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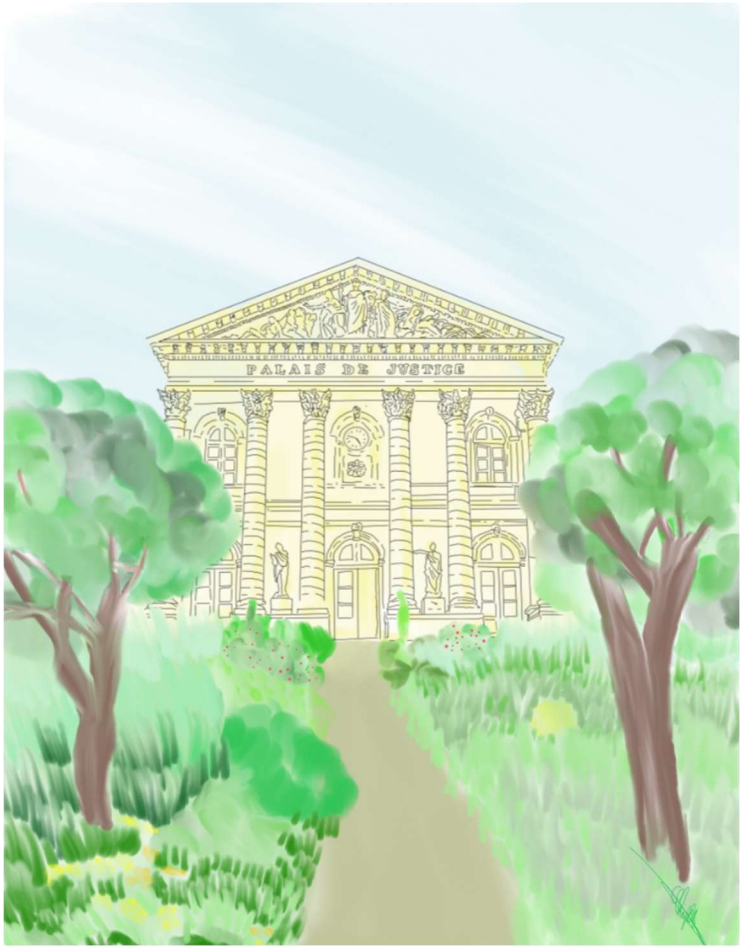
EFFECTIVE CIVIL ACTION FOR INDIVIDUALS SEEKING REPARATION FOR ENVIRONMENTAL DAMAGE IN EUROPE: CHALLENGES AND PROSPECTS



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On 27 March 2019, a dispute over toxic mining waste in Arica, Chile, first brought before the Chilean courts, and opposing 796 Chilean citizens and the Swedish company Boliden, ended after more than ten years. A court of appeal in Sweden dismissed the application on grounds of statute of limitations and the plaintiffs were required to pay millions in litigation costs.[1]
This disappointing outcome led the Swedish film director Lars Edman to wonder: 'Is Justice for all?'[2] Therein lies a more pointed question: as environmental damage affects everyone, is everyone entitled to obtain reparation? Statutes of limitations, the burden of proof and legal costs are some of the many challenges that face individuals seeking civil liability from polluters.

The Directive of the European Parliament and of the Council of 21 April 2004[3] describes environmental damage as any negative modification or degradation affecting species, their natural habitats, water, soil, or any natural resources directly or indirectly. However, the restrictive scope of this definition clashes with the extensive potential damage to individual property or human health that may occur with ongoing climate change. Thus, hereafter, environmental damage will also include its resulting negative effects on individuals.

The justice system has already seized upon the necessity to address this growing concern.
On the one hand, criminal proceedings may sanction activities endangering or harming the environment.[4] In fact, at European Union level, the inclusion of environmental offenses within the scope of the European Public Prosecutor's Office is under discussion.[5] However, criminal environmental justice remains in the hands of public prosecutors.
On the other hand, administrative proceedings allow the regulations and decisions of administrative bodies to be overturned or modified to ensure an effective fight against climate change.[6] However, such proceedings can only guide public policies and do not enable individuals to seek reparation from those liable for environmental damage.
In this context, civil procedure may be the entry point for citizens to act through their own legal personality when the environment is in jeopardy, either individually or as part of a class action.

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[1] The Court of Appeal for Northern Norrland (Sweden) T294-18, 27 March 2019, the Company Arica Victims KB v. Boliden Mineral AB.
[2] *Arica*, directed by Lars Edman and William Johansson Kalén, 2020, Lightdox.
[3] Parliament and Council Directive 2004/35/CE, OJ L 143, Art. 2.
4 For instance: the Finnish Supreme Court (KKO), 21 November 2019, in which the Talvivaara mining company was held accountable for the harm done to the environment by major wastewater leaks. In this case, the former CEO and chairpersons were respectively sentenced to a six-month suspended prison sentence and fines.
[5] European Parliament Resolution, 20 May 2021, OJ 2021 C 15/22.
[6] Conseil d'État (France), Assemblée, 10 July 2020, 428409: the French State was enjoined to take additional measures to achieve the objective of reducing greenhouse gas emissions by 40% by 2030.

Depending on the organization of the justice system in different states, such civil actions could be brought before both civil and administrative courts, as they are in France for example.[7]

International and European law took an early interest in repairing environmental damage by building a civil environmental justice system.

Already in 1989, the European Charter on Environment and Health[8] emphasized the responsibility of every stakeholder in society, including individuals, to contribute to the protection of the environment in the interest of everyone's health.

