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Addressing issues of criminal and civil liability in the context of climate change

Report¹

Committee on Legal Affairs and Human Rights

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Summary

Climate change has now become a global concern of humankind and, by adhering to relevant international treaties member States of the Council of Europe, have recognised their legal responsibility for this phenomenon. Thus, criminal and civil law play an important role in “climate litigation”.

The Committee on Legal Affairs and Human Rights is disappointed that two Council of Europe treaties aimed at strengthening environmental protection – the 1998 Convention on the Protection of the Environment through Criminal Law (ETS No. 172) and the 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (ETS No. 150) – have not attracted the number of ratifications necessary to enter into force.

It calls on member States to reflect on whether there is a need to revise or replace these treaties, in particular Convention No. 172, in order to adapt them to the current challenges related to climate change. The most serious environmental crimes should be punished with appropriate severity. States should consider introducing the crime of ecocide in their national criminal legislation and recognising universal jurisdiction for it.

They should also ratify Convention No. 150 and strengthen civil liability for environmental damage by amending national civil law legislation.

Access to judicial remedies, both to prevent and compensate for damages caused by climate change, should be provided to relevant stakeholders.

1. Reference to committee: Bureau decision, Reference 4530 of 15 September 2020.



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A. Draft resolution²

1. The Parliamentary Assembly is convinced of the importance of a healthy and sustainable environment. It notes that climate change has now become a global concern of humankind: it puts at risk the integrity of all ecosystems and biodiversity and poses serious threats to the enjoyment of people's human rights and fundamental freedoms, including the right to life and the right to respect for private and family life enshrined in Articles 2 and 8 of the European Convention on Human Rights (ETS No. 5). Such urgent challenges to humankind need to be addressed by Council of Europe bodies without delay.
2. The Assembly recalls that by acceding to the 1992 United Nations Framework Convention on Climate Change, member States of the Council of Europe committed themselves to achieve stabilisation of greenhouse gas (GHG) concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Moreover, member States ratified the 2015 Paris Agreement have committed themselves to limit global warming to well below 2, preferably to 1.5°C, compared to pre-industrial level.
3. Therefore, by acceding to these two treaties, member States of the Council of Europe have recognised their legal responsibility for climate change at national, European and international levels and thus, indirectly, the concept of "climate justice". While human rights law may prove useful for ensuring the protection of the environment and for countering climate change, other areas of law, including criminal and civil law, play an increasingly important role in "climate litigation". The Dutch case *Urgenda Foundation v. the Netherlands*, in which the domestic courts confirmed the State's duty to prevent dangerous climate change and further cut its GHG emissions, clearly shows that this type of litigation can be successful.
4. The Assembly has always endeavoured to promote environmental protection and to promote the role of the Council of Europe, responsible, *inter alia*, for drawing up the Convention on the Protection of the Environment through Criminal Law (ETS No. 172, 1998) and the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (ETS No. 150, 1993). Therefore, it is disappointed that these two conventions have not attracted the number of ratifications necessary to enter into force.
5. Therefore, the Assembly calls on Council of Europe member States to give renewed attention to these two treaties without delay. In light of the current circumstances, member States should reflect as a matter of urgency on whether there is a need to revise or replace these treaties, in order to adapt them to the current challenges related to climate change.
6. Moreover, recalling the United Nations "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Respect, Protect and Remedy' Framework", the Committee of Ministers Recommendation CM/Rec(2016)3 on human rights and business and its own [Resolution 2311 \(2019\)](#) and [Recommendation 2166 \(2019\)](#) "Human rights and business – what follow-up to Committee of Ministers Recommendation CM/Rec (2016)3?", the Assembly stresses that it is now widely recognised that businesses hold responsibilities for human rights abuses, including in the environmental field, and that the victims of such abuses shall have access to an effective remedy.
7. Therefore, the Assembly calls on member States of the Council of Europe to:
 - 7.1. ensure that relevant legal instruments are available to respond to environmental and other harm caused by climate change; in this context, access to judicial (civil, criminal and administrative) remedies, both to prevent and compensate for damages caused by climate change in relation to actions or omissions by the State, natural and/or legal persons, is essential;
 - 7.2. implement national courts' judgments delivered in climate litigation cases;
 - 7.3. ensure that NGOs working for environmental protection and human rights protection are entitled to launch proceedings against States and private entities for conduct that might have an impact on climate change;
 - 7.4. ensure an enabling environment for environmental human rights defenders and refrain from any acts of intimidation or reprisal against them;
 - 7.5. strengthen corporate liability by establishing companies' duty of vigilance, requiring them to detail their activities affecting the environment, and so on climate change;
 - 7.6. ensure that corporate social responsibility for preventing and remedying environmental harm is taken into account in procurement contracts and the allocation of public funds;

2. Draft resolution adopted by the committee on 17 May 2021.

- 7.7. ensure that any person with an interest in climate litigation have effective access to appropriate information on environmental matters and the risks related to climate change;
 - 7.8. provide training and workshops on the specificities of environmental law and aspects of climate change for judges and legal practitioners.
8. As regards reinforcing criminal liability for acts and omissions that might have an impact on climate change or cause other severe environmental damage, the Assembly calls on member States of the Council of Europe to:
- 8.1. strengthen their co-operation as regards pursuing a common criminal policy aimed at the protection of environment;
 - 8.2. give priority to harmonisation of laws on liability for environmental damage, with special focus on the definition of environmental crimes and sanctions related thereto;
 - 8.3. revise or replace, as soon as possible, Convention No. 172 in order to have a legal instrument better adapted to the current challenges;
 - 8.4. ensure that the most serious environmental crimes are punished with appropriate severity, by introducing relevant sanctions in their criminal legislation and by effectively prosecuting the perpetrators of such crimes;
 - 8.5. consider introducing the crime of ecocide in their national criminal legislation, if not yet done;
 - 8.6. consider recognising universal jurisdiction for ecocide and the most serious environmental crimes, including in the 1998 Rome Statute of the International Criminal Court.
9. As regards reinforcing civil liability for acts and omissions that might have an impact on climate change or cause other severe environmental damage, the Assembly calls on member States to:
- 9.1. ratify Convention No. 150 and take the necessary measures to adapt it to the current challenges;
 - 9.2. strengthen civil liability for environmental damage by amending national civil law legislation, if need be, in particular by alleviating the burden of proof, in particular by establishing factual presumptions regarding causation, for persons requesting compensation for damage, adding specific provisions on responsibility for ecological harm, and/or by expanding the scope of strict liability in relevant situations relating to environmental damage.
10. The Assembly also invites Council of Europe member States which are also member States of the European Union promote the revision of the relevant European Union legal instruments concerning liability for environmental damage, including Directive 2008/99/EC of the European Parliament and the Council on the protection of the environment through criminal law and Directive 2004/35/EC of the European Parliament and the Council on environmental liability, in order to adapt them to current challenges, including climate change, in line with relevant international and Council of Europe's standards.
11. The Assembly also calls on member States of the Council of Europe to fulfil all their commitments stemming from the UN Framework Convention on Climate Change and the Paris Agreement.
12. It also calls on them to enhance their co-operation with other international organisations, in particular the United Nations, the World Bank, the Organisation for Economic Cooperation and Development (OECD) and the European Union, in order to consolidate coherent standards on legal responsibility for conduct that might have an impact on climate change and promote implementation of the United Nations Guiding Principles. In particular, member States of the Council of Europe should support the adoption of a legally binding instrument on business activities and human rights, which is now being examined by the United Nations Open-ended inter-governmental working group on business and human rights.

B. Draft recommendation³

1. Referring to its Resolution ... (2021) "Addressing issues of criminal and civil liability in the context of climate change", the Parliamentary Assembly welcomes the establishment by the European Committee on Crime Problems (CDPC) of its Working Group on the Environment and Criminal Law (CDPC-EC).

2. Bearing in mind the work recently started by the CDPC-EC, it recommends that the Committee of Ministers draft, without delay, a new legal instrument to replace the Convention on the Protection of the Environment through Criminal Law (ETS No. 172), which remains unimplemented due to the lack of ratifications. The new legal instrument should address the recent developments in the environmental situation (including climate change) and should seek to update and improve the existing convention. It should combine the fundamental principles of criminal and environmental law and try to achieve a minimum degree of harmonisation as regards definitions of criminal offences and related sanctions, according to the below principles:

- 2.1. the offences and sanctions must be governed by the principle of the legality, namely they must be defined clearly and precisely;
- 2.2. sanctions must be necessary and proportionate;
- 2.3. recognition of the general interest of protecting the environment shall be the core principle;
- 2.4. a harmonised sanctions mechanism shall be based on solidarity between the States and the existence of common rules for developing international co-operation in the criminal law;
- 2.5. the cost of climate change and inaction with regard to environmental challenges must be well-defined, and effective measures and policies shall be taken within the comprehensive and inclusive framework, in co-operation with other international organisations, in particular the United Nations, the World Bank, the Organisation for Economic Cooperation and Development (OECD) and the European Union.

