [https://perma.cc/BU32- C5ER] and, for the relevant case-law, International Court of Justice Order of 23 Jan. 2020 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020,* I.C.J. Reports 2020, p. 3. M. O'BRIEN & G. HOFFSTAEDTER, *"There We Are Nothing, Here We Are Nothing!". The Enduring Effect of Rohingya Genocide,* in *Social Sciences*, 2020, p. 9.

[42] Global Diligence, *Land Grabbers May End Up In The Hague: Global Diligence Welcomes The ICC Prosecutor's New Case Selection Policy* (Sept. 15, 2016), http://www.globaldiligence.com/2016/09/15/land-grabbers-may-end-up-in-the-hague-global-diligence -welcomes-the-icc-prosecutors-new-case-selection-policy/ [https://perma.cc/8Q29-43FM]. *See also*, Global Diligence, *Communication Under Article 15 of the Rome Statute of the I.C.C., The Commission of Crimes Against Humanity in Cambodia* (2014), https://www.fidh.org/IMG/pdf/executive_summary-2.pdf [https://perma.cc/6SPK-ML28].

[43] Land grabbing practices, also when not stemming from explicit brutal governmental behaviors entailing massive dispossessions forcing people to leave origin lands, is currently studied also under the wider lens of international law rules (mainly at the level of treaty rules) applicable to both the State liability and the foreign direct investment practices particularly relevant since the beginning of this century. Between end last century and beginning of current one, it has been proved that investors from foreign countries have acquired "*arable land in less developed regions – mainly in Africa, South and Central America and Southeast Asia. Since 2000, approximately 15-201 million ha of land worldwide have been acquired or are under negotiation in the context of the recent surge of Foreign Direct Investments in land (FDI in land) (…). Land acquisitions by foreign private investors have taken place on a small scale for decades. However, a changed economic and political environment seems to have accelerated this process in the recent past*" GTZ, Deutsche Gesellschaft für Technische Zusammenarbeit GmbH, study, *Foreign Direct Investment in Land in Developing countries,* Eschborn, Germany, 2009. t.

elements have been considered as relevant to assess "[the] *manner of commission of the crimes".* Those latter, in fact, may be assessed in light of, inter alia, "*the means employed to execute the crime, the extent to which the crimes were systematic or resulted from a plan or organised policy or otherwise resulted from the abuse of power or official capacity, the existence of elements of particular cruelty, including the vulnerability of the victims, any motives involving discrimination held by the direct perpetrators of the crimes, the use of rape and other sexual or gender-based violence or* **crimes committed by means of, or resulting in, the destruction of the environment or of protected objects**" (emphasis added). Moreover, specific elements come into play in order to assess *the impact,* of the crimes, considering, *inter alia, "the increased vulnerability of victims, the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities. In this context,* **the Office will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land***"* (emphasis added) [44].

In this context, it must be mentioned a recent trend aimed at foreseeing an international crime falling under same Rome Statute scope and going beyond same Statute's abovementioned current effects and boundaries. In particular, it is foreseen the chance of establishing a crime corresponding to a conduct – equal to either an act or an omission, but always unlawful or wanton (see infra) – that is apt to cause severe and either widespread or long-term damages to the environment. This definition entails a two-tier elements that must come into play in order that the Rome Statute be applicable in those cases: 1) the damage must have particularly qualified characters (be *severe, widespread and with long-term implications*); 2) both an *act or omission* should be considered as *unlawful* under both international and national law criteria applied when assessing the criminal character of that same act or omission: in such a context, a *wanton* act would fall under the effects of same Rome Statute's provisions that apply to acts or omissions implemented in disregard of their consequences, considering the latter to be expected (awareness) by the offender(s) (on the psychological/substantive elements of an *ecocide* see *supra* when comparing *ecocide* to other acts entailing a civil law liability of the perpetrator)[45].

Behind those definitions, a true readiness exists of bringing at the international law level several kinds of acts too poorly considered under current Rome Statute written provisions. In this context, it is also wise mentioning how the ICC is enabled to provide a wider reading of the Statute, and this also in accordance to the mentioned position recently expressed by same ICC prosecutor's office with the view of bringing under same Prosecutor's investigative tasks in particular acts with significant negative environmental impacts and entailing negative feedbacks on local populations' living conditions (including, as it may be the case, dispossessions of land properties and causing forced migrations)[46]. Article 10 of the Rome Statute specifically provides that "*[n]othing* [in Part 2 of the Rome Statute, which sets out the jurisdiction

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

[45] Stop Ecocide Foundation, Independent Expert Panel for the Legal Definition of Ecocide, Commentary and Core Text, June 2021

[46] In this respect, environmental damage could become relevant under Article 6(c) of the Rome Statute, which punishes the deliberate infliction of "conditions of life calculated to bring about [the] physical destruction" of one group. This might entail, as it did in several cases, an interconnection between rules on the fight against genocide and those aimed at protecting indigenous peoples, as already mentioned above. However, in order to make mentioned art. 6 (c) Rome Statute applicable, the relevant conduct should be carried out "with the intent to destroy" the relevant group as such: this entails the need to prove the existence of a direct *mens rea* requirement, that is to say, a standard of proof too restrictive and high in relation with episodes of environmental damages such as the ones caused by too intensive extractive, industrial or agricultural activities, or where such negative impacts on local populations are mostly due to negligence in the implementation of (or control on) same exemplified activities.

of the ICC] *shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute*"[47].
However, it seems still questionable, at least in the light of current Rome Statute, the chance of assessing the exact boundaries between such high standards with the view of defining a criminal act with serious environmental implications, when it is committed by the *individuals* covered by the Rome Statute [48], and the standards required to define an international liability of the State as such, whenever the latter is identified as the legal entity that either promoted, supported or simply did nothing (see infra on some recent case-law before the Court in Strasbourg) to prevent or correct acts with significant negative environmental impact. In this context, the remarkable attempt of the same ICC offices to extend investigative powers also to acts with environmental implications that, as such, are not connected with military activities (according to existing provisions of the Statute), has obviously raised awareness on the fact that, currently, the Rome Statute lends insufficient guidance for that aim, at least in its current wording. More empirically, one should also take in due account that the path towards an international standard for an environmental crime meets substantial obstacles considering the still partial framework of the States who have completed the procedures of ratification to the Rome Statute itself, with highly relevant international actors in that same group of States (including USA, Russia and China).

2. The "Regional" Approach to *Ecocide*: The European Convention on Human Rights and Fundamental Freedoms (ECHR) and the European Union (EU)

The following chapters will focus on the developments of the topics under study specifically in the European continent, under the two special regimes of the European Convention on Human Rights and Fundamental Freedoms (ECHR)[49] and the treaties on the European Union.
Indeed, under those legal regimes, though reciprocally different[50], environmental issues are tackled, on the one hand, under the specific perspective of a legal element pertaining to the well-being and the protection of life (in a more substantive perspective), and, on the other hand, as a policy that achieves peculiar significance in the light of relevant treaties' objectives, raising specific problematic issues when

[47] This raises issues of relations between, on the one hand, the provisions in the Rome Statute and their implementation under a more evolutionary perspective, and, on the other hand, the chance that, in the implementation of the same Statute of Rome, some practices progressively are raised to the level of obligations stemming from rules of international customary law. Th.

[48] *Ecocide Law*, (MISSION LIFEFORCE, https://perma.cc/L326-S4KA .

[49] 4 November 1950, 213 UN Treaties Series 221.

[50] On this see Opinion of the CJEU n. 2/13 of 18th December 2014, on the accession of the EU to the ECHR, see *ex multissimis,* L.S. ROSSI, *Il Parere 2/13 della CGUE sull'adesione dell'UE alla CEDU: scontro fra Corti?,* http://www.sidi-isil.org/sidiblog/?p=1228 and Id., *Il parere 2/13 della Corte di giustizia dell'Unione europea sull'adesione dell'Unione alla convenzione europea dei diritti dell'uomo: scontro tra corti?,* in SIDIBlog, Vol. 1, 2014, p. 157 ss.; I. ANRÒ, *Il parere 2/13 della Corte di giustizia sul progetto di accordo di adesione dell'Unione europea alla CEDU: una bocciatura senza appello?* Eurojus, http://www.eurojus.it/il-parere-213-della-corte-di-giustizia-sul-progetto-di-accordo-di-adesione-dellunione-euro-pea-alla-cedu-una-bocciatura-senza-appello, 22.12.2014; J.P. JACQUÉ, *CJUE – CEDH: 2-0*, Revue trimestrielle de droit européen, 2014, p. 82 ; P. EECKHOUT, *Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarky?*, Jean Monnet Working Paper n.1/15, 2015; E. CANNIZZARO, *Unitarietà e frammentazione delle competenze nei rapporti fra l'ordinamento dell'Unione e il sistema della Convenzione europea: in margine al parere della Corte di giustizia 2/2013*, in *il Diritto dell'Unione europea,* 2015, p. 623; N. J. CALLEWAERT, B. DE WITTE, M. BOSSUYT, E. BRIBOSIA, C. HILLION, M. KUIJPER, Š. IMAMOVIĆ, J. POLAKIEWICZ, M. CLAES, *The EU Fundamental Rights Landscape After Opinion 2/13*, in *Maastricht Faculty of Law Working Paper*, 2016; more recently, G. RAIMONDI, *Spazio di libertà, sicurezza e giustizia e tutela multilevel dei diritti fondamentali,* in A. Di Stasi & L. S. Rossi (eds.), *Lo Spazio di libertà, sicurezza e giustizia. A vent'anni dal Consiglio europeo di Tampere,* Naples, 2020, p. 27.

it interacts with corresponding national competences, policies and related standards of protection. This is particularly true when one comes considering issues of cooperation in the criminal law field, where *ecocide* should as such find its more *natural* context. It is however useful to illustrate even other areas of EU legislation in the meantime developed towards the same direction of granting an effective environmental protection, such as the rules of non-contractual liability for environmental abuses.