The Council of Europe also made recommendations[9] to ensure that countries integrate the precautionary principle in their public policies to prevent environmental damage, as well as the means to repair it when it occurs. Liability systems, compensation funds and class actions have all been promoted.

Then, Principle 13 of the 1992 Rio Declaration required states to elaborate national laws on liability and compensation for victims of pollution and other environmental damage.

The 1993 Lugano Convention[10] and the 1998 Aarhus Convention[11] went on to combine the civil liability system for dangerous activities resulting in environmental damage with the rights of individuals to information, participation and access to environmental justice.

In this spirit, Protocol no. 11 to the Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR)[12] established direct recourse for any citizen before the European Court of Human Rights (ECtHR) in the event of a violation of the ECHR, including environmental matters. Similar action allows individuals to seek non-contractual liability of the European Union's institutions before the Court of Justice of the European Union (CJEU).[13]

As far as national civil lawsuits open to individuals are concerned, the Directive of 2004 mentioned earlier gave regrettable flexibility to states. Although the last report published on 4 April 2022 by the Intergovernmental Panel on Climate Change[14] calls for immediate action

[7] Tribunal administratif de Paris (France), 1904967, 1904968, 1904972, 1904976/4-1, 14 January 2021.
[8] European Charter on Environment and Health, Frankfurt-am-Main on 7 and 8 December 1989, p. 2.
[9] Council of Europe, Parliamentary Assembly, Recommendation 1614, 2003.
[10] Council of Europe, Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, 21 June 1993.
[11] UNECE, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998.
[12] Council of Europe, Protocol no. 11 to the CPHR, 11 May 1994.
[13] Treaty on the Functioning of the European Union (TFEU), 12012E/TXT, OJ C 326, 26 October 2012, Art. 340.
[14] Working group II contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, 28 February 2022.

across all sectors to secure a livable future, no specific role is granted to citizens on a community level.

Therein lies one of the great paradoxes of our time. The fight against climate change and the protection of the environment are major social challenges today. Still, the response has yet to be sufficient. Indeed, the gap between the will of the public to create a healthy environment and the lack of motivation and means for citizens to ensure this goal is increasing.
Environmental justice remains out of reach for ordinary citizens, even though there are more and more regulations and an increasing number of lawsuits filed by Non-Governmental Organizations (NGOs). However, the former are generally decided at government level, while the latter represent the specific interests of their members and supporters.
In this context, it appears all the more important to enable every citizen to have a say in the legal fight against environmental damage. Civil procedure being different across the continent, how could civil action allowing individuals to seek reparation for environmental damage be more effective in Europe?

Addressing the advent of a new European framework (4) beyond existing guidelines (3) implies reviewing the current provisions available to individuals to seek reparation for environmental damage before national (1) and regional courts (2).

1. Comparative Study of Individual Actions available for Reparation of Environmental Damage across Europe

European States often share common conditions of admissibility when it comes to individual applications on grounds of environmental damage. However, the baseline provided by the 2004 Directive and common civil law principles do not exclude some striking national differences and innovations.

A. The Individual Right to Act for the Reparation of Environmental Damage across Europe

When introducing a civil case, an applicant is typically required to demonstrate direct and certain interest in the ruling. Traditionally, justice systems only allow individuals to act upon the defense of their own personal interest. Sometimes however, individuals are entitled to carry a much greater cause when given standing to act.

1. Self-Serving Procedures. Most European countries do not provide a specific procedure dedicated to action for the reparation of environmental damage. They generally remain within the framework of civil liability principles. Thus, it is admissible for individuals to claim compensation when damage caused to the environment has affected their physical integrity or belongings directly and personally. In Germany, for example, a law enacted on 10 December 1990 charged operators of particular installations, liable for such injuries, with the duty to compensate the victim.[15] Much as in the 2004 Directive, the defendant is referred to as an 'operator', meaning a public or private person that operates or controls one of the activities included in the text. The qualification of the plaintiffs' personal interest allows individuals to hold both private and public entities liable for damage to the environment in spectacular decisions. On 17 June 2021, a Belgian court recognized the interest of thousands of citizens suffering from the effects of climate change in acting against the State.[16]

However, abiding by these rules and qualifying personal damage remains difficult. Indeed, individuals must often navigate through numerous and technical laws. The Finnish system, notably, defines civil liability according to the nature of the operator's activity. Aside from the Environmental Damage Act of 1995,[17] laws like the Water Act[18] or the Oil Pollution Fund Act[19] coexist.

Extending the notion of personal interest could help overcome this difficulty. The same German law of 1990 awards individuals the right to seek the restoration of nature or a landscape following interference by an operator. Linking a hazardous activity with its impact on the environment could turn out to be easier. Granted, that possibility is subject to the additional demonstration of personal damage affecting the plaintiff's property,[20] but pushing that idea further, one could consider the protection of the environment as part of everyone's personal interest. Nature often being described as a 'common good',[21] any individual as one of its many owners could directly benefit from acting in its defense. In addition, national,[22] regional[23] and

[15] Environmental Liability Act (Germany), 10 December 1990, Section 1.
[16] Tribunal de première instance francophone de Bruxelles (Belgium), R.G. 2015/4585/A, 17 June 2021, *Klimatzaak*..
[17] Environmental Damage Act (Finland), 24.1.1995/55, 1 March 1995.
[18] Water Act (Finland), No. 264 of 1961, 1961.
[19] Oil Pollution Compensation Fund Act (Finland), No. 379 of 1974, 24 May 1974.
[20] Environmental Liability Act (Germany), 10 December 1990, Section 16.
[21] *Tragedy of the Commons*, Garrett Hardin, *Science*, New Series, Vol. 162, No. 3859 (Dec. 13, 1968), pp. 1243-1248.
[22] Constitution of Portugal, 2 April 1976, Art. 9.
[23] UNECE, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998, Art.1.

international[24] laws have recognized the fundamental right to live in a sustainable and healthy environment. Thus, reparation of damage caused to the environment could be considered as everyone's personal interest and grounds for a civil liability action. Obviously, such a possibility remains unrealistic as courts would be overwhelmed with cases and multiple substantial liability issues would arise.