3. The Assembly also recommends that the Committee of Ministers:

- 3.1. conduct a study on the notion of 'ecocide', its introduction into domestic legislation and its possible universal recognition;
- 3.2. examine why the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (ETS No. 150) has received none ratification and encourage member States that have not yet done so to ratify it;
- 3.3. consider whether it would be desirable to revise this convention (in particular by updating its Appendix I on dangerous substances) or replace it by another legal instrument better adapted to the current environmental challenges;
- 3.4. conduct a study on national climate litigation cases;
- 3.5. when tacking stock of the implementation of its Recommendation CM/Rec(2016)3 on human rights and business, reflect on how environmental issues, are taken into account by member States of the Council of Europe, in particular in the context of access to effective remedies and due diligence procedures.

3. Draft recommendation adopted unanimously by the committee on 17 May 2021.

C. Explanatory memorandum by Mr Ziya Altunyaldiz, Rapporteur

1. Introduction

1.1. Procedure

1. I was appointed rapporteur by the Committee at its meeting on 9 November 2020 and a decision was taken to send a questionnaire to national delegations through the European Centre for Parliamentary Research and Documentation (ECPRD). The replies to this questionnaire are summarised in the Appendix to the report. At its meeting on 19 January 2021, the Committee held a hearing with the participation of: Ms Sibel Kulaksiz, Senior Economist and Task Team Leader, World Bank; Professor Marta Torre-Schaub, Research Director, Institut des sciences juridique et philosophique de la Sorbonne, Université Paris 1 Panthéon-Sorbonne; and Mr Jesper Hjortenberg, Chair of the Council of Europe's European Committee on Crime Problems (CDPC).

1.2. Economic impact of the climate change and cost of inaction

2. Climate change remains an acute threat to economy including global development and shared prosperity. It poses high risks to countries' long-term development, economic growth and stability. Droughts, heat waves, floods and other extreme events are causing enormous damage, often reversing hard-won development gains. In the medium and long term, climate change has critical implications for standard of living, food security, health, productivity and quality of life.

3. Changes in climate will amplify the existing challenges posed by poverty, weak government institutions, adverse living conditions, heavy dependence on agriculture and natural resources, rapid population growth, and an overall limited capacity to cope with climate variability and change.

4. The cost of inaction is high. Current global efforts are not bringing results fast enough. If corrective actions continue at current speed, climate change impacts will push 100 million additional people into poverty by 2030. Furthermore, climate change will force 140 million people into migration by 2050. So far, only 26 Parties, representing 40 countries, have adopted a net-zero target. This is only 14.4% of global greenhouse gas (GHG) emission (according to Climate Watch [Net-Zero Tracker](#)). Nearly 90% of marine fish stocks are exploited (according to the Food and Agriculture Organisation of the United Nations), putting at risk the 3 billion people who depend on the ocean for their livelihood (according to the United Nations Development Programme).

5. A persistent increase in average global temperature by 0.04°C per year, in the absence of mitigation policies, reduces world real gross domestic product per capita by 7% by 2100. By 2050, cumulative damages from climate change may reach US\$8 trillion. Already, in 2019, climate change contributed to extreme weather events causing US\$100 billion in damages. Agriculture will be the most affected sector. Over half the world's GDP – around US\$44 trillion – is highly or moderately dependent on nature (according to the World Economic Forum).

6. Ensuring a successful transition towards a low-carbon economy can obtain a sustainable economic growth while at the same time creating jobs. One study found US\$23 trillion in investment opportunities to finance the national climate action commitments of 21 emerging markets, that includes investments in resilient infrastructure in South Asia (according to International Finance Corporation Annual Report of 2016). Climate action could also unlock US\$26 trillion globally in investments and create 65 million more jobs through 2030 (according to a report of the Global Commission on the Economy and Climate of 2018).

1.3. Issues at stake

7. Although the Earth's climate has always fluctuated, it is now scientifically undisputed that human-made GHG emissions contribute to this fluctuation and have so far caused approximately 1°C of global warming above pre-industrial levels. Therefore, climate change has now become a global concern. It leads *inter alia* to an increased frequency of extreme weather events and natural disasters, rising sea levels, heat waves, droughts, water shortages, enhanced spread of diseases, and loss of biodiversity. These negative impacts are predicted to increase further in the near future.⁴ A continuous rise of temperatures would be catastrophic and

4. For more details on the implications and potential future risks of climate change as well as adaptation and mitigation options, see the scientific assessments of the Intergovernmental Panel on Climate Change: www.ipcc.ch/.

could lead to direct effects like the inhabitability of regions, loss of livestock and food supply, as well as indirect impacts like loss of livelihoods and essential services, increased inequality and mass migration. Heat waves are a particular problematic consequence of climate change. According to an analysis by the European Commission, it is calculated that a temperature rise of above 2°C by 2100 would result in 132 000 additional heat wave-related deaths in the European Union, compared to only 58 000 if the temperature rises less than 2°C.⁵ A less known consequence of increasing temperature is rising antimicrobial resistance, namely antibiotic resistance in bacteria. There are 33 000 deaths a year in Europe caused by antimicrobial resistance; climate change inaction will cause this figure to rise even higher.⁶ Besides them, an expansion of protected areas in Antarctica with a high ecological standard seems to be central for the entire planet and, despite its great distance, also for Europe, because the region is crucial for the world climate and the preservation of global biodiversity. Antarctica and the entire Southern Ocean are an extremely biodiverse but also fragile ecosystem that is coming under increasing economic pressure. At the same time, the Antarctic ecosystem is suffering from global climate warming, so it is very important to improve climate resilience. Climate change also clearly poses serious threats to the enjoyment of people's human rights, threatening the right to life and the right to respect for private and family life enshrined in Articles 2 and 8 of the European Convention on Human Rights (ETS No. 5, "the Convention").⁷

8. A healthy and sustainable environment is not only ultimately a prerequisite for prosperity and welfare but also the full enjoyment of all human rights. Human rights violations caused by climate change pose urgent challenges to humankind, which need to be addressed by Council of Europe bodies. However, the commitment to environmental protection by the Council of Europe is not new. Various international legal standards have been developed, which have influenced progress on tackling environmental issues.⁸ The Assembly itself has adopted numerous recommendations relating to the protection of the environment through human rights law.⁹

9. Although the Convention does not explicitly guarantee the right to a healthy environment, the European Court of Human Rights ("the Court") has developed an extensive case law on the issue¹⁰, mainly through the concept of positive obligations under Article 2 (the right to life) and Article 8 (the right to respect for private life) of the Convention. However, violations of other articles of the Convention such as Articles 6, 10 and Article 1 of Protocol No. 1 may also be relevant. The applicability of the Convention to environmental issues does, however, have its limits. In a case brought by Greenpeace and others against Germany, the applicants had their business premises close to a heavily trafficked road and claimed that the German State had not taken sufficient actions to reduce the negative environmental impact caused by such emissions from diesel-fuelled vehicles, resulting in violation of their rights under Article 8. The Court, however, found the case manifestly ill-founded. It recalled that there was no 'explicit right to a clean and quiet environment' and noted that the authorities had taken measures to reduce diesel emissions from cars, and that States enjoyed a wide margin of appreciation when deciding how to deal with environmental issues.¹¹

10. In the case *Budayeva and Others v. Russia*, the Court found a violation of Article 2 of the Convention due to insufficient measures to protect the life of the applicants against a devastating mudslide in the town of Tyrnauz, a mountainous district close to Mount Elbrus.¹² A similar issue was raised in the case *Murillo Saldias and Others v. Spain*,¹³ in which torrential flooding devastated a Spanish campsite in August 1996, resulting in 96 deaths. The applicants claimed that the Spanish authorities had not taken sufficient preventive measures to ensure the protection of the lives of the campers. The Court, however, declared the application inadmissible due to lack of victim status (for the first applicant) and non-exhaustion of domestic remedies (for the other applicants). Nevertheless, situations arising from extreme weather conditions and events will increasingly be a feature of cases concerning climate change and sooner or later, the Court will issue judgments on these issues.