2.1. The ECHR

In the international treaty law domain, the ECHR, though not comprising any express provision establishing a fundamental right to the environment, has been understood by the European Court of Human Rights (ECtHR) under an evolutionary reading. So, the same ECtHR takes frequently into consideration issues related to environmental protection, developing a now well-established jurisprudence aimed at accepting an individual right to a "safe environment" as a component of the right of a private and family life pursuant to art. 8 ECHR[51], providing as follows: "Everyone has the right to respect for his private and family life, his home and his correspondence". The jurisprudence of the Court has by now developed some principles.

In the decision Lopez Ostra v. Spain[52] ECtHR has recognized that the evacuation of residents in the locality of Lorca, nearby Murcia, as a result of an accident at the waste disposal plant, built on public land with a subsidy from the Spanish State, constituted a violation of art. 8 of the Convention.

In Guerra v. Italy[53] the same Court found that the fact that the citizens concerned had not received adequate information on the issues concerning the pollution in progress had entailed a violation of the right to respect of private and family life in accordance with art. 8 of the Convention. Again, the question of the applicability of art. 8 of the Convention in air pollution cases was submitted to the Court in the judgment Hatton v. United Kingdom [54].

In a remarkable case, the Court held that each time individuals are under concrete threat connected to environmental issues (be them from pollution or natural hazards), the responding government has a positive obligation to put in place regulatory initiatives (such as any regulatory means on the licensing, start-up, operation, and control of the hazardous activity) that must include appropriate public surveys and studies allowing the public to assess the risks and effects associated with the relevant activities. In this case, ECtHR also mentioned the precautionary principle as a constituent factor of a proper environmental policy at the national level[55] .

Later, the ECtHR has retraced its previous jurisprudence by emphasizing the importance that public environmental policies have assumed in particular following the Aarhus Convention: in this regard, the Court makes reference to relevant national or supranational impact assessment procedures (environmental feasibility studies) and has reaffirmed frequently the right to individual access to administrative procedures by providing, among other things, means for reviewing these procedures both in the courts and before independent authorities [56].

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[51] Recently, *ex multis*, see K. MORROW, *The ECHR, Environment-Based Human Rights Claims, and the Search for Standards* in S. Turner, D. L. Shelton, J. Razzaque, O. McIntyre (eds.), *Environmental Rights, The Development Standards*, Cambridge, 2019 p. 41, O. PEDERSEN, *The European Court of Human Rights and International Environmental Law,* in J. H Knox and R. Pejan (eds.), *The Human Right to a Healthy Environment,* Cambridge, 2018, accessible here https://www.researchgate.net/publication/325649940_The_Human_Right_to_a_Healthy_Environment.

[52] 9 December 1994, App. 16798/90.

[53] 19 February 1998 App. 1998-I.

[54] Judgment of 2 October 2001, App. 36022/97.

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

[56] ECtHr of 21 July 2011, Grimkpvskaya v. Ukraine App. 38182/03.

It is also worth noting how the ECtHR (and, previously, the Human Rights Commission) examined aspects of environmental protection as an individual right in the light of Protocol no. 1 article 1 annexed to the ECHR, dealing with the protection of private property[57].
In another relevant case, the ECtHR had a chance to balance environmental protection with other international law standards related to the protection of foreign investments (see *supra*). In Fedayeva[58], indeed, the applicant lived in a steel-producing town, close to a privately owned steel plant . The respondent government adopted policies aiming to improve the environmental situation in the applicant's town and protect public health. Among other measures, the policies included the resettlement of people affected by the activities of the steel plant. The applicant unsuccessfully brought claims seeking resettlement in the national courts. The ECtHR's reiterated that the failure to regulate a private industry may engage State responsibility: indeed, regulating in a manner that may interfere with investment rights is both a prerogative of states and corresponds to a duty under due diligence and human rights law, at least each time the need for regulation raises in order to protect conflicting rights (e.g., the right of foreign investors, on the one hand, and that of local population of the State receiving the investment, *in primis,* individual right to a safe environment).
In a most recent quite relevant case [59], the European Court of Human Rights has sentenced Italy for infringement of art. 8 ECHR, in the case concerning the lack of measures aimed at protecting the environment that the State should have implemented in the areas around Ilva industries located in the Taranto province. In this case art. 8 ECHR does not only apply the above mentioned standard in accordance with previous ECtHR jurisprudence, but it also presents broader evolutionary criteria (such as the concept of "community welfare"), assessing a consolidated situation of absence of adequate interventions along a time period considered objectively too extensive and, as such, fit to worsen in a particular way the living conditions of the individuals concerned. The ECtHR, in the Cordella judgment, noted also that the steady negligence on the part of public authorities in protecting some basic individual rights implies as such a breach of the "due diligence" obligation, considering how such obligation has widened the range of international duties binding the States. In fact, the latter should – particularly in cases of environmental protection through the protection of private and family life – implement more extensive preventive measures from a both substantial and a temporal point of view, in order to provide individuals with a satisfactory protection from future and/or even only potential dangers for health as a component of the protection of human life. This is the result of a correct reading of articles 2 and 8 ECHR when applied to environmental protection issues: in fact, the scope of the protection in this sector, under same ECHR, is not limited to most serious cases where the protection of environment is required for an effective protection of human life, but it extends to a meaning of environmental protection that is broader substantially and in time, in order to prevent (according to abovementioned *precautionary* principle, e.g., via adequate environmental assessment procedures) even future and possible threats to peoples' well-being.

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

[58] Judgment of 9 June 2005, Fadeyeva v. Russian Federation App no 55723/00. On this case, see in part. M. FANOU & V. P. TZEVELEKOS, *The Shared Territory of the ECHR and International Investment Law,* in Y. Radi (ed.), *Research Handbook on Human Rights and Investment*, UK, 2018, p. 93. On interaction between environmental standards and IIL, according to E.U. PETERSMANN, (*Human Rights and International Economic Law,* in Trade Law and Development, India, 2012, Vol. 4 No. 2, p. 282), "*Many international economic treaties serve constitutional functions by committing governments to the use of transparent, non-discriminatory and efficient instruments of monetary, trade, investment, environmental and social policies, thereby promoting consumer welfare and limiting protectionist abuses of foreign policy powers through international legal and judicial constraints"* (pp. 299-300).

[59] January 26th 2019 Cordella et autres c. Italie, Appl. 54414/13 and 54264/15.

It could then be reckoned that due diligence, being wider in scope and generally pertaining to international law issues, is implemented in the EU via the precautionary principle, which explicitly inspires EU approach to environmental policies. In the same Cordella and others decision, the Strasbourg Court condemns Italy also for infringement of art. 13 ECHR, as the internal remedies aimed at dealing with the environmental degradation created by Ilva industries over the years have proved inapt with the view of meeting effectively same individuals' essential needs inherent to their living conditions and health.
A ruling that could be defined as absorbing the aspects and items of protection referred to, including the right to an effective remedy pursuant to art. 13 ECHR, as attributable to principles of environmental protection, is derived from the Onerylidiz v. Turkey[60], as a particularly serious case of violations of minimum safety and environmental standards (in that case, the Court had to deal with an explosion due to the dispersion of methane gas produced by the decomposition of waste left abandoned in the municipal streets of a town in Anatolia) which caused the death of several of the applicant's relatives[61].
It can be summarized here that, in a first category of hypothesis, with respect to which a "probable at the limit of certainty" risk for the health of the applicants arises, the Strasbourg Court connects the right to a healthy environment to the protection of human life (Article 2 ECHR), as such representing a core standard in the human rights protection system. In other cases, this risk cannot be considered as fully reached and the Court nevertheless considers an only "probable" or even "presumed" risk for human health and well-being [62] : in this second kind of situation, it is the Court's view that the damage to human health should be prevented or otherwise stigmatized by tracing the protection of the individual right to live in a healthy environment to the aforementioned protection of private and family life pursuant to art. 8 ECHR.
One should not elude, anyway, that environmental protection is not formally enshrined in the ECHR as an autonomous title for individual protection. Awareness is anyhow raising at the on a strict interrelation between full and effective protection of fundamental human rights and the environment as the context where individuals are put in a condition to effectively enforce these rights. On this, a recent statement from the Council of Europe's Parliamentary Assembly[63], under p. 1, has clearly stated what follows: **"***The United Nations states in its Environment Programme that "human rights cannot be enjoyed without a safe, clean and healthy environment; and sustainable environmental governance cannot exist without the establishment of and respect for human rights". This relationship between human rights and the environment is increasingly recognised, and the right to a healthy environment is currently set out in over 100 constitutions worldwide. Despite this, the United Nations High Commissioner for Human Rights has estimated that at least three people a week are killed protecting our environmental rights, while many more are harassed, intimidated, criminalised and forced from their lands*".
Notwithstanding this raised awareness also at the political/institutional level, a problem exists for the definition of an individual right to get environmental protection, with specific reference to the existing connections between the quite evolutionary ECtHR's address and the still vague wording of current article 37 of the Charter of fundamental rights of the European Union (see *infra*). In this respect, ECtHR case-law clearly plays a quite significant role in the development of this topic even in the more specific context of the European Union. In fact, the boundaries of EU competence in the environmental policy, also in the

[60] Judgment of 18 June 2002, App. 48939/99.