Nonetheless, European States have already extended the individual right to act within the framework of personal interest through class actions. In Europe, class actions are typically brought by charities or NGOs. Still, some countries like Sweden provide individuals with the right to seek damages and restoration from anyone who carries out or has carried out a dangerous activity without a permit or precautionary measures. Such action can be brought through an 'individual class action', in which one person claims to represent a group of people sharing a common personal interest. Following an opt-in system, the members of the group benefit from the ruling, even if they are not considered parties to the case.[25] Therefore, individuals can seek reparation for environmental damage by combining their personal interests, thus improving their chances of gaining satisfaction. Although, once again, this extension remains bound by the necessity to demonstrate a shared interest affecting the members individually.

2. Selfless Procedures. Against all odds, European law systems sometimes give individuals the opportunity to defend a greater cause. These 'assigned actions' occur when a party benefits from a standing to act.

On the one hand, the public interest, defined as 'the welfare or well-being of the general public',[26] falls under the authority of national public prosecutors. Once again, one can easily conceive the purpose of this monopoly: if everyone could defend everybody, no one would benefit from the action and judges would be left dealing with billions of cases. Nonetheless, some European countries are getting close to conceding actions based on the defense of the public interest for individuals. Back in Ancient Rome, any citizen could report an infringement of common goods or public order to Justice and become a law enforcer. The *actio popularis*, as it was known, was meant to overcome the inaction of the state. Today, the Latvian Constitution

[24] Human Rights Council, A/HRC/48/2, 8 October 2021, resolution 48/3.
[25] Class Proceedings Act (Sweden), (2002:599), 30 May 2002, Section 13.
[26] Random House Webster's Unabridged Dictionary, 2021.

states that any citizen can initiate judicial proceedings against public or private defendants in the case of 'evident risk for the environment or environmental harm'. The only criterion of admissibility governing such action is a breach of law or the demonstration of real damage.[27]

On the other hand, defending a collective interest appears more accessible to an individual action. To clarify, 'collective' differs from 'shared'. While the latter simply consists in the addition of personal interests of all members of a group, the former refers to the interest of the group on its own. The claimant representing the group does not suffer from personal injury. On that ground, some countries like France allow entities to act upon a collective interest.[28] Yet, such action does not often leap from the hands of labor unions or consumer associations.

Clearly, environmental liability actions granted to individuals remain within moving but strict boundaries in Europe.

B. The Procedural Conditions Imposed on Individuals Seeking Reparation for Environmental Damage across Europe

Despite the particular nature of environmental damage, conflicting strains and stakes in justice systems, such as the proper administration of justice or equality before the law, shape the conditions citizens must comply with to repair environmental damage. Competent jurisdiction or the principles governing civil procedure can thus render this environmental justice either easier or, on the contrary, more challenging.

1. Jurisdictions Dedicated to Environmental Justice. In general, in cases of environmental damage, citizens around Europe must take legal action before the ordinary courts according to the place where the damage occurred. As mentioned earlier, both an administrative and a civil court can be designated. In Spain, Italy or France[29] for instance, an individual suffering from environmental damage caused by an omission or an act by a public authority can seek liability before an administrative court. Otherwise, civil jurisdictions hold individuals or private companies accountable for the environmental damage they caused.

[27] Constitution of the Republic of Latvia, Article 9 Section 9, *Legal and Practical Implications of actio popularis under Aarhus Convention in Latvia*, Ms Marta Osleja.
[28] Code du travail (France), art. L. 2132-3.
[29] Law 29/1998 (Spain), 13 July 1998, Regulating the contentious jurisdiction; Constitution of the Italian Republic (Italy), 22 December 1947, Art.103; Code de justice administrative (France), Art. R. 311-1 à R. 312-19.

Nevertheless, competence of ordinary courts in civil environmental justice does not mean total absence of specialization. First, case attribution within the courts can lead to chambers being *de facto* specialized in certain forms of environmental damage, such as those caused by nuclear infrastructures in Germany or the Netherlands.[30] Secondly, members composing the courts are sometimes specialized in environmental matters.[31] Whether they are professional judges trained initially or during their career[32] to handle such cases, or experts and professors in the field, their skills are required because of the highly technical level of environmental disputes. Reasoning for decisions and case processing time are better off.
However, examples of entire courts specialized in environmental matters in Europe do exist, such as the Environmental Court in the Flemish region of Belgium[33] or the Land and Environmental Courts in Sweden whose members, chosen by public authorities, are made up of a mix of professional judges, technicians and experts.[34]

However, legal action before such courts and judges are not the only way for individuals to obtain reparation in case of environmental damage. The use of alternative dispute resolution must also be mentioned. Indeed, settlements may be considered more profitable for individuals who deem hazardous procedures against major companies to be expensive and time-consuming. Mediation or informal procedures, such as the use of the Informal Resolution of Environmental Conflicts through neighborhood dialogue[35] in Portugal, can in fact lead to compensation and remedy. However, such a settlement renders any future legal action inadmissible, implying that the right to a healthy environment is disposable; a vision that is not shared by every European country, according to the way some have adapted their civil procedure to rise to the growing challenge of environmental justice.