5. Rossinot, Hélène, "Impacts of climate change and air pollution on the health of the EU population", November 2020, European Parliament, p. 2.

6. Ibid.

7. For more details on how climate change threatens the enjoyment of human rights, see [UN Human Rights Council Resolution A/HRC/RES/41/21 on "Human rights and climate change"](#), adopted on 12 July 2019 at the 41st session of the Human Rights Council.

8. See for example the [European Social Charter](#) (ETS No.35, 18 October 1961) and the [Convention on the Conservation of European Wildlife and Natural Habitats](#) (ETS No. 104, 19 September 1979).

9. For example, [Recommendation 1614 \(2003\) "Environment and human rights"](#).

10. See European Court of Human Rights, [Factsheet – Environment and the European Convention on Human Rights](#), March 2020.

11. [Greenpeace e.V. and Others v. Germany](#), application no. 18215/06, decision of 12 May 2009.

12. [Budayeva and Other v. Russia](#), application no. 15339/02+, judgment of 20 March 2008.

13. [Murillo Saldias and Others v. Spain](#), application no. 76973/01, decision of 28 November 2006.

11. On 3 September 2020, six Portuguese children and young adults lodged an application to the Court against 33 States Parties to the Convention. They are claiming that the impact of climate change presumed to result from States' non-respect of their commitments under the 2015 Paris Agreement (the aim of which is to limit global warming to well below 2, preferably to 1.5°C, compared to pre-industrial levels) had violated their rights under Articles 2, 8 and 14 of the Convention (prohibition on discrimination), and are seeking a judgment requiring the 33 governments "to take the urgent action needed to stop the climate crisis".¹⁴ A similar case was lodged before the Court by a group of Swiss older women at the end of October 2020.¹⁵ The applicants claim that their health is threatened by increasing heat waves due to climate change. They also demand that the Swiss federal authorities change their climate policies so as to achieve climate targets.¹⁶ Another application was recently lodged before the Court by an Austrian man with temperature-dependent form of multiple sclerosis, claiming that climate change and the Austrian authorities' inaction severely impacted his daily life, personal dignity and well-being.¹⁷

12. Recognition of legal responsibility for climate change at national, European and international levels began with the signing of the UN Framework Convention on Climate Change in 1992¹⁸ and varies widely between States. While human rights law is essential for ensuring the protection of the environment, and is invoked more and more often to counter climate change, due account should be paid to other areas of law as well. Administrative law, company law, tort law, constitutional law and (international) criminal law will be just as important in the fight against climate change. Although the effectiveness of their legal mechanisms varies significantly and they are used unevenly, they are being used increasingly and climate litigation is playing an ever more important role.

13. In accordance with the title of the reference to committee, my report focuses on the aspects of criminal and civil liability in the context of climate change. The Council of Europe has adopted two Conventions in these areas: the 1998 Convention on the Protection of Environment through Criminal Law (ETS No. 172) and the 1993 Lugano Convention on Civil Liability for damage resulting from Activities Dangerous to the Environment (ETS No. 150). These conventions aim at improving the protection of the environment at European level respectively by using criminal law to deter and prevent conduct harmful to the environment and by ensuring adequate compensation for damage resulting from activities dangerous to the environment. Few States have ratified these two conventions since they were opened for signature, however, meaning that a European liability regime for negative impact on the climate has not yet been achieved.

14. While climate change lawsuits have become more commonplace in the 21st century and legal regulation has been acknowledged as playing a central role in responding to climate change, the topic of liability must be addressed at European level, within the framework of the common legal standards of the Council of Europe. Council of Europe member States should not only take urgent and ambitious – and co-ordinated – action to minimise their impact on climate change but also develop coherent international standards and effective regulation to hold private and public entities liable for that impact. Liability can be used as a tool to both prevent and compensate for damages caused by climate change. Nevertheless, because of the global nature of climate change, an important legal argument is used against "climate litigation": climate change is damaging to all, but to no one in particular. This means that the victims and those responsible for the damage must be named and the provisions on criminal and civil liability have to be invoked.

2. Issues of criminal and civil liability

2.1. General points

15. The way environmental crime is described in national legislation has fundamentally changed during the past 30 years. In the 1970s, when criminal environmental law emerged in many member States of the Council of Europe, it had a mostly administrative character, which meant that, for example, operators had to apply for a permit and run their operations in accordance with the permit conditions. Criminal provisions were intended only to subject those who acted in contravention of these administrative obligations to criminal sanctions. This had been described as the "administrative dependence of environmental criminal law"¹⁹. Thus, in its early

14. *Cláudia Duarte Agostinho and Others v. Portugal and 32 other States*, application No. 39371/20, communicated to the Governments on 13 November 2020.

15. *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, Application No. 53600/20, communicated to the Government on 17 March 2021.

16. Greenpeace International, [Press release 27 October 2020](#).

17. <https://abcnews.go.com/Health/wireStory/ms-patient-sues-austria-health-impact-climate-change-76198981> (2 March 2021).

18. See its Article 4.

stages, environmental crime did not take into account the actual nature of the danger to the environment caused by a particular action or behaviour. The environment was seen only as something to be administratively managed and as administrative laws were of lesser priority, environmental crimes often went unprosecuted.

16. Today, Council of Europe member States address environmental crime differently. Criminal provisions are no longer added to administrative environmental laws, but instead often form part of substantive criminal law as self-standing provisions. This legislative technique better protects the environment. Member States now focus on the resulting endangerment of or harm to the environment or the physical integrity of a person rather than a specific administrative contravention. Criminal liability therefore no longer results from a violation of administrative obligations. While some Council of Europe member States have codified environmental crime in special environmental codes²⁰, others have incorporated it into their general criminal codes²¹.

17. Furthermore, there has been a trend towards using the so-called “toolbox” approach to environmental crime, which considers criminal law as only one of various available enforcement instruments. While the endangerment and harm to the environment is dealt with through civil and administrative penalties, criminal law is reserved for the most serious cases and is therefore considered an *ultima ratio*.²²

2.2. 1998 Convention on the Protection of the Environment through Criminal Law

18. The use of criminal law as a last resort in order to deter and prevent conduct which is most harmful to the environment is not new at European level. On 4 November 1998, the Convention on the Protection of the Environment through Criminal Law (hereafter “Convention No. 172”) was opened for signatures. Its Preamble stresses that “the life and health of human beings, the environmental media and fauna and flora must be protected by all possible means”. This convention was the first binding international convention dedicated to harmonising criminal law on environmental issues. It sought to develop a framework for sanctioning environmental crime on the global, regional and national levels, which is important considering that environmental pollution does not stop at national borders. It aimed at improving the protection of the environment by harmonising national legislation in the field of environmental offences, which would ultimately enhance and facilitate international co-operation. This convention therefore obliges the Contracting States to introduce specific provisions into their criminal law or to modify existing ones (Article 5). It is open for accession by non-member States. While it would need only three ratifications to enter into force, so far only Estonia has ratified it, in 2002, and 13 other Council of Europe member States have signed (most recently Ukraine, in 2006) but not yet ratified it.²³ Nevertheless, it has been described as the “Council of Europe’s most noteworthy achievement”²⁴ in the field of environmental protection.

19. Convention No. 172 creates legislative obligations regarding substantive as well as procedural criminal law. With regards to substantive law, it first of all defines as criminal offences a number of acts committed at national and transnational level, intentionally or through negligence, causing or likely to cause lasting damage to the quality of the air, soil, water, animals or plants, or resulting in the death or serious injury of a person (Articles 2-4). It penalises abstract and concrete endangerment of the environment as well as a separate offence for pollution with serious consequences (Article 2). This facilitates the aforementioned toolbox approach with the *ultima ratio* principle (also mentioned in the Preamble). Moreover, illegal behaviours which are not covered by Articles 2 and 3 of the convention, shall be liable to sanctions or other measures as criminal offences or administrative offences (Article 4). The convention defines the concept of criminal liability of natural and legal persons and makes corporate liability (criminal or administrative) obligatory (Article 9). The sanctions available shall include imprisonment and pecuniary sanctions (Article 6) and may include reinstatement of the environment (Articles 6 and 8), the latter being an optional but revolutionary provision at the time. The convention further specifies the measures to be adopted by the Contracting States so as to enable them to confiscate instrumentalities and proceeds or property the value of which corresponds to such

19. Faure, M., “The Revolution in Environmental Criminal Law in Europe”, Virginia Environmental Law Journal, 2017, Vol. 35(2): 321-356.