[61] In addition to Onerylidiz case, see judgment of 2 March 2008 in the Budayeva case and Others v. Russia, app. nos. 15339/02, 2166/02, 20058/02, 11673/02 and 15343/02.

[62] ECtHR of 10 January 2012 Di Sarno e o. v. Italy, App. 30765/2008, v. C. CONTARTESE, *La sentenza Di Sarno c. Italia: un ulteriore passo avanti della Corte di Strasburgo nell'affermazione di obblighi di protezione dell'ambiente,* la Comunità internazionale, 2013 p. 135 .

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

light of the subsidiarity principle, could no longer represent an insurmountable obstacle to the possibility (or a true obligation) for the same EU Court of Justice to consider the protection of the environment, notwithstanding the vague wording in the EU Charter, as a true right worthy of protection in the same EU legal system.

Inter alia, mentioned obligations presumably (or effectively) pending on EU institutions would exist also on the basis of the doctrine on the *equivalent level of protection*, according to which it is necessary to prove that within the European Union a level of protection of a fundamental right must be at least equivalent to that already guaranteed in the system created by the ECHR[64]. On this, the so called "horizontal rules" in the same Charter on the fundamental rights of the EU could lend some guidance with the view of expanding same express boundaries under article 37 of the Charter, specifically when comparing the level of protection established, respectively, in the EU legal system and in other international legal systems, such as that established under same ECHR.

2.2. The European Union

2.2.1 General framework on EU's competence on criminal law

In its landmark judgment of 13 September 2005[65], the Court in Luxembourg annulled a framework decision of the European Union on environmental liability adopted on the basis of Articles 29, 31 (e) and 34 (2) (b) of the European Union Treaty in the pre-Lisbon edition[66], affirming the correctness of the choice of art. 175 European Community Treaty (now 192 Treaty on the Functioning of the European Union, TFEU) as the legal basis for a subsequent directive. In its reasoning, the Court refers first of all to art. 47 of the EU Treaty previous Lisbon Treaty, concerning the establishment of the principle of supremacy of the EC Treaty on the EU Treaty, for the simple reason of precedence of the obligations imposed by EC Treaty on the same parties of both treaties (and this also by way of derogation to relevant rules in the Vienna Convention on the Law of the treaties). Moreover, the Commission noted that the

[64] According to this doctrine it is necessary to verify that within the European Union a level of protection of fundamental rights at least equivalent to the level already offered in the ECHR be guaranteed, ECtHR judgment of 30 June 2005, Bosphorus Airways v. Ireland, app. 45056/98, and previous jurisprudence relating to the ascertainment that, in order to deem the immunity regime due to bodies or agents of an international organization (e.g., the European Space Agency) effective, the legal system of this organization guaranteed a level of protection of individual rights at least equivalent to that guaranteed through the ECHR (see ECtHR judgment of 18 February 1999, app. 26083/94, Waite and Kennedy v. Germany as well as sentence of same date, app. 28934/93, Beer and Regan v. Germany), E. CANNIZZARO, *Sulla responsabilità internazionale per condotte di Stati membridell'Unione europea: in margine al caso* Bosphorus, Rivista di diritto internazionale, 2005, p. 762, L. DANIELE, N. PARISI, A. GIANELLI, A. BULTRINI, S. AMADEO, P. SIMONE, *La protezione dei diritti dell'Uomo nell'Unione europea dopo il Trattato di Lisbona,* il Diritto dell'Unione Europea, 2009 p. 645. More recently, see ECtHR of 18 June 2016, *Avotiņš v. Latvia,* app. n. 3890/11, and in literature, S. Ø. JOHANSEN, *EU law and the ECHR: the Bosphorus presumption is still alive and kicking - the case of Avotiņš v. Latvia*, EULaw Analysis, http://eulawanalysis.blogspot.it/2016/05/eu-law-and-echr-bosphorus-presumption.html e G. BIAGIONI, *Avotinš v. Latvia. The Uneasy Balance Between Mutual Recognition of Judgments and Protection of Fundamental Rights*, in European Papers, 2016, p. 579, http://europeanpapers.eu/en/system/files/pdf_version/EP_eJ_2016_2_12_Insight_Giacomo_Biagioni_0.pdf .

[65] Case C-176/03, *Commission v Council*, I-7879, A. MIGNOLLI, *La Corte di giustizia torna a presidiare i confini del diritto comunitario. Osservazioni in calce alla sentenza C-176/03*, in *Studi sull'integrazione europea*, 2006, p. 327, F. JACOBS, *The Role of the European Court of Justice in the Protection of the Environment,* in *Journal of Environmental Law,* 2006, p. 185, R. PEREIRA, *Environmental Criminal Law in the First Pillar: A Positive Development for Environmental Protection in the European Union?,* in *Energy and Environmental Law Review*, 2007, p. 254, L. SCHIANO DI PEPE, *Competenze comunitarie e reati ambientali: il "caso" dell'inquinamento provocato da navi,* in P. Fois (ed.), *Il principio dello sviluppo sostenibile nel diritto internazionale ed europeo dell'ambiente,* Naples, 2007, p. 463.

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

approach followed by the Court in this case "*is a functional approach (...). The possibility for the Community legislator to provide for measures in the criminal field derives from the need to enforce Community legislation*"[67]. In a subsequent case[68], the Court further emphasized the difference between the identification of the European Community's competence to regulate criminal aspects of environmental protection and the actual competence of the Community itself to establish the kinds and levels of penalties (always under relevant criminal law and procedural criminal law) applicable to cases of violation of environmental standards, being such competence clearly not attributable to the European Community in the period prior to the Lisbon Treaty.

The Lisbon reforms were part of a broader review of the sector relating to judicial cooperation in criminal matters, "transferred" in the Title V of the Treaty on the functioning of the European Union relating to the Area of Freedom, Security and Justice (AFSJ), following the abolition of the so-called "Third pillar" established with the Maastricht Treaty. Art. 83, paragraph 2, TFEU, in particular, highlights that the possibility for the Union to adopt directives establishing minimum measures aimed at defining crimes and related sanctions can emerge only if this proves to be "essential" for the effective implementation of a Union policy in an area subjected to legislative harmonization. In this case, an EU legislative act (directive) aimed at regulating topics with a criminal law meaning can be adopted with the same legislative procedure (ordinary or special) followed to implement the regulatory framework aimed at achieving the aforementioned harmonization in the relevant sector (e.g., the various kinds of "ecological" crimes listed in the directive 2008/99[69], see *infra,* corresponding to issues of environmental protection pursued at EU level by means of *parallel* acts based on the relevant TFEU rules on environmental protection). Some interpretative problems, however, stem from the need to verify the "essential" character of a legal source dealing with criminal law matters in order to "effectively implement" an EU policy [70].

For the sake of completeness, and also with the view of underlying the relevance given under the Lisbon reforms to these topics, one should not forget the *emergency brake* and an *accelerator* mechanism foreseen under articles 82(3) and 83(3) TFEU (respectively, on approximation of some aspects of criminal procedure and on approximation of criminal offences and sanctions in some areas of criminal law listed at article 83 nn.1 and 2). The sensitiveness (both legal and political) of those aspects is proven in particular by the mentioned *emergency brake* – that is, the possibility for a Member State to oppose a draft legislative act that would "affect fundamental aspects of its criminal justice system", by submitting the question to the European Council – for which a specific declaration (n. 26) has been adopted in order to allow the Council of the EU to intervene in cases where one Member States decides to opt-out a directive to be adopted according to mentioned TFEU's provisions. Under same declaration, it is also foreseen the

[67] See COM (2005) 583 final, Communication from the Commission to the European Parliament and the Council on the consequences of the (abovementioned) Court's judgment of 13 September 2005. This statement allows us to fully understand the rationale of the Court's decision in favor of embedding the matter in question in the EC Treaty, and not in that on the EU Treaty pre-Lisbon. This is, however, a long-standing view of the Court of Justice of the European Union. Indeed, ever since the *Simmenthal* case (of 9 March 1978, 106/77, ECR 1871) the Court of the European communities evidenced the need that EC law obligations (when stemming from an EC directly applicable act, e.g., a regulation) be implemented at the national level also by means of criminal law acts (C. AMALFITANO, *Commentary to art. 83 TFEU,* in A. Tizzano (ed.), *Trattati dell'Unione europea,* 2014, part. at p. 905).