2. The Principles Governing Civil Environmental Procedures. They are always the result of a constant search for a balance between opposing stakes. Statutes of limitations and the burden

[30] *Rapport Général : Accès des citoyens à la justice et organisations juridictionnelles en matière d'environnement - Spécificités nationales et influences du droit de l'Union Européenne*, Associations of the Councils of State and Supreme Administrative Jurisdictions (ACA-Europe), 2012, p.22
[31] Ibid. p.22-23
[32] Continuous training is available nationally or through international bodies such as the European Judicial Network or the European Institute for Public Administration.
[33] *Rapport Général : Accès des citoyens à la justice et organisations juridictionnelles en matière d'environnement - Spécificités nationales et influences du droit de l'Union Européenne,* ACA-Europe, *op. cit.*
[34] Environmental Code (Sweden), Chapter 20.
[35] By The European Union Network for the Implementation and Enforcement of Environmental Law.

of proof are emblematic examples, especially when it comes to allowing individuals who have suffered from environmental damage to obtain reparation.

Regarding the statute of limitations, national procedures seek a balance between two main objectives. On the one hand, they aim at the fairest justice system possible; one that enables citizens to see their damage repaired even long after it has been caused. On the other hand, a proper administration of justice must be managed, requiring damage that can still be proven, before uncongested courts. Different choices have been made across Europe, reflecting the importance given by each country to environmental liability. This may go from a three-year limitation period for general extra-contractual responsibility in Germany[36] for instance, to ten years following the occurrence of the damage in Finland[37] or even no limits in time in Italy.[38] Countries such as France modulate the statute of limitations, either by taking into account the nature of the damage suffered,[39] or by changing the starting point of the limitation period according to the nature of the activity that caused the damage[40] or the moment the claimant was made aware of it.[41] This solution is especially beneficial in environmental justice as the long-term consequences of damage caused to the environment usually become apparent years or even decades later.

Nevertheless, does this suffice to ensure reparation? Sometimes at least, mandatory insurance for operators likely to harm the environment[42] or compensation funds[43] can secure compensation. The latter may also be the last resort for individuals who cannot prove the environmental liability of an operator or a state.

Indeed, the burden of proof that falls upon the claimant is sometimes particularly heavy in civil environmental justice. The uncertainty revolving around some technologies and the often-delayed appearance of the damage renders proof of a clear causal link between an act or omission and the damage difficult. Positions across European countries are yet again quite heterogeneous.

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[36] Environmental Liability Act (Germany), 10 December 1990, Section 17.
[37] Governmental Decree 713/2009 on compensation for certain damage to the environment (Finland), 24 September 2009.
[38] Decree No 152/2006 (Italy), 3 April 2006.
[39]Code civil (France), Art. 2226: in case of damage to the physical integrity of the person, the limitation period is lengthened to ten years.
[40]Code de l'environnement (France), Art. L. 152-1.
[41]Code civil (France), Art. 2224.
[42] For instance in Portugal and Spain - *Environmental liability transfer in Europe – Report of the Network for Industrially Co-ordinated Sustainable Land Management in Europe*, 2020/2021.
[43] Decree No. 2020-1463 (France), 27 November 2020: for instance, the Pesticide Victim Compensation Fund.

The most demanding countries, like Belgium,[44] base their liability system upon undisputable evidence that the person or entity liable for damage or nuisance caused to the environment has committed a fault. However, recent case law, namely the 26 May 2021 Court of The Hague decision[45] has more or less nullified the proof of this required fault by saying that Shell should have considered the environment more in the current context, beyond the mere respect of applicable rules.

Some European countries, like Sweden,[46] do not require fault but simply a clear causal link.

Finally, others, integrating the precautionary principle in their liability system, hold accountable any party who may have caused the damage. Finland[47]and Germany[48] are examples of countries that presume cause. In doing so, they greatly lighten the burden of proof for individuals and reduce their legal costs as, in environmental matters, expensive expert reports and extensive research work are required. Even when the expert report is ordered by a judge, which is possible for every European judge but unevenly used,[49] the fees are charged to the claimant.

Thus, the financial concern being a deterrent for individuals to take legal action, even fewer European citizens go before the European courts to have their environmental damage repaired.

2. European Civil Action for Individuals Seeking Reparation for Environmental Damage

Besides the possible civil action available in different European countries, individuals can also initiate proceedings to repair environmental damage before both the ECtHR and the General Court of the European Union (GCEU) or the CJEU. Such action is limited to the responsibility of the states that are parties to the ECHR and the European Union's institutions respectively, due to their failure to avoid environmental damage or to have it repaired, but cannot lead to reparation directly from polluters.

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[44] Tribunal de première instance francophone de Bruxelles (Belgium), R.G. 2015/4585/A, 17 June 2021, *Klimatzaak*.

[45] Court of The Hague (The Netherlands), C/09/571932 / HA ZA 19-379, 26 May 2021.

[46] Environment Code (Sweden), Section 8 – Chapter 32.

[47] Environmental Damage Act (Finland), 1 June 1995.

[48] Environmental Liability Act (Germany), 10 December 1990, Section 6.