20. For example, criminal provisions in the Environmental Protection Act of 1991 in Denmark.

21. For example Germany in 1980 and the Netherlands in 1989.

22. “The Revolution in Environmental Criminal Law in Europe” *op. cit.*

23. As of 19 April 2021, see at:

www.coe.int/en/web/conventions/full-list/-/conventions/treaty/172/signatures?p_auth=8rw9V6nz.

24. Lambert, Elisabeth, “The Environment and Human Rights. Introductory Report to the High-Level Conference ‘Environmental Protection and Human Rights’”, Strasbourg, 27 February 2020, p. 6.

proceeds, in respect of criminal offences (Article 7). It facilitates the participation of groups, foundations and associations in criminal proceedings through *actio popularis* (Article 11) and fosters international judicial co-operation (Article 12).²⁵

20. Although Convention No. 172 included what were at the time of its adoption progressive approaches, more recently it has been criticised for being too vague, for omitting important issues such as international relapse, transnational environmental crimes and climate change, and for not instituting a monitoring mechanism. Establishing corporate liability should be made an obligation in order to enable the sanctioning of companies who contribute to environmental damage. The low number of ratifications also demonstrates that the Convention is in need of either a revision or of being replaced by another, updated legal instrument.

21. The European Committee on Crime Problems (CDPC) has recently released a Working Paper on Protecting the Environment through Criminal Law (“CDPC Working Paper”), in which it indicated that it would consider devising text for a new convention.²⁶ It points out the primary difficulties that the existing convention faces, its focus and general principles, as well the work of the European Union on environmental protection through law.

22. As stressed in the CDPC Working Paper, from an environmental law point of view, one of the main problems is the existence in national and international law of many binding but disorderly rules, often lacking specific criminal law provisions and scattered at different levels. Since the second half of the 20th century, environmental law has seen a proliferation of legal texts at international and European level: there are now over 300 multilateral international treaties focusing on issues affecting entire regions if not the whole planet and more than 900 bilateral international treaties on transfrontier pollution.²⁷ Moreover, an additional layer of rules has been developed at the EU level.

23. The CDPC Working Paper thus acknowledges that environmental criminal law appears to be a vast and complex area, and above all difficult to transpose in terms of domestic criminal legislation and to unify. Due to their specific characteristics, environmental issues are difficult to reconcile with the universal principles of criminal law. The main obstacles are the definition in clear and precise terms of what constitutes an environmental offence (principle of the legality of criminal offences and penalties), the degree to which it becomes grave and serious (principle of necessity of punishment), and the “price” of nature (principle of proportionality of the penalty). National criminal law systems are very diverse and they use different legal notions. Moreover, one should also bear in mind that criminal law is, in essence, a sovereign matter and that the protection of environment is also ensured by administrative and civil sanctions.

24. The CDPC Working Paper also underlines that a possible future convention would have to combine the fundamental principles of criminal and environmental law. Thus, from the perspective of criminal law, the offences and punishments laid down must be governed by the principle of the legality, which means that they must be defined clearly and precisely, and sanctions must be necessary and proportionate. Solidarity between the States and the existence of common rules for developing international co-operation in the criminal law field are crucial for establishing a harmonised sanctions mechanism, namely because of the transnational character of environmental crimes. From the perspective of the specific domain of the environment, recognition of the general interest of protecting the environment is the core principle. While facing new challenges, States are called to renew the legal bases of international co-operation in this area, in particular in order to ensure the safety of the planet, the balance of the biosphere, biodiversity and ecosystems and to lay down minimum rules for more effective environmental protection. Therefore, “(...) the criminal law mechanism must take an approach that is both sectoral and systemic, to cover the full range of conduct and activities that cause or may cause the most serious damage to the environment”.²⁸ As regards the definition of offences, the CDPC recommends establishing offences of non-compliance with pre-established special rules – of a legislative or administrative nature –, relating to specific “unlawful” acts (including water, air, fauna, flora, waste, pollution etc.), and “general offences endangering the planet”, to cover the most serious instances of massive damage to the environment for which, for the time being, there are no sufficiently dissuasive

25. For further details see [the Convention on the Protection of Environment through Criminal Law](#) and the [Explanatory Report to the Convention on the Protection of Environment through Criminal Law](#), Strasbourg, 4 November 1998.

26. European Committee on Crime Problems, [CDPC\(2020\)9, Working Paper on Protecting the Environment Through Criminal Law](#), Strasbourg, 16 September 2020.

27. V. M. Prieur, *Droit de l'environnement*, Précis Dalloz, 8th edition., 2019; R. Romi, *Droit international et européen de l'environnement*, LGDJ Montchrestien, Domat Droit public, 3th edition, 2017 and C. Roche, *L'essentiel du droit de l'environnement*, Gualino, Lextenso éditions, 11th edition, 2020-2021, quoted in [CDPC\(2020\)9, op. cit.](#), p. 2.

28. [CDPC\(2020\)9 op. cit.](#), p. 3.

sanctions (for example clearance of rainforests, the pollution of ground and water resulting from oil drilling or the environmental danger from tankers transporting hazardous substances which enter protected marine areas).²⁹

25. The CDPC has established a Working Group on the Environment and Criminal Law (CDPC-EC), composed of experts representing member States of the Council of Europe and a scientific expert, to discuss the possibility of more concrete progress on the protection of the environment through criminal law and a possible revision of the Convention No. 172 or the drafting of a new Council of Europe instrument.³⁰ It will, *inter alia*, analyse the reasons of the failure of Convention No. 172, identify the current and future environment challenges/risks facing States and conduct a comparative law analysis. As regards the major axes of a possible new or updated instrument, it will determine environmental concepts to be integrated and defined, substantial and procedural criminal law, preventative, protective and international co-operation measures and mechanisms for monitoring the implementation of the instrument. The CDPC-EC held its first meeting on 20-21 April 2021, via videoconference.

2.3. European Union Directive 2008/99/EC

26. Within the European Union, over 250 texts, mainly directives, lay down standards and limits in the area of the environment. Convention No. 172 has had a major influence on the adoption of some of these instruments, including Directive 2008/99/EC of the European Parliament and the Council on the protection of the environment through criminal law³¹ and Directive 2009/123/EC on Ship-source Pollution.³²

27. Directive 2008/99/EC is of particular importance in this context, as it lays down the minimum rules to be followed by European Union member States in the field of environmental criminal law. The aim is to “achieve the effective protection of the environment through more dissuasive penalties for environmentally harmful activities, which typically cause or are likely to cause substantial damage to the air, including the stratosphere, to soil, water, animals or plants, including to the conservation of species”.³³ Failure to comply with a legal duty to act should be subject to corresponding penalties and be considered as a criminal offence throughout the European Union, when committed intentionally or with serious negligence.³⁴ Article 3 of the Directive provides for a list of types of conduct that constitute criminal offences, when unlawful (namely infringing relevant European Union legislation, a national law, administrative regulation or decision) and committed intentionally or with at least serious negligence (for example the discharge, emission or introduction of dangerous materials or ionising radiation into air, soil or water, waste management and shipment, destruction of protected wild flora and fauna species, etc.). Its Article 6 stipulates that European Union member States shall ensure that legal persons can be held liable for such offences. However, according to the CDPC Working Paper, the Directive’s content is “lightweight and no more than tentative”, mainly because the definition of criminal offences merely adds criminal sanctions to administrative sanctions and does not cover stand-alone crimes and offences against the environment.³⁵ Nor does it sufficiently address the difficulties linked to the increased involvement of organised crime groups and the need to promote more transfrontier co-operation.

2.4. Ecocide

28. Since the 1970s, there have been several calls for enhanced environmental protection through international criminal law, *inter alia* by including a fifth crime in the Rome Statute, the so-called “ecocide”. Many academics and practitioners had argued for its inclusion and, in April 2010, UK-based lawyer Polly Higgins submitted a proposal to the United Nations Law Commission for amendment of the Rome Statute. Ms Higgins defines ecocide as “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”³⁶. However, there is not yet any universally accepted legal definition of this crime. In her proposal, Ms Higgins identifies two types of ecocide – human

29. *Ibid.*, p. 5.

30. See discussion paper [CDPC\(2021\)4](#) of 25 March 2021 and the agenda of the first meeting, [CDPC-EC\(2021\)OJ1](#) of 22 March 2021.

31. [Directive 2008/99/EC](#) is currently under revision. The revised Directive will be proposed by the European Commission in the 4th quarter of 2021. See [European Commission Work Program 2021, Annex II](#), p. 16.