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

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

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

chance for any Member State to ask the Commission to examine the situation under art. 116 TFEU (that is to say, with the chance of adopting a directive aimed at eliminating distortions of competition created by the differences among member states' legislative frameworks[71]).
Under wider perspective, one should consider that EU is based on several general principles aimed at establishing an effective, reliable and consistent legal system based on minimum standards equally applicable to EU Member States and the EU as such. These general rules and principles serve as "blocking devices " whenever relevant sources of EU law, while aiming at the same legitimate objectives pursued by the EU treaties, do not establish sufficiently detailed and coherent legislative frameworks as to entail effective and stringent obligations for EU Member States. For example, in the area of freedom, security and justice (AFSJ), since the Treaty of Amsterdam, the EU has developed its own legislation step by step, without however being able to cover in an always effective, coherent and complete way the many topics that fall into that ambit of law.
EU action on criminal law has always had a different (more limited?) scope than that of other areas of EU action and legislation. Leaving aside the issue of Member States' duty to transpose in their own legislation an EU directive, this kind of source, to which EU makes particular recourse in the area of criminal law (see *infra*), is in general fit to force the member states in the achievement of same directive's goals. This issue is different from that of selecting which, among an EU directive's provisions, might perform *direct effects* in the national legal system, e.g. in cases where directive's provision(s) is(are) apt to grant or to improve individual rights/freedoms not foreseen or not adequately protected by a corresponding national legislation. On the opposite, EU directives' provisions aimed at improving the cooperation among member states in the area of criminal law (in the context of the Area of Freedom security and justice, AFSJ, specifically devoted to this kind of cooperation, see Chapter 4 in Title V of the Treaty on the Functioning of the European Union, TFEU) cannot be begged by national authorities or judiciaries in order to restrict individual rights[72].
Under a different perspective, the *Pupino* case[73] has been particularly clear in indicating that one of the main EU legislation's goals in the criminal law area is that of increasing and deepening, as far as possible, the protection of victims of crimes. In the EU Court's view, although the EU did not have exclusive competence in the relevant legislative field, priority should have been accorded to some provisions of the framework decision on the position of victims in criminal proceedings, that is, a source envisaged in the pre-Lisbon regime which was not directly applicable as such and whose provisions couldn't perform direct effects in national legal orders. EU Court has make aims pursued by the framework decision (that is to say, the protection of particularly weak individuals affected by crimes) prevail and, to this end, resorted to the "sincere cooperation " criterion, currently foreseen at art 4 (3) TEU. In fact, in accordance to that principle (previously foreseen at art. 5 EEC Treaty), the Court of Justice has frequently enhanced the content and the effects of obligations that for same EU Member States result from relevant EU law sources, especially when same content and same effects cannot be clearly inferred from related provisions of that sources. In the Court's words: "*It would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation - requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfillment of their obligations under European Union*

[71] On this provision, see *ex multis* A. ARENA, *Commentary to art. 116,* in A. Tizzano (ed.), *Trattati dell'Unione europea,* Milan, 2014, in part. at p. 1274.
[72] On this well established stanrdards of EU law, see among many others, P. CRAIG, G. DE BURCA, *EU Law. Text, cases and materials,* Oxford, 2010, p. 85. J RIDEAU, *Droit Institutionnel de l'Union Européenne,* Paris, 2010, p. 197, E. CANNIZZARO, *Il diritto dell'integrazione europea,* Turin, 2020, p. 141, R. ADAM & A. TIZZANO, *Manuale di diritto dell'Unione europea,* Turin, 2021, p. 182, U. VILLANI, *Istituzioni di diritto dell'Unione europea,* Bari, 2020, p. 313.
[73]Judgment of 16 June 2005, Case C-105/03, I-5285 C. LEBECK, *Sliding Towards Supranationalism? The Constitutional Status of EU Framework Decisions after Pupino*, German Law Journal, 2007, p. 501, E. HERLIN-KARNELL, *In the Wake of Pupino, Advocaten voor de Wereld and Dell'Orto,* German Law Journal, 2007, p. 1147.

law - were not binding also in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions".
In conclusion, though concerning a specific source of EU law aimed at protecting particularly fragile individuals (such as those victims of a crime), the cited case gives us a sufficiently clear example of the role played by the EU Court on those issues, explaining the juridical path that, though under some conditions, leads to giving precedence to EU legislation. Furthermore, in addition to the general principles of EU law, such as the aforementioned duty of sincere cooperation, we know that judicial cooperation in civil and criminal matters raises many questions relating to the protection of human rights.

2.2.2. Mutual trust as a requirement of criminal law in the EU

Same aspects dealing with the interactions between EU criminal policies and law and the relevant human rights that come into play in the same area achieve specific significance when it comes considering the position of those accused or convicted of a crime[74]. Indeed, the main purpose of the European Arrest Warrant (EAW)[75] is that of improving an effective prosecution through member states borders and inside the EU of the crimes listed in the same Framework decision establishing the EAW itself. The CJEU has acknowledged the chance for EU law to restrict some prerogatives enjoyed by individuals under national legislation, if such a limitation is aimed at improving the cooperation among judiciaries as it is pursued by the EAW itself [76]. In that case, the CJEU examined expressly the compatibility of the EAW system[77]

[74] In this context, one should not forget the s.c. *Taricco saga,* coming from an Italian Constitutional Court provisional decision (ordonnance n. 24/2017) invoking before the CJEU the national identity criterion (art. 4 n. 2 TEU), with the aim of challenging a rather rigorous reading offered by the CJEU of art. 325 TFEU, concerning the protection of EU financial interests, with respect to an Italian law (based on the favor rei criterion under art. 25, paragraph 2, Italian Constitution) that shortened the time-limits for initiating a criminal proceeding for infringement of fiscal legislation (see CJEU 8 September 2015, case C-105/14, *Taricco,* EU:C:2015:555 and a subsequent *revirement* under CJEU 5 December 2017, C-42/17*, M.A.S. e M.B,* ECLI:EU:C:2017:936): *ex multis* C. AMALFITANO, *Da un'impunità di fatto ad un'imprescrittibilità di fatto della frode in materia di imposta sul valore aggiunto?*, in *Quaderni di SIDI Blog*, 2, 2016; L.S. ROSSI, *Come risolvere la questione Taricco senza far leva sull'art. 4 n. 2 TUE?*, in *SIDI Blog*, www.sidiblog.org, 2017; P. MORI, *Taricco II o del primato della Carta dei diritti fondamentali e delle tradizioni costituzionali comuni agli Stati membri,* in *il Diritto dell'Unione europea*, *Osservatorio,* dicembre 2017; R. MASTROIANNI, *La Corte costituzionale si rivolge alla Corte di giustizia in tema di "controlimiti": è vero dialogo?,* in *Federalismi,* 2017, p. 2; L. GRADONI, *Il dialogo fra corti, per finta,* in *Quaderni SIDIBlog,* 2018, p. 5; D. GALLO, *La primazia del primato sull'efficacia (diretta?) nel diritto UE nella vicenda Taricco,* in *Quaderni SIDIBlog,* 2018, p. 48.

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

[76] Judgment of 26 February 2013. C-399/11, Melloni, p. 375 ss.; K. LENAERTS, *Exploring the Limits of the EU Charter of Fundamental Rights,* in *European Constitutional Law Review,* 2012, p. 375; P. MENGOZZI, *La rilevanza giuridica e l'ambito di applicazione della Carta alla luce della giurisprudenza della Corte di Giustizia*, in *Studi sull'integrazione europea,* 2015, p. 23; D. V. SKOURIS, *Développements récents de la protection des droits fondamentaux dans l'Union européenne: les arrêts* Melloni *et* Åkerberg Fransson, in *il Diritto dell'Unione europea,* 2013, p. 229; A. TIZZANO *L'application de la Charte de droits fondamentaux dans les États membres à la lumière de son article 51, paragraphe 1,* in *il Diritto dell'Unione europea,* 2014, p. 429 ss. For an overview see P. MORI, *Autonomia e primato della Carta dei diritti dell'Unione europea,* in G. Nesi & P. Gargiulo (eds.), *Luigi Ferrari Bravo. Il diritto internazionale come professione,* 2015, p. 169.