[49] *Rapport Général : Accès des citoyens à la justice et organisations juridictionnelles en matière d'environnement - Spécificités nationales et influences du droit de l'Union Européenne,* ACA-Europe, *op. cit.*, p.8.

A. Individual Action before the ECtHR

Protocol no. 11 to the ECHR introduced the opportunity for individuals to initiate proceedings before the ECtHR in the event of a violation of the Convention, which progressively applied to environmental matters. Such actions can enable indirect repair of environmental damage, since Article 41 of the ECHR enables the Court to afford 'just satisfaction to the injured party' if the internal law of the concerned state 'allows only partial reparation to be made'.

1. Admissibility Criteria. This individual action before the ECtHR has quite a limited perimeter regarding the standing to act and the statute of limitations according to Articles 34 and 35 of the Convention. It can only be initiated 'after all domestic remedies have been exhausted', which limits action to individuals who have already gone through a long judicial process in their own country. Moreover, this request must be filed 'within a period of four months from the date on which the final decision was taken'.

The main hurdle to such individual action lies in the interest in acting: the plaintiff must be the 'victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention'. Moreover, the ECtHR may declare an individual application inadmissible if 'the applicant has not suffered a significant disadvantage', except when the respect of the Convention requires an 'examination of the application on the merits'. This means firstly that an *actio popularis*, where the applicant is not a victim of the alleged violations of the rights set forth in the ECHR, is not admissible before the ECtHR.[50] This also means that, whereas the ECHR does not enshrine any right to a healthy environment as such, plaintiffs must demonstrate which rights protected by the Convention were undermined by environmental damage.

2. Human Rights under the ECHR Enabling Individual Action on Environmental Matters. Without being completely exhaustive, individual action before the ECtHR in environmental matters can be justified by the violation of at least four different substantive human rights protected by the text: the right to life,[51] the right to respect for private and family life and

[50] ECtHR, *Le Mailloux v. France,* Appl. no. 18108/20, , Judgment of 5 November 2020.
[51] ECHR, Art.2; for instance: ECtHR, *Öneryildiz v. Turkey*, Appl. no. 48939/99, Grand Chamber Judgment of 30 November 2004

home,[52] freedom of expression and to receive and impart information,[53] and the protection of property.[54]

Individual action before the ECtHR in environmental matters can also be justified by the violation of at least two different procedural rights: access to court[55] and the right to an effective remedy.[56] As a result, the ECtHR quite widely recognizes the existence of an interest in acting in cases of environmental damage.

B. Individual Action before the European Union Jurisdictions

According to Article 340§2 of the Treaty on the Functioning of the European Union (TFEU), the European Union must repair damage caused by its institutions in the case of non-contractual liability. This falls under the jurisdiction of the GCEU[57] and, for appeals, of the CJEU.[58] Since Article 340§2 TFEU refers to the 'general principles common to the laws of the Member States', the admissibility criteria of such action are defined by case law. Due to these quite restrictive criteria, neither the GCEU nor the CJEU has issued any significant judgment regarding the European Union's non-contractual liability on environmental matters yet.

1. Admissibility Criteria. No specific standing to act is required in order to seek the European Union's extra-contractual liability before the GCEU or the CJEU: an action is admissible from any citizen, whatever his or her nationality or his or her location. However, the interest in acting is more difficult to establish. The plaintiff must indeed prove that he or she has suffered personal damage,[59] which actually excludes any *actio popularis*.

If both the European Union's institutions and the Member State's institutions cause the damage suffered (for instance in the case of illegal national acts resulting from an illegal directive from

[52] ECHR, Art.3; for instance: ECtHR, *Cordella and Others v. Italy*, Appl. nos. 54414/13 and 54264/15, Judgment of 24 January 2019
[53] ECHR, Art.10; for instance: ECtHR, *Steel and Morris v. the United Kingdom*, Appl. no. 68416/01, Judgment of 15 February 2005
[54] ECHR, protocol 1, Art.1; for instance: ECtHR, *Dimitar Yordanov v. Bulgaria*, Appl. no. 3401/09, Judgment of 6 September 2018
[55] ECHR, Art.6; for instance: ECtHR, *L'Erablière A.S.B.L. v. Belgium*, Appl. no. 49230/07, Judgment of 24 February 2009
[56]ECHR, Art.13; for instance: ECtHR, *Hatton and Others v. The United Kingdom*, , Appl. no. 36022/97, Grand Chamber Judgment of 8 July 2003
[57]TFEU, Art.256 1.
[58]TFEU, Art.268.
[59] GCEU, T-197/17, *Marc Abel and Others v. European Commission* (ECLI:EU:T:2018:258), 4 May 2018, at para. 27.

the European Union), the plaintiff must fulfill a complementary condition: all domestic recourse is to be exhausted without reaching complete repair of the damage suffered.[60]

In any case, according to Article 46§1 of Protocol no. 3 to the TFEU on the Statute of the CJEU, actions relating to the non-contractual liability of the European Union are subject to a five-year statute of limitations from the occurrence of the event giving rise to such liability. According to the CJEU, the time starts only when the damage suffered has materialized,[61] even before the plaintiff has precise and detailed knowledge of the facts at stake or is able to assess the reality of the damage.[62]

Finally, the extra-contractual liability of the European Union's institutions constitutes liability for fault without any presumption. Consequently, the plaintiff must prove the existence of a sufficiently serious breach of a rule of law intended to confer rights on individuals, directly linked to the damage suffered.[63]