32. Vagliasindi, G.M. (2015), [Directive 2008/99/EC on Environmental Crime and Directive 2009/123/EC on Ship-source Pollution](#). Study in the framework of the European Union Action to Fight Environmental Crime (EFFACE) research project. Catania, University of Catania, p. 7.

33. Preamble to the Directive, 5th indent.

34. *Ibid.*, 6th and 7th indents.

35. [CPDC\(2020\)9](#) op. cit., p. 5.

caused, and naturally occurring – and argues for application of the principles of superior responsibility and strict liability. Preventing naturally occurring ecocide should become a responsibility of governments, while responsibility for preventing human-caused ecocide should lie on governments as well as businesses. Through the creation of a legal *duty of care*, States would become legally bound to act before mass destruction occurs and to assist countries at risk of ecosystem collapse. The crime of ecocide, through its prohibition of mass damage and the destruction of ecosystems and the legal *duty of care* placed on persons in positions of superior responsibility, could become a preventative measure, stopping major polluters from contributing to climate change.

29. The implementation of proposals such as the one by Ms. Higgins has been under consideration on several occasions in the past, and several States have incorporated ecocide into their criminal codes.³⁷

3. Civil liability

3.1. General points

30. The second, most common, liability regime is the civil track. While criminal liability is used as an *ultima ratio* judicial tool, civil liability is intended to have wider scope and be more readily applicable. Both private and public actors can be held accountable on the basis of civil liability. Common law and civil law countries often construe their civil liability regimes differently, while some European countries contain variances from both legal cultures.

31. Two common civil liability regimes are fault-based liability and strict liability. Fault-based liability entails, as the name suggests, that one or more persons have acted in a way which fails to meet the expected standard of behaviour in a given situation. Failure to meet this standard can be done deliberately, namely intentionally, or negligently, namely in violation of a duty of care. Deliberate or careless behaviour is not required for a person to be held accountable on the basis of strict liability. Strict liability was introduced as a legal concept after the industrial revolution. The spread of new machines, industrial plants and similar technology involving high risks resulted in an increase of damage for which no direct fault could be attributed. People who suffered damage from industrial accidents nevertheless required compensation. Companies had greatly benefited from the industrial revolution, with increased efficiency and revenues. However, there was a mismatch between the profits they made and the negative effects they caused on the society around them. Strict liability was therefore introduced to place the liability when something went wrong on those whom it was most reasonable to hold responsible.

3.2. Convention on Civil Liability for damage resulting from Activities Dangerous to the Environment

32. The Council of Europe's 1993 Lugano Convention on Civil Liability for damage resulting from Activities Dangerous to the Environment (hereafter "Convention No. 150") aims at providing for the possibility for adequate compensation for damage resulting from activities which are dangerous to the environment (which are defined in its Article 2 Section 1³⁸) and also provides for means of prevention and reinstatement. In its meaning, damage can occur not only in connection with "impairment of the environment" but also with persons (loss of life or personal injury) and property and may include the costs of measures taken to prevent it. The damage covered may result from "a sudden occurrence, from continuous occurrences or from a series of occurrences."³⁹ As stated in its Preamble, one of the core features of this convention, which appears in most environmental legislation, is the "Polluter Pays" principle, which basically places the economic burden where it properly belongs.

33. Convention No. 150 applies the strict liability regime for damage done to the environment, and thereby provides for more stringent protection. It also covers all hazardous professional activity performed by both private and public entities.⁴⁰ In addition, the *locus standi* is enlarged to include environmental associations and foundations (Article 18). Indeed, it is often NGOs and environmental foundations that have the resources

36. Higgins, P. D. Short and N. South, "Protecting the planet: A proposal for a law of ecocide". *Crime, Law and Social Change*, 2013, Vol. 59(3): 251 – 266, p. 257.

37. For example, three Council of Europe member States: Georgia, the Republic of Moldova and Ukraine.

38. A dangerous activity means an activity performed professionally involving dangerous substances (which are listed in Appendix 1 to the convention), genetically modified organisms or micro-organisms and operations concerning waste. See Explanatory report on Convention No. 150, paragraph 9.

39. *Ibid.*, paragraph 6.

40. See its Articles 6 and 7. The person made liable is the person who controls the dangerous activity ("the operator").

and commitment to bring climate change litigation before a court. To provide standing to such entities is therefore essential when attempting to attribute liability to private and/or public actors for climate change and/or environmental damage. The convention also deals with access to information (in its Chapter III). Holding a public or private actor liable for negative impact on the climate requires solid technical and scientific evidence. Determining the actual damage, who was in control of the risk(s) and establishing causality is a very difficult task in climate change litigation. Providing sufficient access to information on technical details from actors and operators mitigates, at least to some degree, this difficulty.

34. Convention No. 150 is a legal instrument which could act as an effective framework for claims of negative impact on the climate. The convention allows for ratification by non-member States of the Council of Europe. This is important and necessary due to the cross-border nature of climate change impact. However, the convention was adopted in 1993, at a time when environmental awareness and climate change were at an early phase. It would need to be updated in accordance with new scientific insight and legal and political developments, so as to make it better suited to attribute civil liability for negative impact on the climate. As proposed by Professor Marta Torre-Schaub, it could be expanded to include climate issues, in particular by amending the list of dangerous substances (Appendix I) by adding greenhouse gases, including carbon dioxide (CO₂).⁴¹ It should be recalled that Convention No. 150 has not been ratified by any Council of Europe member State and has been signed by only nine States.⁴² This may be due to the fact that the “Polluter Pays” principle is central to the European Union Directive 2004/35/EC of 21 April 2004 “on environmental liability with regard to the prevention and remedying of environmental damage”, which has been implemented by Council of Europe member States which are also members of the European Union (although this directive deals mainly with corporate administrative liability). It is clear that Convention No. 150 requires revision as well as more attention and publicity, or to be replaced by a new legal instrument.

4. Climate change litigation

4.1. Litigation against States

35. Today, States are targeted by lawsuits against inadequate climate protection policies and the non-implementation of international climate treaties. These claims are mainly based on human rights and public international law. The claimants often demand a more proactive mobilisation against climate change, such as a change in energy policy or more ambitious GHG cuts. However, the recent developments show that some of those claims are not only based on public law, but also on civil law (in particular tort law).

36. The Dutch Urgenda case (*Urgenda Foundation v. the Netherlands*) is well known as the first successful case of climate change litigation before national courts. The case was lodged on behalf of 886 Dutch citizens and was based on the European Convention on Human Rights, the Dutch Constitution and an unwritten duty of care deriving from the Dutch Civil Code. It was examined in three instances.

37. On 24 June 2015, the Hague District Court concluded that the Dutch State had to limit the joint volume of Dutch annual GHG emissions, or have them limited, so that this volume would have reduced by at least 25% (instead of 17%) at the end of 2020 compared to the level of the year 1990.⁴³ The District Court found that a sufficient causal link could be assumed to exist between the Dutch GHG emissions, global climate change and the effects (now and in the future) on the Dutch living environment. It also concluded that the State had acted negligently and therefore unlawfully towards Urgenda by starting from a reduction target of less than 25% in 2020, as compared to the year 1990. Although the Dutch Government invoked the argument of the separation of powers, the District Court found that the aspects associated with the separation of powers (*trias politica*) did not constitute an obstacle to allowing the claim. The petitioners also relied on an interpretation of Article 2 and Article 8 of the European Convention on Human Rights: the District Court found this argument to be persuasive but did not explicitly rely on it.⁴⁴

41. This was done in the United States, following the Supreme Court's ruling of 2 April 2007 in the case *Massachusetts v. Environmental Protection Agency*: the Air Pollution Act expanded the list of toxic products that can cause damage by adding CO₂.

42. As of 19 April 2021, see at:

www.coe.int/en/web/conventions/full-list/-/conventions/treaty/150/signatures?p_auth=5C1qRIMx.

43. *Urgenda Foundation v. the Netherlands*, 24 June 2015, Hague District Court, para. 5.1.

44. Ibid. See also Suryapatim, Woerdman Dr, “Situating Urgenda v the Netherlands within comparative climate change litigation”, *Journal of Energy & Natural Resources Law*, 2016, Vol.34(2): 165-189, p. 172.

38. After an appeal by the government, the Court of Appeal of the Hague upheld the District Court's judgment on 9 October 2018, although it relied on different legal grounds.⁴⁵ The final judgment in the case was given on 20 December 2019 by the Dutch Supreme Court, which upheld the Court of Appeal's judgment.