[77] The Court in particular examined one of the EAW provisions (Article 4a(1)(a) and (b) of Framework Decision 2002/584), and clarified that, according to that provision, "*once a person convicted in absentia was aware, in due time, of the scheduled trial and was informed that a decision could be handed down if he did not appear for the trial or, being aware of the scheduled trial, gave a mandate to a legal counsellor to defend him at the trial, the executing judicial authority is required to surrender that person, with the result that it cannot make that surrender subject to there being an opportunity for a retrial of the case at which he is present in the issuing Member State*". In order to

with fundamental rights, particularly in the light of the right to an effective judicial remedy and the right to fair trial set out in Articles 47 and 48(2) of the Charter of fundamental rights of the European Union. In the CJEU's view, the right of an accused person to appear in person at his trial is not absolute but can be disregarded. The Court further stated that the objective of the Framework Decision on judgments in absentia was to enhance procedural rights whilst improving mutual recognition of judicial decisions between Member States and found Article 4a(1) compatible with the Charter.

The main criticism on this decision, apart from more technical aspects specifically dealing with criminal and procedural legislations in different EU Member States (in the case at hand, Italy and Spain), lays on the fact that the Court compared some general requirements of EU institutional framework – such as mutual trust between different national procedural systems and mutual recognition of decisions between different EU Member States' authorities/judiciaries (inspiring as such the EAW mechanism) – with some core procedural rights enshrined in the Charter of fundamental rights of the European Union. This aspect has been reexamined and clarified further by the same Court in Luxembourg in a subsequent case[78] , when, specifically on the *mutual trust* principle, the Court had the chance to clarify what follows: *... the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law… Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.* This rests among one of the crucial and most controversial aspects of current EU law and integration process, and also as far as the chance of strengthening environmental protection in the EU legal system and between EU member states is concerned. Indeed, it should be envisaged the possibility that an environmental crime equal to *ecocide* be included among criminal acts for which all existing procedural means such as the EAW shall be of essential support for an effective prosecution of same crimes across EU. In this context, a continuing balance between, on the one hand, the need that all relevant procedural rights of the accused be adequately protected and, on the

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better clarify the controversial matter, it could be recalled that under Italian procedural law it is impossible to appeal against sentences imposed *in absentia*: consequently, Mr. Melloni, who should have been rendered by the Spanish judiciaries to the Italian ones via an EAW adopted by the Spanish authorities, requested that the execution of the EAW be made conditional upon Italy's guaranteeing the possibility of appealing against that judgment.

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

other, the need that relevant crimes going under the *ecocide* be effectively pursued into each of EU member states, emerges as one of the most essential and still debated topics for the definition of a *new* crime for the protection of the environment across Europe[79].

2.2.3. Notes on the *external* dimension of EU criminal law and policy

In this context, EU runs the specific task of taking part to the fight of crimes with an international character by means of a specific cooperation agreement concluded with the abovementioned ICC in the context of EU Common Foreign and Security Policy's tasks [80].

Following the Kampala Review Conference held on 31 May – 11 June 2010 , the EU updated its Common Position 2003/444/CFSP by adopting Council Decision 2011/168/CFSP on 21 March 2011[81] aimed at a) advancing support for the Rome Statute by promoting the widest possible participation in it, b) preserving the integrity of the Statute, c) supporting the independence of the Court and its effective and efficient functioning, d) supporting co-operation with the Court and to assist it in implementing the principle complementarity.

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[79] On the principle of mutual trust (notoriously inspired on the mutual recognition principle, as a general device in the internal market functioning, e.g. CJEU 20 February 1979, C-120/78, *Rewe-Zentral,* Racc. 649, cd. *Cassis de Dijon*), in the relevant AFSJ, the literature is abundant. Let us quote here just the followings: G. DE KERCHOVE,, A. WEYEMBERGH (éd.), *La confiance mutuelle dans l'espace pénal européen/ Mutual Trust in the European Criminal Area*, Bruxelles, 2005; C. AMALFITANO, *Mandato d'arresto europeo: reciproco riconoscimento vs. diritti fondamentali? Note a margine delle sentenze Radu e Melloni della Corte di giustizia,* in *Diritto penale contemporaneo*, (dirittopenaleuomo.org); K. LENAERTS, *The Principle of Mutual Recognition in the Area of freedom, Security and Justice, il Diritto dell'Unione europea*, 2015, p. 525*;* A. WILLEMS *Mutual Trust As a Term Of Art In EU Criminal Law: Revealing Its Hybrid Character,* in *European Journal of Legal Studies*, 2016, p. 211; D. DÜSTERHAUS, *In the Court(s) We Trust - A Procedural Solution to the Mutual Trust Dilemma,* Rivista, 1, p. 26, P. MENGOZZI, *L'applicazione del principio di mutual fiducia e il suo bilanciamento con il rispetto dei diritti fondamentali in relazione allo spazio di libertà, sicurezza e giustizia,* in *Rivista,* 2017, 2, p. 1; E. PISTOIA, *Lo status del principio di mutua fiducia nell'ordinamento dell'Unione secondo la giurisprudenza della Corte di giustizia. Qual è l'intruso?,* Rivista, 2017, 3, p. 26; L. PANELLA, *Mandato di arresto europeo e protezione dei diritti umani: problemi irrisolti e "incoraggianti" sviluppi giurisprudenziali,* in Rivista, 2017, 3 p. 5; F. MAIANI, A. MIGLIONICO, *One principle to rule them all? Anatomy of mutual trust in the law of the Area of Freedom, Security and Justice,* Common Market Law Review, 2020, p. 7; S.A. BLOK, T. VAN DEN BRINK, *The Impact on National Sovereignty of Mutual Recognition in the AFSJ. Case-Study of the European Arrest Warrant,* German Law Review, 2021, p. 45,; L.S. ROSSI, *Fiducia reciproca e mandato d'arresto europeo. Il "salto nel buio e la rete di protezione,* 2021, p. 1. In the context of an analysis on respect of rule of law in the EU Member States, M. CARTA, *Unione europea e tutela dello Stato di diritto negli Stati membri,* Bari, 2020, at p. 81 ff.

[80] Agreement between the International Criminal Court and the European Union on cooperation and assistance OJ L 115, 28.4.2006, p. 50. For an overview of issues related to EU external action on Justice and Home affairs, see, *ex multis,* T.A. ALEINIKOFF, V. CHETAIL (eds.), *Migration and International Legal Norms*, the Hague-London-Boston, 2003 G. CELLAMARE, *Gli accordi di riammissione dell'Unione europea,* in *Studi sull'integrazione europea*, 2010, p. 369; M. CREMONA, *EU External Action in the JHA Domain. A legal perspective*, EUI Working Paper, n. 24, 2008; M. CREMONA, J. MONAR, S. POLI (eds.), *The External Dimension of EU's Area of Freedom, Security and Justice,* Brussels, 2011; F. TRAUNER & H. CARRAPIÇO, *The External Dimension of EU Justice and Home Affairs after the Lisbon Treaty: Analysing the Dynamics of Expansion and Diversification*, in *European Foreign Affairs Review,* 2011, p. 1; J. MONAR, *The External Dimension of the EU's Area of Freedom, Security and Justice. Progress, potential and limitations after the Treaty of Lisbon*, Stockholm, 2012; A. ROSAS, *EU External Relations: Exclusive Competence Revisited,* in *Fordham International Law Journal*, 2015, p. 1073; G. CAGGIANO, *Scritti sul diritto europeo dell'immigrazione,* II ed., Turin, 2015; P. FRANZINA (ed.), *The external dimension of EU Private international Law after Opinion 1/13,* Cambridge, 2016, S. M. CARBONE, C. TUO, *Il nuovo spazio giuridico europeo in materia civile e commerciale. Il Regolamento 1215/2012,* Turin, 2016.

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

By means of another decision of the Political and Security Committee in the Council (PSC)[82], an Action Plan to follow-up on the abovementioned Decision 2011/168 on the International Criminal Court was adopted, with the following finalities: a) coordinating EU's activities to implement the objectives of the Decision; b) granting the universality and integrity of the Rome Statute; c) keeping independence of the International Criminal Court and its effective and efficient functioning; d), enhancing co-operation between EU and the Court, an e) supporting implementation of the principle of complementarity[83].
On 25 June 2012, the Council of the EU adopted a Strategic Framework on Human Rights and Democracy with an Action Plan for putting it into practice[84].
Following another Action plan in the meanwhile adopted on 2015[85], and after the appointment of the first EU Special Representative for Human Rights (EUSR) in 2012 and the 2019 Council conclusions on democracy[86], the current High Representative of the EU for Foreign Affairs and Security Policy (art. 18 TEU) submitted a more recent EU Action Plan on Human Rights and Democracy 2020-2024[87] where it is openly denounced a "widespread impunity for human rights violations and attacks on the role of the International Criminal Court" with the resulting acknowledgment of the need that EU external action be strengthened in the relevant field (see page 2 of the Action Plan 2020 on promotion of human rights and democracy).