2. Lack of Significant Case Law on Environmental Matters. Rules of law intended to confer rights on individuals relating to the protection of the environment are numerous under European Union law. As a result, considering the above, the implementation of the liability of the European Union's institutions seems possible in the case of environmental damage. Nevertheless, in practice, no significant judgment has been issued yet by either the GCEU or the CJEU and, in fact, the few attempts have been rejected so far. For instance, actions seeking recognition of the European Commission's liability have been dismissed. Regarding regulations on nitrogen oxide emissions, the 1,429 plaintiffs had not suffered any personal damage.[64] Regarding the lack of transparency and sanctions on stolen emission allowances within the greenhouse gas emission allowance trading system in the European Union, no fault on the part of the European Commission was established.[65]

This did not discourage ten families from countries across the world from filing an action against the European Parliament and the Council of the European Union due to their globally insufficient measures on climate protection. This case, nicknamed the People's Climate Case,

[60] CJEU, C-175-84, *Krohn v. European Commission* (ECLI:EU:C:1986:85), 26 February 1986, at para. 27.
[61] CJEU, C-283-05 P, *Holcim (Deutschland) AG v. European Commission* (ECLI:EU:C:2007:226), 19 April 2007, at para. 29.
[62] CJEU, C-469/11 P, *Evropaïki Dynamiki v. European Commission* (ECLI:EU:C:2012:705), 8 November 2012, at para. 36.
[63] CJEU, C-352/98 P, *Bergaderm and Goupil v. European Commission* (ECLI:EU:C:2000:361), 4 July 2000, at para. 42.
[64] GCEU, T-197/17, *Marc Abel and Others v. European Commission* (ECLI:EU:T:2018:258), 4 May 2018.
[65] CJEU, C-556/14 P, *Holcim (Romania) SA v European Commission* (ECLI:EU:C:2016:207), 7 April 2016.

aims at both challenging certain directives and regulations and obtaining reparation based on non-contractual liability for damage to property, income and health. Nevertheless, the GCEU dismissed the request as inadmissible;[66] and an appeal process is underway, providing hope that the CJEU will finally take up environmental justice.

In the end, these actions before the European courts cannot be considered as effective civil actions for individuals seeking reparation for environmental damage. They have very limited scope: responsibility of the states that are parties to the ECHR where the ECtHR is concerned; responsibility of the European Union's institutions regarding the GCEU or the CJEU. Moreover, they are difficult to implement: the former requires exhaustion of all domestic recourse; before the latter, no successful outcome as yet in environmental matters. Fortunately, the Council of Europe and the European Union have also contributed to environmental justice through their guidelines.

3. European Guidelines for Individual Civil Actions Seeking Reparation for Environmental Damage

Besides the two actions mentioned above, the Council of Europe and the European Union have developed guidelines to be implemented in the different European countries regarding civil actions for individuals in cases of environmental damage.

A. Guidelines from the Council of Europe

On top of the Lugano Convention dealing with the role of individuals in environmental civil justice, the Council of Europe took part in the shaping of civil actions regarding environmental matters through ECtHR case law.

1. Lugano Convention. The Lugano Convention[67] makes operators of dangerous activities and of sites for the permanent deposit of waste liable without fault for the damage caused by their activities, with, nevertheless, some liability exemptions, including in particular the respect of tolerable levels of pollution under relevant local circumstances. Recourse is open to anyone who has suffered damage consecutive to these activities, such as loss of life, personal injury,

[66] GCEU, T-330/18, *Armando Carvalho and Others v. European Parliament and Council of the European Union* (ECLI:EU:T:2019:324), 8 May 2019.
[67] Council of Europe, Treaty No. 150, Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, 21 June 1993

damage to property, damage by impairment of the environment or costs of preventive measures. Actions are subject to a limitation period of three years from the date on which the claimant knew or ought reasonably to have known of the damage and of the identity of the operator, without exceeding 30 years from the incident that caused the damage.

The proposed mechanism seems quite efficient but, in practice, only nine countries executed the Lugano Convention[68] and none of them ratified it, so the Lugano Convention never entered into force.

2. ECtHR Case Law on Environmental Civil Actions for Individuals. The main contribution of the Council of Europe to civil environmental justice is actually the case law of the ECtHR.

First, based on Article 13 of the ECHR relating to the right to an effective remedy, the judges insisted on the importance for countries to make sure that plaintiffs can have their request fully and precisely analyzed by national courts in a case of environmental damage.[69] This requires in practice certain expertise in national courts on environmental matters.

Moreover, based on Article 6§1 of the ECHR relating to the right of access to a court, the ECtHR specified that in cases where there is scientific evidence that a person is unable to know that he or she is suffering from a certain disease, this circumstance should be taken into account for the calculation of the limitation period.[70] In other words, a statute of limitations cannot close any opportunity to act even before the disclosure of environmental damage.

Finally, as in other domains, the ECtHR considers that in cases of environmental damage, individuals should obtain court decisions and have them enforced within a reasonable time.[71]

B. Guidelines from the European Union

Notwithstanding the quite limited input from the CJEU on environmental civil justice, the European Union proceeded with an extensive appropriation of the Aarhus Convention and adopted two directives that have influenced civil actions on environmental matters at state level.