39. The Court of Appeal and the Supreme Court concluded that Articles 2 and Article 8 of the Convention provided for a positive obligation on the Dutch State to protect its residents' right to life and right to respect for private and family life. The two courts' reasoning was that climate change had to be deemed a "real and immediate" threat to the current generation residing in the Netherlands.⁴⁶ The State had a duty to protect its residents' right to life and right to respect for private and family life when a real threat exists. The Court of Appeal and the Supreme Court also diverged from the District Court's conclusion on the applicability of protection in space and time. They focused exclusively on the protection of current residents in the Netherlands, not future generations or people living elsewhere. A final important aspect of the courts' judgments was the statement that States could not "evade" their GHG reduction responsibilities, even though an individual country's cuts may be minimal from a global perspective. Otherwise, no State would be held responsible for GHG cuts, the courts argued. Each State therefore should carry its share of responsibility.⁴⁷

40. Media, practitioners, and scholars are now claiming that this case creates a global legal precedent, possibly enabling more successful climate change litigation cases throughout Europe and the world. However, critics are worried that the judiciary will now get too politically involved in environmental policy making, and thereby will not respect the fundamental principle of separation of powers. Furthermore, some critics are of the opinion that the subject matter is not suited for judicial scrutiny, coining the term "too big to trial".⁴⁸

41. Nevertheless, following the Urgenda case, similar cases have been lodged by NGOs in other European States (notably Belgium, France, Norway, Switzerland and in the United Kingdom). In Belgium, in 2015, the NGO Klimaatzaak brought before the Brussels civil court of first instance an action against the Federal State and the three Belgian regions (Flanders, Wallonia and Brussels) in order to force the Belgian authorities to respect their international climate commitments, some of which they derive from the Convention on the Rights of the Child. The pleadings took place between 16 and 26 March 2021⁴⁹. Moreover, in 2016, some citizens challenged in court the Brussels Capital Region over poor air quality.

42. In France, following a lawsuit by four NGOs (Notre affaire à tous, Greenpeace, Oxfam and Fondation Nicolas Hulot) for the State's inaction in fulfilling its obligations resulting from the Paris Agreement (*carence fautive*), a historical judgment (*l'Affaire du siècle*) was rendered on 3 February 2021⁵⁰: the Paris Administrative Court recognised the French State's responsibility for its inaction in respect to climate change. The court concluded that the State had failed to meet its commitments to reduce GHG between 2015 and 2018 and was found liable for "ecological damage". It postponed for two months its decision on injunctions on the measures to be further taken by the State, pending the outcome of a similar case lodged before the State Council (*Conseil d'Etat*) by the municipality Grande-Synthe (in the *département* Nord). The French State was condemned to pay a symbolic euro for "moral damage" to the four NGOs, whose legal action had been supported by 2.3 million people in the country.

43. In Norway, in 2016, some NGOs filed a lawsuit against the State, claiming that the decision to grant ten production licenses in the Barents Sea in the 23rd licensing round was invalid (Greenpeace Norway and Nature and Youth v. the State/Ministry of Petroleum and Energy, also known as *People v. Arctic Oil*). They invoked the violation of Article 112 of the Constitution (which states that citizens have the right to a safe and healthy environment and that the State must implement measures to secure this right) and Articles 2 and 8 of the European Convention on Human Rights. The Supreme Court handed down its judgment on 22 December 2020⁵¹ and rejected the appeal, although a minority of its judges believed that procedural errors had been committed when the licenses for oil drilling were granted. This was the first time that the Supreme Court had ruled on a case of this dimension over the new version of Article 112 of the Constitution.

45. [Urgenda Foundation v. the Netherlands](#), 9 October 2018, Court of Appeal of the Hague.

46. [Urgenda Foundation v. the Netherlands](#), 20 December 2019, the Dutch Supreme Court.

47. *Ibid.* See also Backes and van der Veen, "Urgenda: The final judgment of the Dutch Supreme Court", *Journal for European Environmental & Planning Law* 17 (2020) 307 – 321, p. 309.

48. Loth, Marc, "Too Big to Trial? Lessons from the Urgenda case", January 2018, SSRN Electronic Journal, pp. 1-15.

49. www.natura-sciences.com/environnement/klimatzaak-affaire-climat-belgique-tribunal.html.

50. To read the judgment, see [here](#).

51. See the translation of the judgment [here](#). See also: www.greenpeace.org/international/press-release/46140/outrage-after-judgement-in-favour-of-the-norwegian-oil-state/ and Libell H. and Kwai I., "Norway's Supreme Court Hears Rights Challenge to Arctic Oil Drilling", 5 November 2020, *The New York Times online*.

44. In Switzerland, in May 2020, the Federal Court rejected a claim by an NGO representing older women, *Aînéés pour le climat*, who requested the Swiss Government to fulfil its international commitments stemming from the Paris Agreement.⁵²

45. In the United Kingdom, there have been and are a number of ongoing cases that involve the UK Government, regarding its policies and their compatibility with national and international law⁵³. For example, in 2018, Plan B, a climate change legal campaign group, brought a legal action against the Secretary of State for Transport. This was for failing to take into account the Paris Agreement and the aim to limit the temperature global rise to 1,5° C. The case was originally lost by Plan B at the High Court, but the loss was overturned in the Court of Appeal. Finally, following an appeal by Heathrow Airport Limited, in December 2020 the Supreme Court found that the Government had not failed to take into account the Paris Agreement⁵⁴. In addition, there are a number of planning cases that have reached the higher courts, where granting planning permission is contested on the grounds that sufficient account has not been given to climate change policies and impacts. For instance, one of these cases concerned the conversion of Drax power station, one of the biggest in the United Kingdom, from coal to gas. Planning permission was granted by the Secretary of State in October 2019. The case was challenged by Client Earth, but this failed in the Court of Appeal in January 2021. However, Client Earth's view is that the case has established that "ruling overturned the high court's finding that major UK energy projects could not be rejected on climate grounds".⁵⁵

4.2. Corporate liability

46. The notions of "corporate social responsibility" and "human rights and business" originate from a societal demand to hold commercial companies accountable for social and environmental damage their commercial activity is inflicting on their surroundings.⁵⁶ Although over the past few decades, these concepts were based mainly on voluntary approaches, it is now widely recognised that businesses hold responsibilities in this area. The United Nations "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Respect, Protect and Remedy' Framework", endorsed by the United Nations Human Rights Council in 2011 and also by Committee of Ministers Recommendation CM/Rec(2016)3 on human rights and business of 2 March 2016, have been a big step forward in this respect. They stress not only the need for the States to regulate businesses' respect for human rights (including through the respect of relevant environmental laws), but also corporate responsibility to respect human rights, in particular by implementing human rights due diligence procedures (including environmental impact assessment in some situations). The United Nations guiding principles also stress that States must take appropriate steps to ensure, through judicial (civil and criminal), administrative, legislative or other appropriate means, access to effective remedies for abuses by businesses (see Principle 25). Therefore, the recognition of corporate social responsibility for human rights abuses plays an important role in environmental litigation, where damages to the environment can also cause violations of human rights.

47. A recent development within corporate social responsibility is related to litigation cases against corporations for alleged damage to the climate. Since 2005, NGOs, States and individuals worldwide have brought about over 1 200 cases against private entities⁵⁷ (mainly against fossil fuel corporations⁵⁸). Cases brought against corporations have a different character than cases brought against States. Claimants usually demand economic compensation for damage to crops, property, or infrastructure, etc. caused by a result of climate change such as floods or heat waves,⁵⁹ whereas in actions against the State, based on public law, they ask for a symbolic sum or a declaration.

48. Corporate climate change liability can be based on a variety of legal regimes. Tort law, fraud, planning law and company law have all been invoked.⁶⁰ In Europe, cases have been brought by NGOs against Total in France⁶¹ and Royal Dutch Shell in the Netherlands and are not aimed at economic compensation. The

52. They subsequently seized the European Court of Human Rights (see paragraph 11 above): www.greenpeace.ch/fr/communique-de-presse/59049/ainees-cour-europeenne/.

53. For more details, refer to the climate case database [website page](#) on the UK cases and to practical Law, [Climate change litigation, 2021](#).

54. See [Plan B v. Heathrow Expansion](#) for more details about the case.

55. To read the full judgment, see [ClientEarth v. Secretary of State for Business, Energy and Industrial Strategy](#), 21 January 2021.