2.2.4. Few remarks on *Brexit*

It is also worth taking into account the regime established, in particular, for United Kingdom in the light of recent Brexit agreement. The core issue, with regard to current *new* position of UK as a non-EU member State, and after the end of a transitional period in 2020, rests on the application (or not) of current regulation on the European Arrest Warrant[88]. On this, some have submitted a three-cases scenario:

1. Draft of a 'surrender agreement' between EU and non-EU countries as it was adopted between EU/Schengen zone countries and the EU as such, on the one hand, with Norway and Iceland, on the other hand [89].
2. It is also under discussion that, in the absence of a compromise, UK asks to access the 1957 Council of Europe Convention on extradition[90] (a different international agreement in the context of the Council of Europe system), as it allows accession of non-EU countries to it: as a consequence, UK

[82] n. 12080/11 of 12 July 2011.

[83] Complementarity is at the core of the functioning of the Rome Statute (art. 1): it "*1) protects the accused if they have been prosecuted before national courts; 2) it respects national sovereignty in the exercise of criminal jurisdiction; 3) it might promote greater efficiency because the ICC cannot deal with all cases of serious crimes; and 4) it puts the onus on states to do their duty under international and national law to investigate and prosecute alleged serious crimes (that is, it is not just a matter of efficiency but a matter of law, policy, and morality"* (Sails, p. 3).

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

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

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

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

[88] 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States OJ L 190, 18.7.2002, p. 1.

[89] 2006/697/EC: Council Decision of 27 June 2006 on the signing of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway. Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway OJ L 292, 21.10.2006, p. 1.

[90] European Convention on extradition, 13 December 1957, https://rm.coe.int/1680064587.

could become a non-EU Contracting party to the Convention itself[91]. A similar chance is foreseen also under other Council of Europe international agreements related to issues of judicial cooperation on criminal matters [92].

3. In a "worst-case scenario", where no chance for UK exists of getting into an agreement with EU under the alternate conditions indicated in the letters a) and b) above, an UK legislative act could always be amended or adopted as to allow that a mechanism (to be taken at the national level) such as the European Arrest Warrant be granted to citizens of EU member states, even referring to relevant EU legislation (cooperation in the criminal law area) for that purpose[93].

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

As far as environmental protection is concerned, but always considering relevant framework on criminal law cooperation, it is worth noting that Art. 37 of the Charter of Fundamental Rights of the European Union (CFREU) reads as follows: "A high level of environmental protection and the improvement of its quality must be integrated into Union policies and guaranteed in accordance with the principle of sustainable development". It would therefore be questionable whether and to what extent such a provision of the Charter effectively enshrines a fundamental human right or whether it is limited to establishing, as it also seems from its wording, a "principle", thus offering a concrete example of the distinction made by art. 52 (5) of the Charter itself in the revised version and proclaimed in 2007.
Although Art. 37 CFREU is clearly aimed at founding an un-enforceable individual right. "Principles" enucleated in the same Charter (and to which art. 37 CFREU seems to make reference) are anyway also apt to gain, precisely through their inclusion in the Charter, a deeper political (and even legal) meaning that can be developed via the *acquis communautaire* and CJEU case law, being also apt to be meant, even though potentially, as true individual rights. However, the fact remains that the Court has not been particularly inclined to depart from the content of art. 52 par. 5 of the Charter, according to which the provisions of the Charter encompassing principles "can be implemented by legislative and executive acts adopted by institutions, bodies, offices and agencies of the Union and by acts of Member States when they implement Union law, (...) [e] may be invoked before a judge only for the purpose of interpreting and checking the legality of said acts ". In particular, following the relevant case-law[94] the fact that the

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

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

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

[94] See CJEU Judge Trstenjak's conclusions in the case C-282/10, Dominguez, ECLI: EU: C: 2011: 559. Essentially in the same sense - albeit with some further problematic profile regarding specifically the possibility that, e.g., the rule under art. 26 of the Charter (regarding the protection of the disabled) be meant, alternatively, as a "right" or as a "principle" pursuant to art. 52 par. 5 of the Charter itself - see CJEU of May 22nd , 2014, case C-356/12, Glatzel, ECLI: EU: C: 2014: 350, N. LAZZERINI, *Commentary on Art. 52,* in R. Mastroianni, O. Pollicino e others (eds.),

"principles" require, in order to be operational, regulatory and organizational interventions of the Union and its Member States clearly emerges from the expression "*promote its application"*, contained in art. 51, no. 1, second sentence, of the Charter[95], also related to the "principles" under same art. 52 para. 2 of the Charter.

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

Going beyond the boundaries of a contentious provision such as art. 37 of the CFREU, one should not forget how environmental law under current TFEU and related legislation has consistently progressed and become a core objective of most of EU policies. Besides, environmental protection is a true transversal aim of any of the EU activities, as it can be inferred also from the main general provisions of the TEU (in part. under art. 3 para. 3, with explicit reference to sustainable development goals and a "high level" of environmental protection and improvement of its quality) [96] .

2.2.6. Environmental liability

Beside EU competence on criminal law matters (and also at the level of EU external relations), issues of individual damages occurring from activities with significant environmental impact are also specifically addressed under relevant EU rules of private international law (whose competence is now established under art. 81 TFEU), whenever individuals might claim compensation for damages (including those with a broader character connected to a significant negative change of own life conditions) suffered from private and public entities' behaviors with a meaningful ecological impact with a trans boundary character[97]. Directive 2004/35 forms a framework for environmental liability – deprived of any criminal

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Carta dei diritti fondamentali dell'Unione europea, Milan, 2017, p. 1076; B. NASCIMBENE, *Carta dei diritti fondamentali, applicabilità e rapporti fra giudici: la necessità di una tutela integrata, European Papers*, 2021, p. 81.

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

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

[97] e.g. arts. 4 and 7 Reg. 864/2007 (on the law applicable to non-contractual obligations, OJ 2007 L 199 p. 40) concerning the individual right to claim damages, including the cases where environmental damages might even just indirectly ensue from bad environmental behaviors committed in a place different from that where same damages have occurred. Jurisdictional issues for controversial cases arisen from non-contractual obligations, with particular reference to environmental damages, are also dealt in Brussels I Regulation Recast (Regulation No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) OJ 2012 L 351 p. 19); R. BARATTA, *Réflexions sur la cooperation judiciaire civile suite au Traité de Lisbonne*, in G. Venturini, S. Bariatti (eds.), *Nuovi strumenti del diritto internazionale privato. Liber Fausto Pocar,* Milano, 2009, part. p. 11; M. Bogdan, *Some Reflections Regarding Environmental Damage and the Rome II Regulation,* in G. Venturini, S. Bariatti (eds.), *Nuovi strumenti del diritto internazionale privato. Liber Fausto Pocar,* Milano, 2009, p. 75; C. TUO, *Armonia delle decisioni e ordine pubblico,* in *Studi sull'integrazione europea*, 2013, p. 507; D. LECZYKIEWICZ, *Human Rights and the Area of Freedom, Security and Justice: Immigration, Criminal Justice and Judicial Cooperation in Civil Matters*, in M. Fletcher, E.Herlin-Karnell and C. Matera (eds.), *The European Union as an Area of Freedom, Security and Justice*, London, 2016, p. 57; K. LENAERTS, *The European Court of Human Rights and the Court of*

law character – based on the "polluter pays" principle, with the view of preventing and remedying environmental damage. It doesn't apply to activities aimed at the national defense or international security. The Directive aims at preventing and remedying environmental damage and does not affect rights of compensation for traditional damage granted under any relevant international agreement regulating civil liability.
Member States may allow that operators who are not at fault or negligent shall not bear the cost of remedial measures, in situations where the damage in question is the result of emissions or events explicitly authorized or where the damage could not have been known when the event or emission took place. Member States are also invited to report the Commission on the experience gained in the application of this Directive so as to enable the Commission to consider whether any review of Directive itself would be appropriate, taking into account the impact on sustainable development and future risks to the environment.
Articles 12 and 13 fix the conditions required to be entitled respectively: a) to submit observations to the competent Authority regarding the existence of environmental damages; or b) to submit legal actions before an independent and impartial public body, for the purpose of reviewing the decisions adopted by the competent Authority. Same Articles 12 and 13 give legal standing to those who "have a sufficient interest in the decision-making process on environmental matters concerning the damage" or who "claim the violation of a right", in cases where national law requires it. Obviously, the constitutive elements of these conditions are determined by national legislations, as the directive only requires the recognition that a *sufficient interest* of all non-governmental organizations that promote environmental protection exists. It must however be noticed that an effectiveness requirement exists with the view that the procedural means offered at national level are apt to the pursuance of same directive's goals [98].
Finally, the directive limits its scope where it provides for the possibility for national legal systems to grant the right to exercise the actions referred to in art. 12 and 13, only in cases where there is a violation of a specific subjective legal situation, whether it is qualified as a true right or "legitimate interest" (in accordance, in particular, with the Italian legal system). It remains to be seen whether any individual can ultimately rely on the protection afforded for the correct application of EU law following the relevant EU Court of Justice case law: in fact, as is well known, starting from the *Francovich* and *Brasserie du Pêcheur* judgments[99], the Court affirmed the principle of responsibility of the Member States by requiring them to

Justice of the European Union: Creating Synergies in the Field of Fundamental Rights Protection, in *il Diritto dell'Unione europea*, 2018, p. 9.