1. Aarhus Convention. The United Nations Economic Commission for Europe (UNECE) initiated the Aarhus Convention[72] that entered into force on 30 October 2001 and currently

[68] Cyprus, Finland, Iceland, Italy, Liechtenstein, Luxembourg, the Netherlands and Portugal

[69] ECtHR, *Hatton and Others v. the United Kingdom*, Appl. no. 306022/97, Grand Chamber Judgment of 8 July 2003.

[70] ECtHR, *Howald Moor and Others v. Switzerland*, Appl. nos. 52067/10 and 41072/11, Judgment of 11 March 2004

[71] ECtHR, *Bursa Barosu Badkanligi and Others v. Turkey*, Appl. no. 25680/05, Judgment of 19 June 2018.

[72] UNECE, *op. cit.*, p.3.

numbers 47 countries. The European Union was one of the initial signatories and even went further by adopting a dedicated Regulation in order to apply the Aarhus Convention to the European Union's institutions and bodies.[73]
Regarding environmental civil actions, Article 9 of the Aarhus Convention invites each party to ensure access to justice for every member of the public having a sufficient interest, in order to challenge acts and omissions by private persons and public authorities that contravene applicable law relating to the environment, and obtain adequate and effective remedies. For acts and omissions on the part of the European Union institutions and bodies, the European Union's dedicated Regulation refers to the existing proceedings before the CJEU.

Nevertheless, in the last amendment of this Regulation in 2021, the European Union went further by introducing an innovative *actio popularis*. Members of the public can file a complaint if they demonstrate that they have been directly affected by an impairment of their rights compared with the public at large, or a sufficient public interest and support for their case by at least 4,000 members of the public residing in at least five different countries of the European Union, with at least 250 members of the public coming from each of those countries.[74]
In this context, even if it is less precise than the Lugano Convention regarding civil liability on environmental matters, the Aarhus Convention is a reference on public access to environmental justice, and judgments through the European Union frequently refer to it.[75]

2. Directive 2004/35 on Environmental Liability.[76] Under this Directive and in accordance with the 'polluter-pays' principle, operators of some specific dangerous activities are liable without fault for any damage to the environment, whereas operators of other activities are liable in case of fault, and only for damage to protected species and natural habitats.
Beyond this ease in the burden of proof for plaintiffs, Directive 2004/35 makes a competent authority within each country responsible for ensuring that appropriate preventive actions are taken by the operators or at their cost or, failing that, for implementing appropriate remedial action at the operators' costs. The competent authority has five years from the completion of the preventive or remedial action to recover costs from the operators.

[73] European Parliament and Council Regulation 1367/2006, OJ 2006 L 264/13, as modified by European Parliament and Council Regulation 2021/1767, OJ 2021 L. 356/1.
[74] European Parliament and Council Regulation 2021/1767, Art. 1(3) amending Art. 10 of the European Parliament and Council Regulation 1367/2006.
[75] For instance: Tribunal de première instance francophone de Bruxelles (Belgium), R.G. 2015/4585/A, 17 June 2021, *Klimaatzaak*, at para. III.A.1.2.
[76] European Parliament and Council Directive 2004/35, *op. cit.,* p.1.

Finally, Directive 2004/35 grants individuals having a sufficient interest according to the applicable national law the right to have access to a court in order to challenge the decisions, acts or failures to act of the competent authority, but does not give these individuals a right to compensation further to environmental damage.

As a result, this Directive only allowed individuals to monitor actions that remained in the hands of the competent authority. It was not until 2020 that the European Union adopted a new Directive that could have a significant impact on individual environmental civil actions.

3. Directive 2020/1828 on Representative Actions.[77] This Directive organizes more extensive implementation of representative actions for the protection of the collective interests of consumers through the European Union, and its scope includes in particular infringements by traders of the provisions of Directive 2012/27 on energy efficiency.[78] Members of the European Union are compelled to adopt and publish all laws, regulations and administrative provisions to comply with Directive 2020/1828 by 25 December 2022.

Directive 2020/1828 defines a representative action as 'an action for the protection of the collective interests of consumers', which are themselves defined as 'the general interest of consumers and, in particular for the purposes of redress measures, the interests of a group of consumers'. It does not create an *actio popularis* enabling an individual to act in defense of a general interest. Nevertheless, it is interesting to note that it deviates from the classical appreciation of personal interest in acting for civil actions in order to recognize the existence of a general interest specific to a group of individuals. Consequently, individuals cannot defend such interests of consumers themselves, and 'qualified entities' to be determined in each country are responsible for bringing these representative actions.

These new representative actions could contribute to renewing and accelerating environmental civil justice within the European Union.

4. Toward a Standardized European Procedure for Individuals Seeking Reparation for Environmental Damage

Procedural standardization of environmental civil actions was not the European Union's first priority when starting Judicial Cooperation. However, a new dynamic was launched by the European Parliament in 2017 to draw civil procedure systems closer together. The objective is

[77] European Parliament and Council Directive 2020/1828, OJ 2020 L 409/1.
[78] European Parliament and Council Directive 2012/27, OJ 2012 L 315/1.

clear and noble: to guarantee the respect of a fair trial[79] by establishing minimal common proceedings before the jurisdictions of the European Union. A legislative act is to be expected, but in the meantime, some proposals could be made to standardize rules and turn Europe into a pioneer in environmental civil justice.

A. Standardized Civil Actions Dedicated to Individuals Seeking Reparation for Environmental Damage

Much like the terms of both the Aarhus Convention and the 2020 Directive, individuals could be given standing to act for the defense of nature's integrity, notably through prospective actions grounded on three distinct interests in acting: the collective interest, nature's interest and shared personal interests.