56. See Assembly's [Doc. 12361](#) "Human rights and business" for an in-depth explanation of this topic.

57. Marchand, Oliver, "Climate Change: a growing liability for companies and investors", *The Emission*, 27 April 2019, Carbon Delta.

58. De Wit E., Quinton A. And Meehan F., "Climate change litigation update", Norton Rose Fulbright, 25 March 2019.

59. Novel, Anne – Sophie, "Climate Change: A new subject for the law", *The UNESCO Courier*, March 2019.

60. Clarke M. and Hussain T., "Climate Change Litigation: a new class of action", 13 November 2018, White & Case.

claimants are mainly seeking to obtain court rulings that would oblige energy companies to reduce their GHG emissions in line with the [Paris Agreement](#). The Dutch case has striking similarities with the Urgenda case (see above). The plaintiff bases its case on Shell's *duty of care*, derived from the Dutch Civil Code and relevant national case law, as well as Articles 2 and Article 8 of the European Convention on Human Rights.⁶² In addition, in Germany, a Peruvian farmer, Saul Luciano Lliuya, sued German energy utility RWE in 2015. He lives in the town of Huaraz below the Palcaraju glacier whose meltwaters feed Lake Palcacocha. In his view, GHG from RWE's coal-fired power plants are partly to blame for increasing the rate at which the glacier is melting, producing water that threatens to raise the level of Lake Palcacocha and flood his home, and that RWE must accordingly make a financial contribution to any necessary protective action. At first instance the complaint was rejected by the Regional Court (Landgericht) in Hamm in a judgment of 15 December 2016, but, following Mr Lliuya's appeal, it is now pending before the Hamm Higher Regional Court (Oberlandesgericht).⁶³

5. Conclusion

49. Given the urgency of the climate crisis and the importance of holding private and public actors liable for their contributions to climate change, it one needs to focus on deterrence and corrective justice in order to adopt instruments that prevent, correct and compensate for the damage caused by climate change, even if the exact potential damage may be unknown when the GHG emissions take place. However, international, European and national legal frameworks on responsibility are very uneven and problematic, particularly as regards determining the legal obligation of the State.

50. From economic point of view, it is possible to put the world on a path to net zero target. Countries can reach a nature-positive economy by investing more in green infrastructure and clean energy. Authorities can also gradually raise carbon prices. This will encourage the switch to clean technologies. These carbon revenues should be invested in people so that households are not negatively affected by rising prices. The transition towards green economy should be equitable, inclusive, and pro-growth. The green recovery requires governments to act decisively, together. The European Commission could be a leading force behind it in collaboration with international organisations such as UN, the World Bank, the International Monetary Fund, and the Organisation for the Economic Development and Cooperation.

51. On the way forward, in addition to economic actions, strong legal measures are required. Strengthened global collaboration is needed to reach targets. Legal and economic actions should go hand-in-hand to implement the agenda. Citizens are now demanding legal actions against longstanding problems. Bringing criminal and civil liability will be a game changing the next step. This will help bring deterrence. There is a high economic cost of environmental damages and compensation is required.

52. As far as criminal liability is concerned, across Council of Europe member States, there is a wide variety of national laws regulating liability for environmental damage. In the majority of countries, most (but not all) of the provisions regulating this liability are contained in the Criminal Codes. They generally refer to the most severe environmental damages and provide for corporate criminal liability but do not contain specific provisions on the conducts that might have an impact on climate change. As regards the international and European level, the current arsenal of instruments comprises a whole host of general texts that do not contain a specific criminal law mechanism to ensure compliance with the standards they establish, which seriously compromises their effectiveness. There is a need to rethink the current approach to environmental criminal law and to adopt a new one. Given the diversity of national legislation, one should try to identify what already exists in domestic criminal law systems, which could then be supplemented with innovative repressive elements in order to respond more effectively to current environmental challenges (global warming, erosion of biodiversity, depletion of natural resources, the increasing number of environmental offences, etc.).

53. Therefore, a unified criminal law mechanism should therefore be introduced establishing common definitions of criminal offences and related sanctions, including deterrent financial penalties, in order to achieve a minimum degree of harmonisation in Europe, which would ensure the effectiveness of the rules. Devising such a new approach would constitute a response to current concerns and criticisms expressed in public opinion and would take account of progress in domestic law and national and international case law in the area of environmental protection. International co-operation in the field of environmental criminal law, including judicial co-operation, should also be reinforced, as pollution and other acts or phenomena which

61. www.bfmtv.com/economie/entreprises/energie/le-petrolier-total-attaque-en-justice-pour-inaction-climatique-par-des-ong_AN-202001280250.html.

62. www.theguardian.com/business/2020/nov/30/shell-in-court-over-claims-it-hampered-fossil-fuels-phase-out.

63. "Climate change litigation update", op. cit., and www.preventionweb.net/news/view/75982.

may have an impact on climate change have no borders. The most serious environmental crimes must be punished with appropriate severity. States should consider recognising universal jurisdiction for such crimes, including in the 1998 Rome Statute of the International Criminal Court, and introducing the crime of ecocide in their national criminal legislation.

54. It is at the level of civil law that climate litigation has interesting levers. Since climate change causes damage, loss, risk and harm to both persons and property (and thus also to individual property rights), the civil liability of the various actors can be invoked, usually according to the general rules of tort law and fault-based responsibility. In only a few Council of Europe member States does national legislation contain specific provisions on civil responsibility for environmental damage, including on strict liability in specific situations. The recent developments before other European countries' courts show there is a lot of potential as regards the use of this type of litigation. The Urgenda case was very innovative, as, by combining public and civil law, it established the State's 'duty of care' on the basis of the European Convention on Human Rights.

55. However, there are several problems relating to the use of civil liability: difficulties in establishing a causal link between the damage and its cause, the burden of proof, the legitimacy of the victim at trial and its search for significant punitive sanctions. There are several ways to strengthen civil liability in this area: 1) through a treaty change (by revising Convention No. 150 or replacing it by another treaty); 2) at national level – by strengthening the duty of vigilance of companies to require them to detail their activities affecting the environment, and thereby on climate change (a European Union directive on corporate due diligence and corporate accountability will soon come into force⁶⁴) and/or adding responsibility for ecological harm that is both punitive and preventative to the classic civil liability (like in the French Civil Code).

56. Although the effectiveness of the existing legal mechanisms varies and they are applied unevenly, their use continues to evolve and is playing an increasingly important role. The recent developments in some European countries show that there is a lot of potential as regards the use of climate litigation on the basis of public and civil law, against both States and commercial companies. Thus, it will be interesting to see how domestic case law will evolve in the near future. Moreover, in order to better explore the possible avenues for invoking States' and companies' legal responsibility before courts, it is important to study legal texts, legal custom, the main principles of law and jurisprudence.

57. To conclude, it is unfortunate that the two Council of Europe Conventions Nos. 172 and 150 have received so far very few ratifications. These treaties should be given renewed attention by Council of Europe member States, with reflection on whether they need to be revised or to be replaced by new legal instruments better adapted to the current challenges. As many consequences of climate change are irreversible, at least in the short or medium term, it is important that the revision or replacement of these treaties is given the highest priority on the Council of Europe's agenda.

64. Adopted by the European Parliament on 10 March 2021: www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html.

Appendix

Introduction

1. Parliaments from 29 Council of Europe member States answered the questionnaire sent through the European Centre for Parliamentary Research and Documentation (ECPRD)⁶⁵, providing details about national legal provisions and case law concerning criminal and civil liability for environmental damages, including in situations that might have an impact on climate change. The following countries have responded to the questions: Albania, Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Norway, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey and the United Kingdom.

1. How do your country's laws regulate criminal liability for environmental damage, including in situations that might have an impact on climate change?

2. In the majority of countries, most of the provisions regulating criminal liability for environmental damage are contained in Criminal Codes. They generally refer to the most severe forms of environmental damage and do not contain specific provisions on activities having an impact on climate change.

3. The provisions stipulated in Criminal Codes are often supplemented by special environmental legislation (Belgium, the Czech Republic, Finland, Germany, Iceland and Turkey).

4. In **France**, there is no general criminalisation of environmental violations under criminal law. Most of the environmental offences are included outside the Criminal Code, in other laws such as the Rural Code, the Public Health Code, the Urban Planning Code or the Environment Code.

5. In **Cyprus, Greece, Norway, Romania, Sweden and Switzerland**, the different types of environmental offences are mainly included in specific (environmental) laws. In **Italy**, criminal liability for environmental offences is mainly regulated by the Environmental Code, which was amended by Law no. 68/2015 of 2015, introducing "eco-crimes" in the latter code and in the Criminal Code⁶⁶.