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

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

compensate the damage caused to individuals for any breach of EU law obligations whenever such violations are attributable to any national body, be it legislative, judicial, or executive.
Apart from the lack of a clear depiction of a wide right of access to justice under Dir. 2004/35, the EU legal system has anyway bestowed the possibility for individuals to invoke the breach of procedural criteria underlying, in particular, environmental impact assessments procedures, e.g., in cases where, in addition to the interrupting remedy or to the duty of restoring the *status quo ante*, the Court has provided the possibility of imposing compensation measures on public or private companies in favor of any damaged individuals [100].
The CJEU has additionally found a general right of information and participation of individuals in decision-making processes on environmental matters. Furthermore, that same Court has raised the degree of protection in the judicial context in the environmental sector, particularly in favor of environmental associations, recognizing a widespread judicial review particularly in the field of environmental impact assessment, assigning to national judges (and this also under the terms of art. 19 par. 2 TEU) the function of intervening, according to the relevant procedures and instruments of national law, also against legislative acts that ratify situations where the related procedures imposed by Union law are infringed.
More generally, EU law on environmental protection can affect national procedures and procedural tools aimed at conferring effectiveness on the protection in question, providing for an extensive understanding of the relevant criteria of legitimacy and interest to act in order to guarantee the widest access to justice in this field. It can be recalled, for instance, how under art. 16 of Directive 2008/1/EC of 15 January 2008, on integrated pollution prevention and reduction[101], EU Member States must grant suitable procedures (including those implementing the precautionary principle) apt at offering "members of the public concerned" an effective access to justice "to challenge the substantive or procedural legitimacy of decisions, acts or omissions subject to the provisions on public participation established by this Directive " (…) provided such applicants a) have a sufficient interest or b) claim the violation of a right, in cases where the administrative procedural law of a Member State requires this condition "[102].

2.2.6.1. Individual right to appeal against EU legislation

In the different perspective of challenging European Union acts, including those insisting on environmental (or other public policies') standards, and also under a general accountability requirement that is binding on same EU as a supranational actor, one should recall that the Court of the European Union has strictly interpreted the individual right to appeal against EU acts of general scope in accordance

[100] In judgment of 20 October 2011, case C-474/10, Seaport, ECR 10227 and CJEU January 7, 2004, case C-201/02, Delana Wells, I-723, in particular, pp. 66 and 70, the Court clearly establishes the obligation for States to compensate for the damage caused by the failure to implement the environmental impact assessment procedures, on the assumption that a general obligation for the Member States of the Union exists to remove unlawful consequences of a breach of EU law (see ex multis, 19 November 1991, joined cases C-6/90 and C-9/90, Francovich and Others, n. 24 above, part. paragraph 36 and Court of Justice of 5 March 1996, Brasserie du Pêcheur SA, joined cases C-46/93 e C-48/93, n. 24 above, on this see an abundant literature, U. VILLANI, *Istituzioni di diritto dell'Unione europea,* Bari, 2020, p. 368.

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

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

with art. 263 par. 4 TFEU [103], confirming the duty for individuals to prove, in such cases, that a general act of the EU affects them "individually" and "directly"[104].
In a quite relevant case dealing with reforms of the individual right to challenge an EU act under mentioned art. 263 TFEU, advocate general Jacobs underlined what follows: "[under art. 263 par. 4 TFEU] … *an applicant is individually concerned by a Community measure where the measure has, or is liable to have, a* substantial (emphasis added) *adverse effect on his interests. That solution has the following advantages: - it resolves all the problems set out above: applicants are granted a true right of direct access to a court which can grant a remedy, cases of possible denial of justice are avoided, and judicial protection is improved in various ways; it also removes the anomaly under the current case-law that the greater the number of persons affected the less likely it is that effective judicial review is available; the increasingly complex and unpredictable rules on standing are replaced by a much simpler test which would shift the emphasis in cases before the Community Courts from purely formal questions of admissibility to questions of substance; such a re-interpretation is in line with the general tendency of the case-law to extend the scope of judicial protection in response to the growth of powers of the Community institutions*" [105].
To sum up, an attempt exists at EU level to broaden the individual right to challenge EU acts, that is to say, by allowing a path looking into the true (*substantial*) effects of an EU act – be it legislative (e.g. regulations or directives) or of any other kind (including *sui generis* acts) –, beyond the effects formally fixed under the same provision (the act must be of individual and direct concern). This is only partially achieved under current art. 263 para. 4 TFEU wording: in fact, while, on one hand, that provision refers to *acts* in the broadest meaning when considering the individuals' right to challenge them, on the other hand, the same provision reaffirms the abovementioned requirements (be it of individual and direct concern) in order to assess if an individual is effectively entitled to challenge the act in question (be it an act general in scope or an act that is not addressed to those who claim to be damaged by it)[106].
This is of particular significance for cases where an EU act deals with environment or other subjects that, directly or not, impinge on public health and safety aims (including several aspects of other EU policies, such as agricultural policy or different issues of internal market and free movement of goods), though it is true that, in general, EU law sources related to those matters are inspired to general standards such as the precautionary principle: this implies that, in most cases, EU law sources aimed at environmental protection can infringe other individuals' interests (e.g. private companies) of mainly economic character. This is among the reasons why EU law provides two other main avenues: *1)* on the one hand, the legality (under same art. 263 TFEU meaning) of an EU act could be challenged before a national judiciary and, in that context, the same question can be raised by such judiciary before the same EU court via a preliminary question under art. 267 TFEU: this avenue presumes that the national judiciary is invested of the relevant controversial matter via the infringement of a national act implementing the relevant EU

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

[104] See, among many others, CJEU of 27 Febr. 2014, case C-132/12P, Stitching Woonpunt and others.

[105] Opinion of Mr. Advocate General Jacobs delivered on 21 March 2002, *Unión de Pequeños Agricultores v. Council of the European Union*, C-50/00 P, I-6677.

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

act[107]; *2)* an individual presumably damaged by an EU act can submit an action for damages according to current articles 268 and 340 (2) TFEU, though this different kind of action is conceived as autonomous and of a general character in conformity with the *neminem laedere* principle, applicable as such to any kind of act, including any act adopted by EU institutions, be it of a legislative character or not [108].
In the case of the associations and interest groups, though considered as more widely entitled to take action in order to challenge the negative feedbacks of an EU legislative act on the public and/or on specific groups of EU citizens or populations, a steady case-law has listed three alternative conditions for this kind of action to be considered admissible under same art. 263 par. 4 TFEU: 1) when same associations or interest groups enjoy a series of procedural rights; 2) where their members are also concerned by the EU legislative source at stake; 3) where the association or interest group as such is affected by same EU act[109].

2.2.7. Criminal law liability for infringement of environmental standards

Directive 2008/99[110] sets some common minimum standards throughout the territory of the Union, also with the view of increasing effectiveness to investigation activity of the Police Forces and with the view of providing assistance both within a Member State and at the level of cooperation between States. To achieve those goals, the Directive moves along two lines: on the one hand, it indicates a series of "illegitimate" conducts to be penalized and on the other it introduces the "criminal liability" of legal persons. It foresees therefore a criminal liability as such, leaving no room for choice to the recipient States, regardless of the criminal law system where same Directive must be transposed and implemented. In this perspective, the problem has arisen of compatibility between the criminal liability of legal persons and the criminal systems – such as the Italian one – that follow the *societas delinquere non potest* principle. In fact, the Italian Constitution under its art. 27 first paragraph stipulates that criminal liability is personal, as such pertaining to individuals and consequently excluding it for legal persons' behaviors. Apart from the very detailed list of criminal behaviors formally covered by the Directive under its art. 3, in order for the conduct indicated above to integrate the criminal offense, it requires the coexistence of three elements: a) the conduct must infringe EU legislation referred to in Annexes A[111] and B[112] of the