1. Collective Action. Pushing the terms of the 2020 Directive further, the European Union could enforce a representative action dedicated to individuals seeking reparation for environmental damage that has affected the interest of a human collective, meaning a group of individuals sharing a common activity or attribute. In this sense, every Member State could allow a group of coastline residents to bring an action before a national court for the restoration of a beach or seabed, or even admit a complaint from asthma victims suffering from a pollution spike. The legal grounds for such action would be plenty, such as the right to a sustainable living environment or clean air.[80] Guidelines would obviously be required to provide Member States with a standardized definition of the term and the characteristics of the group's common concern. This procedure would promote citizens' legal initiatives to act without having to seek the intervention of a charity or an NGO.

2. Environmental Action. The notion of legal personality is not exclusive to human beings. Corporations and organizations already benefit from a large array of legal rights, through representation, going as far as holding assets, receiving donations and seeking civil or criminal liability against anyone impairing their property or discrediting their public reputation. However, Nature has not yet been awarded the same credit. Some authors question the possibility of giving rivers, meadows or trees legal personhood to be represented by an individual concerned for their preservation or by anyone having 'a meaningful relation' to the

[79] Charter for Fundamental Rights within the European Union, 2000/C 364/01, 2 October 2000, art.47; ECHR, Art.6.
[80] Human Rights Council, A/HRC/48/2, 8 October 2021, *op. cit*., p.6.

given element.[81] To put this more practically, a farmer would be able to seek the restoration of his damaged field or an angler the preservation of the sea, in addition to their own personal injury. This possibility could be extended to the protection of wildlife and animals, giving the handlers of the latter grounds upon which to act in respect of non-human rights. Such a notion is not far-fetched as some European countries are starting to grant animals a particular status, not quite property but not quite human,[82] and others in the world are already considering them as 'non-human legal person[s]' and giving them the right to freedom.[83] Reaching that milestone could expand the legal actions available to individuals in the preservation of nature.

3. Class Actions. As of today, neither the ECtHR nor the Courts of the European Union recognize the right of an individual to act for the reparation of the general interest. Nonetheless, innovative European legislation could prescribe the possibility of a class action dedicated to individuals, inspired by the latest version of the Regulation applying the Aarhus Convention, but on a national basis. A group of individuals could then be granted standing to act for the reparation of environmental damage suffered on a shared individual scale and based on a certain number of petitions. Raising the threshold of said petitions could reveal itself necessary to enforce the procedure in the Member State and avoid preposterous claims.

All these actions, if standardized, would give individuals the means to participate in environmental civil justice. This standardization is also required for the proceedings governing these actions.

B. Standardized Principles to Govern Actions Seeking Reparation for Environmental Damage

To ensure that individuals are granted equal opportunities to see environmental damage repaired across Europe, three levers could be used.

1. Courts dedicated to the matter. As mentioned before, environmental matters are technical. Justice systems in the Member States could benefit from the generalization of dedicated chambers within the courts. Pushing specialization even further, the European Commission

[81] Christopher Stone, '*Should trees have standing? – Towards legal rights for natural objects', Southern California Law Review*, 45, 1972, 450-501.
[82] Code civil (France), Art. 515-14.
[83] Tercer Juzgado de Garantías Poder Judicial Mendoza (Argentina), EXPTE. NRO. P-72.254/15, 3 November 2016.

could even require Member States to create a national court which would oversee environmental cases. This would provide a perfectly balanced solution for individuals, providing both proximity and efficiency that other action before European courts or a procedure before a local but non-specialized court could not. Nevertheless, this implies special training for judges, preferably provided homogeneously throughout the Union. The role of the European Judicial Network could therefore be strengthened.

2. Reform of the statute of limitations. It has been demonstrated previously that the statutes of limitations across Europe are very different, in terms of both length and starting point of the limitation period. The fairest and most acceptable standardization in this matter requires differentiating the self-serving actions seeking reparation for environmental damage from the selfless ones.

The statute of limitations for the former should remain at the discretion of the states, as it embodies their chosen balance between a just system, properly administered courts and the responsibility of the individuals seeking reparation. Nonetheless, a limit to this free range of motion should be drawn in order to give a real chance to any individual seeking reparation: in any state, the starting point for the limitation period must be the moment the individual knew or ought to have known about the damage.

The second action should however simply be non time-barred. Indeed, anyone complying with the admissibility criteria for such actions should be able to defend the environment with no regard for how long ago the act or omission caused the damage.

3. A lighter burden of proof. In the years to come, companies conducting activities endangering or harming the environment risk taking advantage of the heterogeneous requirements amongst states of causal links as mentioned above. Forum shopping may be avoided by establishing shared minimal rules regarding liability conditions across the European Union, while not preventing any Member State from going further on its own.

For instance, for activities that threaten or endanger the environment by their very nature, identified in a regularly updated list, a presumption of the cause of the environmental damage would seem the right solution. Regarding other activities, an objective liability system could be established so that no fault would be required to hold a state or a company liable for environmental damage. In any of these cases, standardization should exclude the possibility to escape liability when other operators have or may have caused the damage too. Anyone

involved in causing the damage should be liable and a shared burden of compensation and remedy should be implemented.

These proposals aim at enabling individuals to gain reparation for the environmental damage they have suffered more or less personally. This would surely be an efficient way to enact change within our production and consumption cycles, thus slowing down global warming. Relying on civil procedures, environmental justice would have a chance to better balance our relationship with the environment, pending the enforcement of judges' decisions.