6. In the **United Kingdom**, there are a range of environmental offences in different pieces of legislation (in England and Wales – mainly in the Environmental Protection Act 1990 and the Wildlife and Countryside Act 1981). There are also offences under the environmental permitting regime: the Pollution Prevention and Control Act 1999 and the Environmental Permitting (England and Wales) Regulations 2016.

7. As regards provisions concerning situations that might have an **(indirect) impact on climate change**, in **Belgium**, the Navigation Code penalises behaviours that might cause deterioration of air and the Law of 20 January 1999 concerns incineration in marine areas. Regulations protecting the air and the Earth's ozone layer (for example, the Criminal Codes of the Czech Republic and Slovak Republic or in the United Kingdom) can also be seen in this context. In **Switzerland**, offences relating to the tax on CO₂ and vehicles' import are included in the federal law on the reductions of CO₂ emissions.

2. If so, may legal persons (companies) be held liable for such offences?

8. In almost every State whose parliament answered the questionnaire, legal persons can be held liable for environmental offences under criminal law.

3. What types of environmental offences are foreseen in your criminal legislation?

9. In the countries whose parliaments replied to this question, offences against the environment are defined in a more or less detailed manner in their Criminal Codes. The most recurrent offence consists in causing, intentionally or negligently, damage to the environment, (Austria, Croatia, Czech Republic and Hungary), including by causing deaths or injuries (Austria, Italy and Slovak Republic), causing "environmental disaster" (Italy), "burdening or destroying the environment" (Slovenia) or infringing regulations on the protection of environment (Iceland, Latvia, Lithuania or Spain) or of water and air (Slovak Republic). Several criminal codes include the offence of "environmental pollution" (defined broadly or through detailed provisions

65. See request 4594 of 18 December 2020.

66. See Title VI-bis of the Italian Criminal Code.

on air, soil and water pollution) (Albania, Croatia, Estonia, Georgia, Germany, Greece, Hungary, Italy, Norway, Poland, Portugal and Turkey). Other main offences, which may be committed intentionally or negligently, refer to:

- endangerment of the ozone layer (Albania, Austria, Croatia, the Czech Republic, Estonia, Greece, Hungary, Lithuania, Slovak Republic, Slovenia, the United Kingdom);
- treatment or disposal of waste in a manner that is hazardous to the environment (Albania, Austria, Croatia, the Czech Republic, Estonia, Germany, Greece, Hungary, Norway, Poland, Slovak Republic, Spain and the United Kingdom);
- treatment or disposal of nuclear material or other hazardous substances in a manner that is hazardous to the environment (Albania, Germany, Greece, Hungary, Italy, Poland and Slovenia);
- operation of a plant in a manner that is hazardous to the environment (Austria, Croatia, Estonia, Germany, Greece and Spain),
- causing damage to animal or plant populations (Albania, Austria, Croatia, the Czech Republic, Estonia, Georgia, Greece, Italy, Latvia, Lithuania, Poland, Portugal, Slovak Republic, Slovenia and the United Kingdom),
- causing damage to habitats in protected areas and other hazards to animal or plant populations (Albania, Austria, Croatia, the Czech Republic, Georgia, Germany, Greece, Hungary, Italy, Lithuania, Norway, Poland, Portugal, Slovenia and Spain).

10. In some countries, the Penal Code also defines some specific offences which refer to clearly unlawful activities (Croatia, Estonia, Georgia, Lithuania, Poland, Portugal, Turkey and the United Kingdom). Moreover, impeding the environmental inspection activities constitute an environmental offence in Italy and Spain.

11. In **France**, the only environmental offence covered by the Penal Code is the act of environmental terrorism, defined as “the act of introducing into the atmosphere, on the ground, in the subsoil, in food or food components or in waters, including those of the territorial sea, a substance likely to endanger the health of humans or animals or the natural environment”, intentionally and with the “aim of seriously disturbing public order by intimidation or terror”.⁶⁷

4. Do your country’s criminal laws define the crime of ‘ecocide’?

12. **Georgia** is the only country whose delegation answered positively to this question. Article 49 of its Criminal Code refers to “ecocide, namely contamination of the atmosphere, soil, water resources, mass destruction of fauna or flora, or any other act that could have led to an ecological disaster”.

13. Beyond that, in **Belgium** and in **France** governmental initiatives have been taken to include the crime of “ecocide” in national legislation.

14. In **Italy**, while the crime “ecocide” is not defined, a specific concept has been created with the term “eco mafia”, referring to organised crime such as illegal criminal activity against the environment, in particular in the field of illegal trafficking and depositing of waste, illegal construction and illegal activities in the agri-food sector.

5. How do your country’s laws regulate civil liability for environmental damage, including in situations that might have an impact on climate change?

15. According to the majority of replies, civil liability for environmental damage (mainly based on tort law) might be applied according to general provisions on liability foreseen in civil law texts. Some countries have also adopted specific legislation in this field (for example Croatia – the Environmental Protection Act, Poland – the Law on Environment Protection, Slovenia – the Environmental Protection Act, Spain – the Law 26/2007 on Environmental Liability in Spain, Sweden – the Environmental Code and Switzerland – the Federal Law on Environment Protection). In **Turkey**, two types of civil liability of the polluter⁶⁸ are stipulated under the Act on Environment: the liability against the public institutions and organisations and the liability against other persons whose pollution causes damage.

67. See article 421-2 of the French Criminal Code.

68. According, to Article 2 of the Act on Environment, the polluter/the polluting party is defined as follows: “Real and legal persons who cause environmental pollution, loss of ecological balance and environmental damage directly or indirectly during or after their activities”.

16. In some countries, there are specific provisions in the Civil Code on civil responsibility for damage caused to the environment (in Albania – Article 624 of the Civil Code and in Slovakia – Article 420a of the Civil Code). In **France**, Article 1246 of the Civil Code defines ecological damage as “a non-negligible harm to the elements or functions of ecosystems or to the collective benefits derived by man from the environment.” It also stipulates that: “Any person responsible for ecological damage is required to repair it”.

17. General provisions on compensating for damages under civil law apply, with a focus on repairing the damage or pecuniary compensation. Strict liability is foreseen in some specific situations, mainly in cases of operators of certain installations under specific legislation (for example under the German Environmental Liability Act) or in cases of pollution (for example under the relevant provisions of the Romanian Government Emergency Ordinance No. 195/2005 on environmental protection).

18. Immovable property owners can request the person who has interfered with their property to remove the interference (which may also be an environmental damage) or to have it repaired, irrespective of the question of fault (see Article 1004(1) of the German Civil Code), or request compensation (Article 2926 of the Czech Civil Code).

19. In the **United Kingdom**, the Regulatory Enforcement and Sanctions Act 2008 (RESA 2008) provides certain environmental regulators (including the Environment Agency, Natural Resources Wales, Natural England and local authorities) with powers to use civil sanctions as an enforcement option, and as an alternative to prosecution, for certain environmental offences. Civil sanctions can include fixed or variable monetary penalties, compliance notices, stop notices and restoration notices.

20. The delegations of several European Union member States (Austria, Belgium, Bulgaria, Cyprus, Greece, Italy, Latvia and Portugal) pointed out that their countries have implemented the European Union Directive 2004/35/EC of the European Parliament and the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

21. There are no specific regulations on civil liability in situations where their actions might **impact climate change**.

6. Have there been any criminal or civil cases brought before national courts in relation to actions or omissions that might have an impact on climate change?

22. The majority of countries have indicated that no criminal or civil cases have been brought before national courts in relation to actions or omissions that might have an impact on climate change. However, **Belgium, Germany, Norway, Switzerland** and **the United Kingdom** provided information on climate litigation cases (see Chapter 4 of the report).

23. Other States have mentioned cases of environmental damage not directly related to climate change: **criminal cases** concerning offences against the environment in Austria, France, Italy, Latvia, Romania, Slovenia and Spain and **civil cases** in Belgium, the Czech Republic, France and Lithuania (mainly due to pollution). In **Belgium**, an action against Volkswagen has been filed in the framework of the “Dieselgate” and another one against Apple concerning planned obsolescence of its devices. In **France**, in the famous Erika case concerning an oil tanker that sank and released its cargo, the Court of Cassation found the petrochemical company Total responsible for an ecological disaster and ordered it to pay damages of 171 million euros, thirteen million of which was for ecological damage. It also recognised for the first time the concept of “ecological damage”.