

# Submission to the Special Rapporteur on Human Rights and the Environment

## Input Regarding the Implementation of the Human Rights Obligations Relating to the Environment

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### A. Introduction

1. This submission addresses issues related to access to justice in environmental matters. In particular it:
  - a. suggests that the effective implementation of human rights obligations relating to the environment can be checked, among the multiple parameters, against the degree of implementation of the third pillar of the UN-ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) dealing with access to justice in environmental matters; and
  - b. brings to the attention of the Special Rapporteur some recent work in the framework of the Task Force on Access to Justice in Environmental Matters (the Task Force), established under the Aarhus Convention.
2. The submission was prepared by Dr. Elena Fasoli (Research and Teaching Fellow at Queen Mary University of London). During the last 7 years she has engaged in extensive research on environmental law and human rights. Dr. Fasoli holds a Ph.D. in international law from the University of Milan and she has been external consultant to the Italian Ministry of the Environment from 2009 to 2013. She is a member of the Aarhus Convention Compliance Committee and has a broad range of publications on this area and. She is currently running a major research project on the “Possibilities for Non-governmental Organisations Promoting Environmental Protection (ENGOS) to Claim Damages on Behalf of the Environment” funded by UN-ECE. Recent work includes the article E. Fasoli, “The German Criteria for Access to Justice under the Scrutiny of the Aarhus Convention Compliance Committee and the CJEU: Is There Room for Similar proceedings Against Italy?”, in E. Lhose and M. Poto (eds.) *Participatory Rights in the Environmental Decision-Making Process and the Implementation of the Aarhus Convention: A Comparative Perspective* (Dunker/Humblot, 2015) 185-198.
3. The author wishes that this submission, largely based on the findings of the recent research undertaken in the context of the Task Force, would be of assistance to the Special Rapporteur in his work. Should this be the case, the author would be happy to provide further information and/or discuss any aspects of the matters raised.

## **B. A recent study on civil actions for damages brought by ENGOs in France, Italy, the Netherlands and Portugal**

4. The Task Force on Access to Justice in Environmental Matters, established under the Aarhus Convention, is committed to providing a platform for sharing information, experiences and good practices related to access to justice in environmental matters e.g. through collection and dissemination of relevant practices and with special attention on the impact of certain barriers in access to justice such as standing, costs of procedures and delays.
5. A recent study conducted under the auspices of the Task Force and commissioned to the author of this submission has tackled the issue of the **“Possibilities for Non-governmental Organisations Promoting Environmental Protection (ENGOS) to Claim Damages on Behalf of the Environment”**. The study takes particular focus on civil actions for damages brought by ENGOs before national courts and tribunals against private operators. The analysis covers practices and examples found in France, Italy, the Netherlands and Portugal.
6. The study complements the one prepared by the Chairman of the Task Force, Prof. Jan Darpö from Uppsala University, on the topic of judicial review of administrative decisions. The report “Effective Justice? Synthesis Report of the Study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in Seventeen of the Member States of the European Union”, is available on the Task Force web page ([http://www.unece.org/env/pp/tfaj/analytical\\_studies.html](http://www.unece.org/env/pp/tfaj/analytical_studies.html)).

## **C. Summary of research findings**

7. From the analysis in the covered jurisdictions it emerges that ENGOs are, in principle, allowed to sue the liable operators before national courts. In so doing the ENGOs avoid addressing the competent authorities in order to ask them to take action. Civil law remedies can, in fact, be a useful tool to repair the damages suffered by ENGOs in the context of e.g. a major pollution accident. ENGOs can claim, for instance, the costs incurred for treating birds after an oil spill (material damages) or the (usually monetary) reparation of the discredit deriving from the failure to pursue their statutory objectives of environmental protection (moral damages).
8. Civil procedures brought by ENGOs, however, do not occur frequently. One of the reasons rests with the difficulties for ENGOs to demonstrate a direct and personal damage in environmental matters. Another reason is the high costs of civil procedures. A trend emerging from the practice in France, Italy and Portugal is that ENGOs join civil actions to on-going criminal proceedings in order to avoid high costs.
9. Quite importantly, the analysis also shows that civil law remedies are ill suited to address the specificities of the damage to the environment in itself, the so-called purely ecological

damage. The research advocates the need to further clarify the nature of this damage and the forms of its reparation.

10. The study further highlights the need to reduce the costs of the civil procedures; the need to consider the possibility to introduce a judicial or non-judicial remedy that entitles the ENGOs to challenge the inactivity of the competent authorities (should they fail to act) so as to order them to take action; and to establish an online database with information on the (on-going and past) investigations on cases of environmental damage and the costs that the competent authorities were able to recover from liable operators. The study also underlines the importance to encourage operators to use financial insurances to cover their environmental responsibility.
11. The preliminary findings of the study were brought to the attention of governmental delegations, networks of national judges and ENGOs during the eighth meeting of the Task Force on 15-17 June 2015. At the meeting the participants welcomed the research and stressed its important impact given the practical difficulties in adjudging the different categories (still not completely explored and systematised) of environmental damages.
12. The final study will be published by the end of November and will be available on the official website of the Task Force ([http://www.unece.org/env/pp/tfaj/analytical\\_studies.html](http://www.unece.org/env/pp/tfaj/analytical_studies.html)).

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