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

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

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

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

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

[112] **Annex B** lists EU legislation adopted on the basis of the Euratom Treaty, the violation of which constitutes an unlawful act pursuant to mentioned Article 2, letter a), point ii). Euratom, formerly EAEC, also assumes exclusive competence, with respect to the Member States, with regard to controls concerning the prohibition of diverting the use of nuclear materials from the civil purposes to which they are intended by the Member States themselves. Rules on nuclear safety are contained in Chapter 3 of Title II of the Euratom Treaty. As regards the regulations concerning the ban on the marketing of radioactive products, see Reg. 3954/87 (which established the maximum admissible

same directive; b) the existence of the psychological element, necessary for the completion of the crime, corresponding to a willful misconduct or to negligence in the form of gross negligence; c) the pipelines must cause damage or determine a concrete danger. These are no crimes of mere danger or conduct, but crimes of concrete danger or damage, with the punishment extended (pursuant to article 4) also to anyone who contributes by way of instigation or aiding and abetting.
The second important change is represented by art. 6 of the directive. According to this provision, legal entities can be held responsible for the unlawful conduct (as set out in the directive) committed "to their advantage" by individuals who hold top positions within the same legal person, and, more precisely: "by any person who holds a prominent position within the legal person, individually or as part of an organ of the legal person, by virtue of: a) the power of representation of the legal person; b) the power to take decisions on behalf of the legal person; or c) the power to exercise control within the legal person. " [113].
Following the Directive's approach and reasoning, a responsibility (to which a Member State must attach specific criminal law significance) exists even when there is a lack of surveillance or control by those indicated above, such as to allow the commission of a crime by a person put under authority. Therefore, a liability of a "active" kind can be affirmed for individuals in top positions, but the directive foresees a title of "non-active" causality as well, which is anyway configured when the legal entity achieves an advantage from the criminal act indicated by the directive. Obviously, the liability of the legal person does not prevent criminal action against individuals who may take part in various ways in the commission of the crime.
The core provision of the Directive lays in the general requirement (art. 5) that measures at the national level be effective, proportionate and dissuasive for the aim of fighting the different kinds of crimes listed therein. It is firstly interesting noting the lack, in the EU system, of any reference to the social aim of the criminal legislation as such, that is to say, the general criminal legislation's scope of "educating" criminals in the attempt of granting their social reintegration (art. 27 par. 3 It. Constitution).
Secondly, the lack of any specification (and the lack of any attribution of competence to the EU institutions for that aim) on the true character of the related penalties (e.g., by indicating a minimum level of the highest penalty) is admittedly based on the need to preserve a principle of *coherence* between the several legislations of EU member States, beside the still less developed institutional framework surrounding EU competence in the relevant field. In fact, notwithstanding the significant changes after the Lisbon Treaty, EU action must still be considered as "required" (see art. 82 n. 2 TFEU) or "essential" (art. 83 n. 2 TFEU), alternatively, when such an action is aimed at "facilitating" mutual recognition of decisions or police cooperation for crimes with a trans-boundary dimension, and where the need arises to made an already existing EU legislation (such as that related to the protection of the environment) truly effective by means of approximation of different national legislations.
While the above reasoning is aimed at grounding the still vague terminology employed in the directive 2008/99 and with the view of assessing the relevant penalties' character, it must be reckoned the fairly limited room left to the supranational level for the aim of compelling the Member States in an area (criminal law) that is apt as such to restrict some basic individual "procedural" rights now affirmed in the same Charter of the fundamental rights of the European Union under the "Justice" chapter (e.g. Art. 49 dealing with legality and proportionality of crimes and penalties). This is among the reasons why in 2012

levels of radioactivity for food products and for animal feeds in case of abnormal levels of radioactivity following a nuclear accident or in any other case of radioactive emergency, OJ of 30 December 1987, L 371), on which see the ruling of the Court of Justice in case C-70/88, European Parliament v. Council Rec. I-4529, s.c. *Chernobyl II.*

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

a group of experts[114] has been charged to monitor the implementation via criminal law of some relevant EU's objectives, including, *inter alia,* the protection of EU financial interests (e.g. art. 325 TFEU): in this communication the Commission has acknowledged that the recourse to criminal law tools for the pursuance of some relevant EU law objectives is not always required. Reference to mentioned characters of the penalties foreseen under EU legislation ("effective, proportionate and dissuasive", beside the need to comply with general principles of proportionality and subsidiarity) is now a standard clause in the area of EU criminal law.

Also, one should not forget that under both international and EU law several general principles (e.g. precautionary principle, polluter pays) are well established and shared. In some cases, a debate between the General Court of the EU and the CJEU has proved how such criteria could improve environmental protection at EU level: e.g. the need of a balance between the Aarhus Convention's provisions and the EU Regulation 1367/2006 was raised by the EU General Court[115]. This could prove, on the one hand, an increased awareness and readiness at the international and EU levels to improve environmental protection under mentioned general standards, and, on the other hand, the need to carefully consider if a stronger defense of such standards by means of e.g. a strict liability criterion under same EU law would meet the sufficient support at the level of each single government and political actor involved in the decision-making process.

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

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

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

Some (preliminary) conclusions

In the light of the above, one must consider the still partial scope of EU powers in the relevant area (criminal penalties), although the abovementioned EU directives' wording on the penalties' character at

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

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

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

It remains however unclear if the directive on environmental crimes meets the suggestions the Court and other EU institutions submitted in the mentioned case on the Framework Decision on criminal penalties for environmental protection (case C-176/03). In fact, in that case the Court was clear by stating that criminal sanctions were to be considered as necessary for effective environmental protection. It might be debated whether the same directive 2008/99 (beside other sources dealing with similar issues [116]) has met the requirements indicated by the CJEU, considering the many different views in the meanwhile raised at the national level on the path towards a more harmonized and stringent EU policy on those topics.

In this context, one should however not forget the different approach followed by EU legislation by comparison to the typical approach followed at the international level. Indeed, the international community (by means of both customary or treaty law rules) aims at affirming general standards regarding the protection of some basic human rights and, together with the definition of those rights, at affirming the corresponding duties on the States to protect those rights. In this case, the international community behaves similarly to a single State, where both general principles and legislative sources stem from a long practice and discussions where different needs and views from civil society, juridical doctrine and the political environment deserve due account On the other hand, the EU legal order is based on the crucial qualification as an "autonomous" legal system, from both the international legal order and from the legal orders of same EU member states [117]. This has been made particularly clear in the search of a common standard of protection for refugees in Europe. In this case, the two main standards of protection are represented, on the one hand, by the relevant ECHR provisions (being that Convention classified as a true international treaty), based on the ban of torture and of inhuman and degrading treatments[118], and, on the other hand, represented by the Dublin system based on a legislative act adopted in the EU. The ECHR system does not contemplate cooperation between its Member States: therefore, the ECtHR examines the behavior of the States parties to the ECHR exclusively for the purpose of assessing their compliance with the precepts of the Convention itself (principle of individual *non-refoulement*, pursuant to a *par ricochet* reading of Article 3 of the ECHR, and *collective non-refoulement*, according to art. 4 of Protocol n. 4 ECHR). The EU/Dublin legal system, on the other hand, essentially contemplates a system of administrative cooperation between Member States in the management of asylum applications submitted by non-EU citizens in one EU Member States. The foundation of this system is mutual trust (see above) between national systems, which in the sector in question (asylum law) is accompanied by the principle that only one Member State has competence to examine an asylum application and possibly to accept it. It is therefore clear that, though transposing the hints from the ECtHR (as subsequently

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

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

[118] ECtHR of 2011 *M.S.S. v. Belgium and Greece*, Appl. N. 30696/09 and of 23 Febr. 2012, Appl. 27765/09, *Hirsi Jamaa and others v. Italy,* see above.

accepted in full by the same EU Court of Justice[119]), the relevant legislation of the EU (Dublin) aims at specifying the scopes of the Strasbourg jurisprudence in this area for the sake of mutual cooperation between the EU Member States [120].

From the above, it is clear that the two legal systems – one belonging to the international law level and the other pertaining to a more *limited* legal system based on the EU treaties – pursue different objectives. Coming back to our main topic, EU is so far pursuing environmental crimes by means of a system where mutual trust and cooperation between national legal orders represent the cornerstones and the sole methodological source of inspiration for the legislator and the interpreter (the Court in Luxembourg). The several hurdles existing in the EU legal system should possibly be confronted to the pressure coming from the international arena around the definition of an ecocide and, in this perspective, push in favor of a braver legislative proposal aimed at the definition of a sufficiently autonomous crime (ecocide) in the context of existing EU legislation.

Some avenues for further development of EU law on those matters, also by amendment of directive 2008/99 (hopefully in the direction of a more explicit reference to the requirements of an effective penalty) could derive from abovementioned EU Action Plan on Human Rights and Democracy 2020-2024[121] where, as above recalled, it is openly remarked the need to strengthen cooperation between EU and the same International Criminal Court. This might entail also that, in the same EU, new consideration will be offered to *crimes committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land,* as already mentioned by the Office of the ICC Prosecutor [122]. Under this perspective, the tasks of the High representative of the EU (art. 18 TEU) of the context of the EU Action Plan 2020-2024 might help re-launching even at the EU level a more open debate on the pressing needs of environmental protection, today felt as particularly urgent in more and more areas of the world, including Europe.

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

[119] CJEU of 21 December 2011, C-411/10, *N.S.,* ECLI:EU:C:2011:865.

[120] The practical result of this is that of transposing in the same Dublin regulation the ban of *refoulement* established at the international leve (see under current art. 3 of Dublin Regulation), though on the basic consideration that legal systems of EU Member States are tied by general principles such as mutual trust and sincere cooperation. For this comparison, see recently C. EECKES, *Integrated Rights Protection in the European and International Context: Some Reflections about Limits and Consequences,* in I. Govaere & S. Garben (eds.), *The Interface between EU and International Law,* Hart publ., 2019, p. 106 ff.

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

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

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